VOTING RIGHTS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112

BILLS TO AMEND THE VOTING RIGHTS ACT OF 1965

JANUARY 27, 28, FEBRUARY 1, 2, 4, 11, 12, 25, AND MARCH 1, 1982

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VOTING RIGHTS ACT

WEDNESDAY, JANUARY 27, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch, Thurmond, and Grassley.

Also present: Senators Mathias, Dole, Specter, Kennedy, and Metzenbaum.

Staff present: Stephen Markman, chief counsel; Dennis Shedd, counsel; William Lucius, counsel; Claire Greif, clerk; and Prof. Laurens Walker.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A. U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the first in a series of eight scheduled hearings on the Voting Rights Act. We are privileged to have with us today an outstanding group of witnesses. As has always been the case on this subcommittee, it will be a balanced group of witnesses as well.

As a member of this body who is still in his first term, I was not present when Congress last considered the voting rights issue in 1975. However, I must observe that I have never before seen an important issue that has been the subject of so much misunderstanding and misconception as the Voting Rights Act. Whatever one's perspective on this legislation, I hope that the hearings to be conducted by this subcommittee will be helpful in defining what precisely are the issues in the forthcoming debate.

To start this process, let me clarify some of the matters that do not seem to be in widespread controversy. First, there seems to be little disagreement that the provisions of the Voting Rights Act ought to be extended. This is certainly my own view and, I believe, the view of a substantial majority of the Senate.

Clearly, the Voting Rights Act has been successful in providing effective voting rights to all citizens, irrespective of race or color. In virtually every jurisdiction in which the special preclearance provisions of the act have applied, there have been significant increases in the percentage of minority individuals registering and voting. The 15th amendment guarantee against the abridgement of

voting rights on the basis of race or color has largely been fulfilled by the Voting Rights Act. It ought not to be dismantled.

Second, there seems to be little disagreement about the specific forms of voting rights protection established by the Voting Rights Act. In particular, I detect little support for the elimination of the preclearance provisions of section 5 of the Voting Rights Act.

While none of us should fail to recognize the substantial transformation in our federal system effected by the Voting Rights Act, neither should any of us fail to recognize the extraordinary circumstances that existed in many of the jurisdictions required to preclear prior to the act. As the Supreme Court has noted, the very constitutionality of the Voting Rights Act has always rested upon the recognition of these extraordinary circumstances. The preclearance procedure ought to be maintained.

Third, there seems to be little disagreement that the preclearance requirement ought to be limited to so-called "covered" jurisdictions. And let us frankly recognize that most of them are in the southern part of our country.

To extend coverage nationally could have no effect other than to dilute the basic coverage of the Voting Rights Act. To extend coverage nationally would also be to call into constitutional question the act by applying the preclearance requirement to jurisdictions in which there have never been the extraordinary circumstances of race that existed in the "covered" jurisdictions. The present limited scope of "preclearance" to the "covered" jurisdictions ought to be maintained.

Finally, let me say that there seems to be little disagreement about any of the other protections of the Voting Rights Act. The abolition of the poll tax, the elimination of literacy tests, and other discriminatory voting devices, the strictures upon residency requirements, the provisions for Federal voting examiners and marshals, and the prohibition of coercion and fraud in relationship to the ballot box should all be maintained intact.

Having said all this, what then is the debate all about? How significant is this debate? In my view, the debate beginning in the Senate today will focus upon a proposed change in the act that involves one of the most important constitutional issues ever to come before this body. Involved in this debate will be the most fundamental issues involving the nature of American representative democracy, federalism, civil rights, and the separation of powers.

While the resolution of this debate may not affect the average person's pocketbook this year, and while it will not affect the interest rate on home mortgages, there is no issue, absolutely no issue, that will be considered during this Congress that is more important to defining ourselves as a Nation and in expressing the values of our Constitution.

In short, what is at issue is the easily overlooked change in a few words in section 2 of this act. Section 2 represents the statutory expression of the 15th amendment to the Constitution of the United States of America. It prohibits voting qualifications or practices or procedures which abridge voting rights on account of race or color. Because it is the codification of the Constitution, it applies throughout the country.

Some people have misconstrued this act and have thought that it only applies to certain Southern States, but actually this provision applies to all 50 States. I might add that it applies to not only every State in the Union, but it applies whether or not they must "preclear."

Until now—until the proposed change in section 2 which was adopted last year by the House after virtually no discussion either in committee or on the floor—section 2 was viewed as perhaps the least controversial provision in the Voting Rights Act—that is, up until now, up until the House acted. Indeed, in a recent analysis of the act that I read, prepared by the Library of Congress, section 2 was not even referred to as one of the "major" provisions of the act.

What the proposed change in section 2 would do is to overturn the traditional understanding of the 15th amendment—reiterated less than 2 years ago by the Supreme Court in the *Mobile* case—that a constitutional violation requires some evidence of an intent or purpose to discriminate.

The proposed language would overturn *Mobile* and, I might add, overturn the intent requirement, and establish in its place a new test for identifying discrimination, a test never before utilized, that focuses purely upon the "results" of an alleged discriminatory action.

I would ask my colleagues as well as others interested in this debate to consider the implications of discarding the intent standard. By focusing upon the results or the effects of an allegedly discriminatory action rather than upon the motivation for such an action, we are redefining the very concepts of discrimination and civil rights. By focusing primarily upon numbers and statistics rather than upon evidence of some wrongful purpose, the "results" test would transform the 15th amendment and the Voting Rights Act from provisions designed to insure equal access and equal opportunity in the electoral process to provisions designed to insure equal outcome and equal success.

Such an objective, the objective of racial balance on elected, representative bodies, is inconsistent with every value of our Constitution. As the Court stated in *Mobile* in rejecting the proposition expressed in the proposed change in section 2, "The right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat."

In short, what the "results" test would do is to establish the concept of "proportional representation by race" as the standard by which courts evaluate electoral and voting decisions, as well as decisions of municipal organization and structure, by communities throughout the Nation.

No, it probably will not result overnight in city councils, and county commissions, and State legislatures, and school boards across the Nation reflecting racial proportions in their jurisdictions. That is too simplistic a notion.

Rather, what the "results" standard will do is to establish the "proportional representation" standard as one by which the Federal Government and the courts assess the constitutional validity of every municipal system, every redistricting plan, every electoral and voting requirement, and every alternation of those systems,

plans, and requirements. Whether or not there is proportional representation by race or whether or not proportional representation is promoted by these policies will become the legal filter through which they are judged.

As in the city of Mobile, never mind that there was no discriminatory purpose behind their establishment, and never mind that there were legitimate, entirely nonracial justifications for such policies. As in the city of Mobile, efforts will be made to dismantle entirely the structures of self-government enacted by citizens across the country.

As the Court observed in the *Mobile* case, the dissenting opinion, which expressed the case for the "results" test, "would discard fixed principles of equal protection in favor of a judicial inventiveness that would go far toward making this court a superlegislature."

The notion of "proportional representation by race" is not a specter that any Member of this Congress has pulled out of a hat. Apart from the fact that the "results" test can have no other meaning by its very terms, the House report on their version of the Voting Rights Act concedes that evidence of proportional representation "would be highly relevant" in establishing a section 2 violation.

In addition, we see many civil rights leaders stating rather explicitly that proportional representation is their goal. Dr. Willie Gibson, president of the South Carolina NAACP, for example, has stated that, "Unless we see a redistricting plan in South Carolina that has the possibility of blacks being elected in proportion to their population, we will push hard for alternative plans."

In addition, the Supreme Court has been forthright in its characterization of the "results" or "effects" standard as one designed to promote proportional representation by race. To refer to the *Mobile* case again, the Court observed, "The theory of the dissenting opinion appears to be that every political group, or at least every such group that is in the minority, has a Federal constitutional right to elect candidates in proportion to its numbers . . . the equal protection clause of the 14th amendment does not require proportional representation as an imperative of political organization."

Before I conclude, let me make an observation about a so-called disclaimer provision in section 2 that we will all be hearing a great deal about during these hearings. This provision, it has been suggested, disclaims the idea that lack of proportional representation constitutes a section 2 or 15th amendment violation. That is pure and unadulterated "smokescreen."

Rather, what the language following the "results" test in section 2 says is that lack of "proportional representation" "in and of itself" is not a violation. It then proceeds to describe merely a few factors that, in conjunction with the absence of proportional representation, will consummate a violation.

These factors include the existence of at-large electoral systems, racial bloc voting, a history of discrimination, majority vote requirements, prohibitions on single-shot voting, and numbered posts. Other factors that have been suggested by the civil rights community or that have been used by the Justice Department in the past include disparate racial registration figures, history of English-only

ballots, the maldistribution of services in racially definable neighborhoods, staggered electoral terms, impediments to third party voting, numbers of minority registration officials, "inconvenient" registration hours, reregistration requirements, registration purging requirements, et cetera, et cetera, et cetera, ad infinitum.

In other words, given the lack of proportional representation, any of these factors which the House report calls "objective" factors of discrimination will suffice to complete a Voting Rights Act violation. Given the absence of proportional representation, virtually any jurisdiction in the country will be vulnerable to a section 2 suit. Indeed, the Court in *Mobile* rejected a similar attempt to disclaim the charge of proportional representation by calling it "illusory" and resting upon "gauzy sociological considerations having no constitutional basis."

The most immediate objective of the section 2 standard is the elimination of at-large systems of voting throughout the country. Never mind the fact that this would require the elimination of a system of government freely chosen by the citizens of two-thirds of the municipalities across the country. Never mind that the at-large system of municipal government was established in most communities throughout the Nation as a result of the progressive reforms of the 1910's and 1920's, and that they had nothing whatsoever to do with racial considerations. Never mind that the case against at-large systems of municipal government rests upon the objectionable and offensive premise that only blacks can represent blacks and that only whites can represent whites, and that the influence of blacks is maximized when they are concentrated in electorally safe and comfortable political ghettos.

The concept of racial quotas that the results test would bring to the Constitution and to the Voting Rights Act is totally at odds with everything that the Constitution has been directed at since the Reconstruction amendments, *Brown* v. *Board of Education*, and the Civil Rights Act of 1964. It is at odds with the notion that Representatives owe their allegiance to individual citizens, not to racial or ethnic blocs. It is at odds with the most fundamental ideas of federalism and local self-government. Indeed, the very term "discriminatory results" is purest Orwellianism in radically transforming the concept of discrimination from a decisionmaking process into an end or an outcome in and of itself.

I challenge anyone who suggests that the consensus in civil rights in this country was built on this theory of civil rights. I do not believe that you can find 1 person in 100 in Boston, Baltimore, or Cleveland, black or white, who would define discrimination in this manner.

Finally, I would like to address one misconception of the traditional intent standard that seems to have been generated by some proponents of the results standard. In short, there is not and there never has been any requirement of a "smoking gun" or a confession of discrimination under the intent standard. It has always been able to be proved by circumstantial and indirect evidence, before *Mobile*, during *Mobile*, and after *Mobile*.

Intent has always been something that could be inferred from the factual events surrounding an alleged act of discrimination. The Supreme Court has stated this in black and white, time after

time after time. Intent has, in fact, been proved time after time after time, without a "smoking gun" and without a confession of intent.

Ladies and gentlemen, I apologize for what is really a somewhat longer opening statement than I normally deliver. This is a complex issue, however, and one of paramount importance. I hope that those in the media who are with us today will recognize the importance of this issue and ask difficult questions of me and of the other Senators, both those who favor the present standard and those who wish to alter it.

Whatever your views on the merits of this change, I hope that you will recognize its significance. Whatever the outcome of this debate, I hope that we will not be able to say a decade from now that no one really appreciated at the time what section 2 was all about.

We are talking here about a change in the concept of voting rights so radical and so inconsistent, in my opinion, with the traditional ideas of equal protection, that it deserves the greatest national debate. I intend to encourage that in whatever way I can as chairman of this subcommittee.

I welcome all of our witnesses here today, whatever their views on this and other matters. In addition to the issue on section 2, I will look forward to testimony during the course of these hearings on the so-called bailout issue. In my estimation, that will be the other major focus of discussion on the Voting Rights Act.

[Material submitted for the record:]

VOTING RIGHTS ACT OF 1965

Public Law 91-285

PUBLIC LAW 89-110, 89TH CONGRESS, S. 1564,
AUGUST 6, 1965

AN ACT To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965".

TITLE I—VOTING RIGHTS

Public Law 94-73

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

Public Law 94-73

SEC. 3. (a) Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that

the appointment of such examiners is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

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(b) If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

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(c) If any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days

after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

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SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this

paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

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If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

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If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972. Public Law 94-73

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future. Public Law 94-73

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or

interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

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(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall

provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to ob-

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ject, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

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SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fourteenth or fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fourteenth or fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: *Provided*, That the Commission is authorized, after con-

sulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided*, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

SEC. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Com-

mission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documen-

tary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service or process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

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(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment, section 2 of the fifteenth amendment and section 2 of the twenty-fourth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

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(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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(e)(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 202 of this Act, to the extent two ballots are not cast for an election to the same candidacy or office.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a), shall be fined not more than $5,000, or imprisoned not more than five years, or both. Public Law 90-284

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11(a) shall be fined not more than $5,000, or imprisoned not more than five years, or both. Public Law 90-284

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligiblity to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after

the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General's refusal to request such survey or census to be arbitrary or unreasonable.

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SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not lim[illegible]o,

registrat..., listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such a ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage. Public Law 94-73

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 or this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. Public Law 94-73

SEC. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting

against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

TITLE II—SUPPLEMENTAL PROVISIONS

APPLICATION OF PROHIBITION TO OTHER STATES

Public Law 94-73
Public Law 91-285

SEC. 201. (a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

RESIDENCE REQUIREMENTS FOR VOTING

Public Law 91-285

SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal pro-

tection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision

after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President. in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision..

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

(h) The term "State" as used in this section includes each of the several States and the District of Columbia.

(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

BILINGUAL ELECTION REQUIREMENTS

Public Law 94-73

SEC. 203. (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

(b) Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political su

sion are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: *Provided*, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

(c) Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

(d) Any State or political subdivision subject to the prohibition of subsection (b) of this section, which seeks to provide English-only registration or voting materials or information, including ballots, may file an action against the United States in the United States District Court for a declaratory judgment permitting such provision. The court shall grant the requested relief if it determines that the illiteracy rate of the applicable language minority group within the State or political subdivision is equal to or less than the national illiteracy rate.

(e) For purposes of this section, the term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.

JUDICIAL RELIEF

SEC. 204. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, or 203, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under

Public Law 94-73

Public Law 91-285

this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

PENALTY

Public Law 91-285

SEC. 205. Whoever shall deprive or attempt to deprive any person of any right secured by section 201, 202, or 203 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

SEPARABILITY

Public Law 91-285

SEC. 206. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

Public Law 94-73

SEC. 207. (a) Congress hereby directs the Director of the Census forthwith to conduct a survey to compile registration and voting statistics: (i) in every State or political subdivision with respect to which the prohibitions of section 4(a) of the Voting Rights Act of 1965 are in effect, for every statewide general election for Members of the United States House of Representatives after January 1, 1974; and (ii) in every State or political subdivision for any election designated by the United States Commission on Civil Rights. Such surveys shall only include a count of citizens of voting age, race or color, and national origin, and a determination of the extent to which such persons are registered to vote and have voted in the elections surveyed.

(b) In any survey under subsection (a) of this section no person shall be compelled to disclose his race, color, national origin, political party affiliation, or how he voted (or the reasons therefor), nor shall any penalty be imposed for his failure or refusal to make such disclosures. Every person interrogated orally, by written survey or questionnaire, or by any other means with respect to such information shall be fully advised of his right to fail or refuse to furnish such information.

(c) The Director of the Census shall, at the earliest practicable time, report to the Congress the results of every survey conducted pursuant to the provisions of subsection (a) of this section.

(d) The provisions of section 9 and chapter 7 of title 13 of the United States Code shall apply to any survey, collection, or compilation of registration and voting statistics carried out under subsection (a) of this section.

TITLE III—EIGHTEEN-YEAR-OLD VOTING AGE

Public Law 94-73

ENFORCEMENT OF TWENTY-SIXTH AMENDMENT

SEC. 301. (a)(1) The Attorney General is directed to institute, in the name of the United States, such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the twenty-sixth article of amendment to the Constitution of the United States.

Public Law 94-73

(2) The district courts of the United States shall have jurisdiction of proceedings instituted under this title, which shall be heard and determined by a court of three judges in accordance with section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by the twenty-sixth article of amendment to the Constitution of the United States shall be fined not more than $5,000 or imprisoned not more than five years, or both.

DEFINITION

SEC. 302. As used in this title, the term "State" includes the District of Columbia.

Public Law 94-73

97TH CONGRESS
1ST SESSION

S. 53

To amend the Voting Rights Act of 1965 to repeal certain requirements relating to bilingual election requirements.

IN THE SENATE OF THE UNITED STATES

JANUARY 6 (legislative day, JANUARY 5), 1981

Mr. HAYAKAWA introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Voting Rights Act of 1965 to repeal certain requirements relating to bilingual election requirements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4(a) of the Voting Rights Act of 1965 is amended—

(1) in the first paragraph thereof—

(A) by striking out "the first two sentences of" after "determinations have been made under"; and

(B) by striking out the last sentence of such paragraph;

(2) in the third paragraph thereof, by striking out "an action under the first sentence of this subsection" and inserting in lieu thereof "the action"; and

(3) by striking out the last paragraph thereof.

(b) Section 4(b) of such Act is amended by striking out the last sentence of the first paragraph thereof.

(c) Section 4 of such Act is amended by striking out subsection (f) thereof.

(d) Section 5 of such Act is amended by striking out "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972," where it appears following "November 1, 1968,".

(e) Sections 3 and 6 of such Act are each amended by striking out "fourteenth or fifteenth amendment" each time it appears and inserting in lieu thereof in each instance "fifteenth amendment".

(f) Sections 2, 3, 4, 5, 6, and 13 of such Act are each amended by striking out ", or in contravention of the guarantees set forth in section 4(f)(2)" each place it appears.

(g) Section 14(c) of such Act is amended by striking out paragraph (3) thereof.

(h) Section 203 of such Act is repealed.

(i) Sections 204 through 207 of such Act are redesignated as sections 203 through 206 respectively.

(j) Section 203 of such Act (as so redesignated by subsection (i)) is amended by striking out "or 203,".

(k) Section 204 of such Act (as so redesignated by subsection (i)) is amended by striking out ", 202, or 203" and inserting in lieu thereof "or 202".

SEC. 2. The amendments made by the first section of this Act shall become effective on the date of the enactment of this Act.

97TH CONGRESS
1ST SESSION

S. 1761

To amend the Voting Rights Act of 1965 to provide for the application of preclearance provisions to all States and political subdivisions and to provide for submission of any changes under the preclearance provisions to the appropriate district court of the United States.

IN THE SENATE OF THE UNITED STATES

OCTOBER 22 (legislative day, OCTOBER 14), 1981

Mr. COCHRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Voting Rights Act of 1965 to provide for the application of preclearance provisions to all States and political subdivisions and to provide for submission of any changes under the preclearance provisions to the appropriate district court of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Amendments of 1981".

SEC. 2. Section 5 of the Voting Rights Act of 1965 is amended—

(1) by inserting "(a)" after the section designation;

(2) by inserting after "November 1, 1972," the following: "or whenever a State with respect to which no prohibition set forth in section 4(a) based upon a determination made under section 4(b) is in effect shall enact or seek to administer any voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date of the enactment of the Voting Rights Amendments of 1981";

(3) by inserting "against the United States" after "institute an action";

(4) by striking out "the United States District Court for the District of Columbia" and inserting in lieu thereof "the appropriate district court of the United States";

(5) by striking out the colon and all that follows through the end of the first sentence of such section and by inserting in lieu thereof a comma and the following: "except that any such qualification, prerequisite, standard, practice, or procedure may be enforced after sixty days after such State or political subdivision has submitted the necessary information to the appropriate district court of the United States and no objec-

tion has been raised by the United States or by any interested person during such sixty-day period.";

(6) by striking out the second, third, and fourth sentences of such section and inserting in lieu thereof the following: "The procedures specified in subsection (b) shall apply to any action brought under this section. The failure of the Attorney General or any interested party to object during the sixty-day period specified in the first sentence of this subsection, or a declaratory judgment entered into under this section shall not bar a subsequent action to enjoin an enforcement of such qualification, prerequisite, standard, practice, or procedure."; and

(7) by adding at the end thereof the following new subsection:

"(b)(1) Upon the filing of a complaint in an action brought under subsection (a) of this section, notice of the action shall be published in newspapers of general circulation in the jurisdiction of the appropriate district court for three consecutive weeks, and the complaint shall, to the extent practicable, be served on all interested persons. Persons interested in the enforcement or administration of any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting required to be tested under subsection (a) of this section by a State or political subdivi-

sion may, in accordance with rules made by each district court, submit their names and addresses to the appropriate district court to be kept in a registry for the purposes of this paragraph.

"(2) Any—

"(A) person who resides within the State or political subdivision seeking to enforce or to administer any such qualification, prerequisite, standard, practice, or procedure, subject to the provisions of subsection (a) of this section; or

"(B) organization which carries on activities in such State or political subdivision,

desiring to object to such enforcement or administration shall be permitted to intervene as a matter of right in the action brought under subsection (a) of this section within sixty days after the last publication required by paragraph (1) of this subsection or upon receipt of the complaint, as the case may be.

"(3) If there is a request for additional information in any action brought under subsection (a) of this section, the sixty-day period during which no such qualification, prerequisite, standard, practice, or procedure may be enforced or administered shall commence when the information is received.

"(4)(A) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the

action brought under this section is pending immediately to designate a judge in such district to hear and determine the action. In the event that no judge in the district is available to hear and determine the action, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the action.

"(B) It shall be the duty of the judge designated pursuant to this subsection to assign the action for hearing at the earliest practicable date and to cause the action to be in every way expedited.

"(5) Notwithstanding any other provision of law, the appeal from any declaratory judgment entered into in any action brought under subsection (a) of this section, or any interlocutory order involving the resolution of any issue relating to the enforcement or administration of any such qualification, prerequisite, standard, practice, or procedure under section 5, shall be expedited to the greatest possible extent.

"(6) Notwithstanding any other provision of law, any declaratory judgment in any action brought under subsection (a) of this section shall be stayed until all appeals in connection with such a judgment have been exhausted or, in the

event no appeals are taken, until the time for such appeals has expired.".

SEC. 3. (a) Section 14(b) of the Voting Rights Act of 1965 is amended by striking out "or section 5".

(b) Section 14(d) of such Act is amended by striking out "or section 5".

97TH CONGRESS
1ST SESSION

S. 1975

To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 15 (legislative day, NOVEMBER 30), 1981

Mr. GRASSLEY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Act Amendments of 1981".

SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended—

(1) by inserting "(1)" after "(a)";

(2) by striking out "seventeen years" each place it appears and inserting in lieu thereof "twenty-two years";

(3) by striking out "ten years" each place it appears and inserting in lieu thereof "twelve years";

(4) by inserting ", except as hereinafter provided in section 4(a)(2) and section 4(a)(3)," after *"Provided*, That no such declaratory judgment shall issue with respect to any plaintiff" each place it appears; and

(5) by inserting at the end of the section new subsections to read as follows:

"(2) Notwithstanding the provisions of section 4(a)(1), any such State or any political subdivision thereof, although the determinations of section 4(b) were not made as to the subdivision as a separate unit, or any such political subdivision with respect to which the determinations of section 4(b) have been made, may at any time bring an action pursuant to the provisions of section 4(a)(3) against the United States for a declaratory judgment that during the five years preceding the filing of the action:

"(A) no test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote in contravention of the guarantees of this Act;

"(B) such State or political subdivision has made all substantial submissions in compliance with section 5 of this Act;

"(C) there remain no unremedied objections by the Attorney General to any submission made pursuant to section 5; and

"(D) there have been no final judgments of any court of the United States that such State or political subdivision purposefully denied or abridged the right of any citizen to vote in contravention of the guarantees of this Act.

Upon making such a showing to the satisfaction of the court, a declaratory judgment shall issue that with respect to such State or a separate political subdivision thereof or such political subdivision the terms of this section have been complied with.

"(3) Notwithstanding the provisions of section 4(a)(1), an action brought pursuant to section 4(a)(2) shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall lie to the Supreme Court: *Provided,* That all filings for the request for three judges pursuant to this section shall be referred to the chief judge of the circuit who shall designate three judges from the circuit, other than

from the petitioning State or from the State in which the petitioning political subdivision is located.".

SEC. 3. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1987".

SEC. 4. This Act shall become effective on the date it is enacted.

97TH CONGRESS
1ST SESSION

S. 1992

To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 16 (legislative day, NOVEMBER 30), 1981

Mr. MATHIAS (for himself, Mr. KENNEDY, Mr. METZENBAUM, Mr. WEICKER, Mr. BIDEN, Mr. CHAFEE, Mr. MOYNIHAN, Mr. CRANSTON, Mr. ANDREWS, Mr. BAUCUS, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. BRADLEY, Mr. BUMPERS, Mr. BURDICK, Mr. ROBERT C. BYRD, Mr. CANNON, Mr. CHILES, Mr. COHEN, Mr. DANFORTH, Mr. DECONCINI, Mr. DIXON, Mr. DODD, Mr. DOMENICI, Mr. DURENBERGER, Mr. EAGLETON, Mr. FORD, Mr. GLENN, Mr. HART, Mr. HATFIELD, Mrs. HAWKINS, Mr. HEINZ, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. INOUYE, Mr. JACKSON, Mrs. KASSEBAUM, Mr. LEAHY, Mr. LEVIN, Mr. LONG, Mr. MATSUNAGA, Mr. MITCHELL, Mr. PACKWOOD, Mr. PELL, Mr. PERCY, Mr. PRESSLER, Mr. PROXMIRE, Mr. PRYOR, Mr. QUAYLE, Mr. RIEGLE, Mr. ROTH, Mr. SARBANES, Mr. SASSER, Mr. SPECTER, Mr. STAFFORD, Mr. TSONGAS, Mr. WILLIAMS, Mr. JOHNSTON, Mr. STEVENS, and Mr. MELCHER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That subsection (a) of section 4 of the Voting Rights Act of

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1965 is amended by striking out "seventeen years" each place it appears and inserting in lieu thereof "nineteen years".

(b) Effective on and after August 5, 1984, subsection (a) of section 4 of the Voting Rights Act of 1965 is amended—

(1) by inserting "(1)" after "(a)";

(2) by inserting "or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit," before "or in any political subdivision with respect to which" each place it appears;

(3) by striking out "in an action for a declaratory judgment" the first place it appears and all that follows through "color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.", and inserting in lieu thereof "issues a declaratory judgment under this section.";

(4) by striking out "in an action for a declaratory judgment" the second place it appears and all that follows through "section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.", and inserting in lieu thereof the following:

"issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

"(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

"(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declara-

tory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

"(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

"(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

"(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending; and

"(F) such State or political subdivision and all governmental units within its territory—

"(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

"(ii) have engaged in constructive efforts to eliminate intimidation and harrassment of persons exercising rights protected under this Act; and

"(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

"(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

"(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision

of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

"(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may intervene at any stage in such action.";

(5) in the second paragraph—

(A) by inserting "(5)" before "An action"; and

(B) by striking out "five" and all that follows through "section 4(f)(2).", and inserting in lieu thereof "ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issu-

ance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds."; and

(6) by striking out "If the Attorney General" the first place it appears and all that follows through the

end of such subsection and inserting in lieu thereof the following:

"(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.".

SEC. 2. Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.".

SEC. 3. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

SEC. 4. Title II of the Voting Rights Act of 1965 is amended by adding at the end the following section:

"VOTING ASSISTANCE

"SEC. 208. Nothing in this Act shall be construed in such a way as to permit voting assistance to be given within the voting booth, unless the voter is blind or physically incapacitated.".

SEC. 5. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on the date of the enactment of this Act.

Calendar No. 302

97TH CONGRESS
1ST SESSION

H. R. 3112

IN THE SENATE OF THE UNITED STATES

OCTOBER 7, 1981
Received; read the first time

OCTOBER 14, 1981
Read the second time and placed on the calendar

AN ACT

To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 4 of the Voting Rights Act of 1965 is amended by striking out "seventeen years" each place it appears and inserting in lieu thereof "nineteen years".

(b) Effective on and after August 5, 1984, subsection (a) of section 4 of the Voting Rights Act of 1965 is amended—

(1) by inserting "(1)" after "(a)";

(2) by inserting "or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit," before "or in any political subdivision with respect to which" each place it appears;

(3) by striking out "in an action for a declaratory judgment" the first place it appears and all that follows through "color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.", and inserting in lieu thereof "issues a declaratory judgment under this section.";

(4) by striking out "in an action for a declaratory judgment" the second place it appears and all that follows through "section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.", and inserting in lieu thereof the following:

"issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

"(A) no such test or device has been used within such State or political subdivision for the purpose or

with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

"(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

"(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

"(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

"(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending; and

"(F) such State or political subdivision and all governmental units within its territory—

"(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

"(ii) have engaged in constructive efforts to eliminate intimidation and harrassment of persons exercising rights protected under this Act; and

"(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

"(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

"(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second

sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

"(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may intervene at any stage in such action.";

(5) in the second paragraph—

(A) by inserting "(5)" before "An action"; and

(B) by striking out "five" and all that follows through "section 4(f)(2).", and inserting in lieu thereof "ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judg-

ment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds."; and

(6) by striking out "If the Attorney General" the first place it appears and all that follows through the end of such subsection and inserting in lieu thereof the following:

"(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been

the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.".

SEC. 2. Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.".

SEC. 3. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

SEC. 4. Title II of the Voting Rights Act of 1965 is amended by adding at the end the following section:

"VOTING ASSISTANCE

"SEC. 208. Nothing in this Act shall be construed in such a way as to permit voting assistance to be given within

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the voting booth, unless the voter is blind or physically incapacitated.".

SEC. 5. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on the date of the enactment of this Act.

Passed the House of Representatives October 5, 1981.

Attest: EDMUND L. HENSHAW, JR.,
Clerk.

By THOMAS E. LADD,
Assistant to the Clerk.

Senator HATCH. Senator Thurmond?

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to be here today as the Subcommittee on the Constitution begins hearings on the Voting Rights Act. I am confident that these hearings will be most beneficial in helping the Senate provide full and vigorous protection of the right to vote in this Nation. Few issues before the Judiciary Committee this session will match this issue in importance, and I am sure that this subcommittee will fulfill its duty to the full Senate and to the American people by establishing a complete and fair record on all of the vital issues before us.

This morning I want to make one point emphatically clear. I support, have supported, and will continue to support the right of every eligible voter in this country to have free, equal, and unhindered access to the ballot box, to cast his or her vote in all local, State, and national elections. This right to vote is the foundation of our democratic system of government and must be fully, fairly, and vigorously protected for all citizens.

Throughout my years of public service I have unyieldingly sought to protect the right to vote. Over 30 years ago as Governor, I personally led the fight in South Carolina to eliminate the poll tax, which I felt constituted a hindrance to some of our citizens in their attempt to exercise their right to vote. My fight to eliminate this barrier to the voting rights of the poor and less privileged preceded Federal efforts to eliminate poll taxes by 17 years. My first successful campaign for the U.S. Senate depended on a write-in effort, and my whole campaign was an attempt to increase voter turn-out and to educate voters on voting procedure, so that the wishes of the electorate could not be frustrated by political bosses or by technicalities.

On the national level, I have also advocated an expansion of the right to vote. Less than 4 years ago, I joined with Senators Kennedy and Mathias, who are here with us today, and with Delegate Fauntroy, to gain congressional approval of the proposed constitutional amendment to give the District of Columbia voting representatives in Congress. Despite criticism of my position, I voted for this measure, because I felt that all people in this Nation should be treated equally and fairly, especially when voting is at issue.

Because I have always valued the right to vote and have acted on that principle, I want to dispel any notion that I might be sympathetic to an attempt to diminish in any way the fair access of citizens to the ballot box. I support full, fair, and equal protection of the right to vote, and I will strenuously oppose any effort to attack the guarantee of this fundamental right.

In the past, I have questioned certain provisions of the Voting Rights Act, but that position must not be interpreted as opposition to the right to vote itself. At the time the act was proposed and later modified, I felt that some of the mechanisms incorporated in the legislation were unconstitutional. I considered it my responsi-

bility to point out those deficiencies to my colleagues in the Senate and to the American people. Although the Supreme Court did not concur with my assessment, some of my views were supported by the late Justice Hugo Black, a man universally remembered for his commitment to individual rights under the Constitution. While there should be a reasonable discussion of the best way to implement and protect the right to vote, there should be no mistake about my position. I believe the right to vote should be fully, fairly, and vigorously defended.

As we attempt to protect voting rights, we must be sure that our approach is reasonable and fair. I have suggested that all provisions of the Voting Rights Act be applied nationwide, not in an attempt to destroy the act but because I believe that a statute must be applied equally to all citizens of this Nation in order to ensure true equal protection under the law. I do not see how you can apply a law to some people in this country and not apply it to all others.

However, if there is not sufficient sentiment for a nationwide extension, then I believe that the approach suggested by President Reagan is fair and reasonable. The act would be extended, and those jurisdictions which clearly are not discriminating would be allowed to escape selective punitive treatment for the first time in almost two decades. Such an approach should address discrimination and the opportunity for bailout at each level—State, county, and city—and each jurisdiction should be held responsible for its own actions.

As we begin our inquiry into the issues surrounding a third extension of the Voting Rights Act, this subcommittee now faces issues which are very different from the concerns about equal access to the ballot box which originally prompted the Voting Rights Act 17 years ago. The House-proposed amendment to section 2 of the act introduces the possibility of a widespread restructuring of our electoral system to facilitate proportional representation on the basis of race or ethnic background. This radical addition to the Voting Rights Act would shift the focus of the law from a question of access to the ballot box to a question of results or outcome of the electoral process. This proposal is dramatic and has profound implications for the fundamental structure and assumptions of our system of government.

Simply stated, we must examine during the course of these hearings whether the individual should remain the basis of political representation in this country or whether we should take a major and perhaps irreversible step toward the adoption of groups as the primary units of our political system. The draftsmen of our Constitution chose the individual as the primary unit of our representative democracy to avoid the dangers of severe conflict and polarization which are inherent in any system which tends to formally establish factions within a society.

I am particularly concerned, as all Americans should be, that the groups for which electoral results would be mandated by this change in section 2 would be defined by racial or ethnic classifications, classifications which are objectionable under a color-blind Constitution. Certainly, this change in the law, which would override the U.S. Supreme Court decision in the *Mobile* case, requires

an in-depth analysis which, in my opinion, has heretofore not been fully undertaken in either body of the Congress.

Of course, before we can address the issue of what needs to be done to ensure that discrimination in voting is eradicated, we must clearly define the concept of discrimination in the area of voting rights. The Voting Rights Act was passed almost two decades ago with the purpose of removing impediments to the right of access to registration and voting. If that original intent is to be carried out, as it should be, then we must concentrate our efforts on eliminating any practices which truly hinder access to the ballot box.

However, some would have us define discrimination as something other than inhibitions on registering and voting. They would define discrimination in terms of the results of elections. For these people, the key words are not "equal access to the ballot box" but "effective political power" or "access to the ballot process." These terms have recently been created or in part borrowed from other types of cases which address the rights of persons as individuals.

Removed from their original context of individual rights, these phrases have taken a giant leap to now signify a theory of political representation which requires us to move along a path which measures success by comparing the representation of a group in elective bodies with the proportion of that group in the general population. From those who would apply this theory of discrimination we should seek to find out why they believe that the adoption of this approach will not encourage or take us closer to mandated proportional representation by race or ethnic group, a position which is being openly advocated by some in our society today.

Another crucial issue we face is the problem of finding a fair way for political jurisdictions which clearly are not engaged in discrimination to free themselves of the admittedly unequal treatment under section 5 preclearance. The preclearance mechanism was set up as a temporary method to correct so-called extraordinary circumstances in certain parts of the Nation. While the law appears to provide an opportunity to bailout for those covered jurisdictions, in reality the law itself has always precluded such an opportunity for bailout for the vast majority of covered jurisdictions. Fundamental fairness requires that these jurisdictions be treated in a reasonable manner, and public policy should dictate a bailout system which offers incentive for compliance with the law.

In conclusion, I want to restate my personal commitment to the right to vote and my support for a full, fair, and equal legislative guarantee of access to the ballot box. I also want to restate my determination to explore fully the new issues concerning both the use of election outcomes as the standard of proof for the realization of voting rights and the need for a fair and effective bailout for those jurisdictions which have been subjected to selective application of the law for the past 17 years. Such a serious inquiry is necessary, and I commend you, Mr. Chairman, for taking the leadership in insuring a full and complete discussion of all of the vital issues before us.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Thurmond.

Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I only want to emphasize one paragraph of my statement which I will later insert in the record.

On December 15, I submitted a bill on the Voting Rights Act which I thought reflected many of the President's positions as set forth in his announcement of November 6. Although this bill is not one from the administration, I consider my bill as a vehicle to proffer the position of the administration before this subcommittee. I believe the position of President Reagan will be a good point of reference for myself and the other members of this subcommittee while we evaluate the testimony presented during these hearings.

Because I revere our federalism, I feel it is necessary to insure the ability of the States to pass laws concerning their citizens. Therefore, although I emphasize that I am not bound by the provisions of my bill, I must admit a predilection to retaining the intent test in section 2 and formulating a reasonable release mechanism for preclearance.

So it is with great interest that I anticipate emphatic and scholarly testimony on these pieces of legislation and await voting for extension of the Voting Rights Act.

That is all I have.

Senator HATCH. Thank you.

[Material supplied follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY

I join Senators Hatch and Thurmond in welcoming the witnesses and beginning what I hope will be very significant and illuminating hearings.

The right to vote is fundamental and presevative of all other rights. The right to vote knows no political affiliation. In a democracy the government must protect, encourage and enhance that right for its citizens. Consequently, the Voting Rights Act is one of the most important civil rights bills enacted by Congress. The Voting Rights Act has had tremendous impact both substantively and symbolically across the country and especially in the states covered by the special provisions. The number of minorities participating in the policial process has seen a very favorable increase.

On December 15, I submitted a bill on the Voting Rights Act which I thought reflected many of the Presidents positions as set forth in his announcement of November 6. Although not an administration bill, I consider my bill as a vehicle to proffer the position of the administration before this subcommittee. I believe the position of President Reagan will be a good point of reference for myself and the other members of this subcommittee while we evaluate the testimony presented during these hearings. Because I revere our federalism, I feel it is necessary to insure the ability of the States to pass laws concerning their citizens. Therefore, although I emphasize that I am not bound by the provisions of my bill, I must admit a predilection to retaining the intent test in section 2 and formulating a reasonable release mechanism for preclearance. So, it is with great interest I anticipate emphatic and scholarly testimony.

[The prepared statements of Senator Dole and Senator Biden follow:]

PREPARED STATEMENT OF SENATOR ROBERT DOLE

MR. CHAIRMAN. THE SUBCOMMITTEE ON THE CONSTITUTION IS BEGINNING HEARINGS TODAY ON ONE OF THE MOST EFFECTIVE PIECES OF CIVIL RIGHTS LEGISLATION EVER PASSED BY THE CONGRESS, LEGISLATION WHICH PROTECTS THE MOST FUNDAMENTAL OF CONSTITUTIONAL RIGHTS, THE RIGHT TO VOTE. KEY PROVISIONS OF THIS LEGISLATION ARE SCHEDULED TO EXPIRE LATER THIS YEAR AND THUS, WE MUST DECIDE: '"SHOULD THE ACT BE EXTENDED? AND IF SO, FOR HOW LONG AND IN WHAT MANNER?"

I AM SURE THAT THERE IS NOT A PERSON IN THIS ROOM WHO WOULD NOT LIKE TO BE ABLE TO TELL US THAT THE ACT IS NO LONGER NEEDED, THAT DISCRIMINATION NO LONGER EXISTS. UNFORTUNATELY, HOWEVER, I BELIEVE THAT THE CONTINUED NEED FOR THE ACT HAS ALREADY BEEN PERSUASIVELY DEMONSTRATED. AS A CONSEQUENCE, I SUPPORT THE ACT'S EXTENSION, AND I BELIEVE THAT THE VAST MAJORITY OF MY COLLEAGUES IN THE SENATE SHARE THIS VIEW.

I ALSO BELIEVE, HOWEVER, THAT SIGNIFICANT ISSUES HAVE BEEN RAISED CONCERNING THE MANNER IN WHICH THE ACT SHOULD BE EXTENDED, AND WHETHER OTHER AMENDMENTS TO THE ACT SHOULD ALSO BE MADE. IN CONSIDERING THESE ISSUES, WE MUST BE EVER MINDFUL OF OUR DUTY TO ENSURE THAT THE VOTING RIGHTS OF OUR CITIZENS SHALL IN NO

WAY BE DENIED OR ABRIDGED. HOWEVER, I THINK IT IS IMPORTANT THAT WE NOT LET OUR ZEALOUS EFFORTS TO ENSURE THIS GUARANTEE, RESULT IN AN IMPOSITION OF STANDARDS WHICH ARE IMPOSSIBLE TO MEET, OR IN REQUIRING THAT THE SINS OF THE PAST MAY NEVER BE ATONED.

IT IS WITH THESE GENERAL THOUGHTS THAT I APPROACH THE SUBJECT OF TODAY'S HEARINGS. MR. CHAIRMAN, IN THE THOROUGH MANNER TYPICAL OF YOU AND YOUR STAFF, YOU HAVE COMPILED A LIST OF WITNESSES REPRESENTING A BROAD SPECTRUM OF VIEWS ON THIS ISSUE, EVERY ONE OF WHOM IS WELL QUALIFIED TO ELOQUENTLY AND PERSUASIVELY ARTICULATE THE INTERESTS WHICH HE OR SHE REPRESENTS. I LOOK FORWARD TO REVIEWING THE STATEMENTS OF EACH OF THESE WITNESSES, AND I THANK ALL OF THEM IN ADVANCE FOR COMING HERE TO SHARE WITH US THEIR VIEWS.

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

With the elimination of the poll tax, residency requirements, and literacy tests, the most egregious aspects of discrimination against American minority voters have been eliminated. However, discriminatory changes in election systems can still deny or abridge minority voting . Therefore, the Voting Rights Act should be extended.

I am a co-sponsor of S. 1992 because I believe strongly that it is necessary to extend the Voting Rights Act requirement for preclearance for certain jurisdictions. Ten years in the future, in 1992, when the amended bill would allow all states to change their election laws without automatic scrutiny by the federal government, hopefully there will be no need for its provisions. Such is not the case in 1982, however. The country still needs the provisions of the Voting Rights Act and it must be extended.

Although S. 1992 is not perfect it is presently the only effective vehicle available to extend all the provisons of the present Voting Rights Act - an act which I believe is critical for this country.

Senator HATCH. Senator Mathias and Senator Specter? I understand you are going to testify, Senator Mathias. Do you have any comments, Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman. I have no statement.

Senator HATCH. Thank you.

Senator MATHIAS. Mr. Chairman, I do have just one question, however, that I think would be helpful to many people in the room.

It is my understanding that you have added 2 days of testimony to the previous schedule that had been planned for January 13.

Senator HATCH. We have changed the dates on which the hearings will be held. I do not think we have added to the total number of hearings.

Senator MATHIAS. I am a little confused.

Senator HATCH. As I understand it, we have the same total number of days.

Senator MATHIAS. We lost 2 days, the 13th and the 20th.

Senator HATCH. No, we lost only 1 day which we will pick up later. But we will have the same number of days of hearings. My goal is to finish at exactly the same time as we had previously planned.

Senator MATHIAS. I understand that, and I applaud that. I had been informed that you had added the 1st and the 12th as dates.

Senator HATCH. I do not think so. The dates are the 27th—today—28th, 1st, 2d, 4th, 11th, 12th, 24th, and 25th of February. By February 25 we will have concluded our hearings, and hopefully we will be able to mark up this bill in the subcommittee shortly thereafter. That has been my goal from the beginning. I intend to maintain that schedule, barring any unforeseen contingencies.

Senator MATHIAS. But the schedule as you have announced it is now the schedule?

Senator HATCH. As far as I am concerned, that is the schedule, unless there is some unforeseen occurrence that would cause me to alter it.

At this time, we will call upon the Attorney General of the United States, William French Smith.

We are very pleased to have you here, General Smith, and we will look forward to your testimony at this time.

STATEMENT OF HON. WILLIAM FRENCH SMITH, U.S. ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Attorney General SMITH. Thank you, Mr. Chairman and members of the subcommittee. I am grateful for the opportunity to appear before this subcommittee to present the administration's views regarding proposed amendments to the Voting Rights Act of 1965.

There is perhaps no more important piece of legislation to come before this Congress than the one now being considered. As President Reagan has so often emphasized, the right to vote is "the most sacred right of free men and women." It rightfully claims this lofty status because it is, in point of fact, preservative of all other rights.

Senator HATCH. Excuse me, Mr. Attorney General.

Can the people in the back hear the Attorney General?

Could you pull the microphone a little bit closer, General Smith?

Attorney General SMITH. Certainly.

The people of America recognized as much in 1870 by their adoption of the 15th amendment to the Constitution. Since then they have supported efforts to expand the franchise and to secure its exercise free from force, fraud, and unlawful discrimination.

By means of constitutional amendment, legislative enactment, and judicial rulings over many decades, the country has demonstrated its continuing commitment to the truths that all men are created equal and that governments derive their just powers from the consent of the governed. It is these ideals that must guide the deliberations of this subcommittee and the full Senate today and in the weeks ahead as they carefully consider the matter at hand.

The Voting Rights Act unmistakably stands as the centerpiece of those legal protections that guard against denials or abridgements of the right to vote. Enacted in 1965 because some States and localities sought to prevent blacks from exercising this most precious right, the act opened a new chapter in the struggle to achieve real equality for racial minorities.

The act's principal purpose was to provide badly needed enforcement tools for carrying into effect the guarantee of the 15th amendment that no one shall be deprived of the right to vote on account of race.

The present act contains both permanent and temporary provisions. The permanent provisions, which apply nationwide, include section 2 of the statute, which generally forbids electoral devices and procedures that deny or abridge the right to vote because of race, color, or, since 1975, membership in a language minority group.

The temporary or special provisions of the act, which include sections 4 and 5, are directed against only a small number of States and some subdivisions in other States. Located primarily in the South, these jurisdictions were historically associated with efforts to deny full political equality to blacks.

The special provisions required these covered jurisdictions to submit for preclearance by the U.S. Attorney General or the U.S. District Court for the District of Columbia all changes in electoral practices or procedures. Such changes are allowed to go into effect only after the submitting jurisdiction satisfies the Attorney General or the district court that the revisions have neither the purpose nor the effect of denying or abridging the right to vote on account of race or membership in a language minority group.

The special provisions also included a so-called bailout mechanism, whereby a covered jurisdiction could, after a certain number of years, apply to remove itself from special coverage on a showing that no prohibited test or device had been used during a set period. At the time of its original enactment, the act set this period at 5 years.

In 1970 Congress reviewed the then 5-year history of the act and found sufficient evidence of continued racial discrimination in voting in the selected jurisdictions to warrant an extension of the preclearance provisions for another 5 years.

In 1975 Congress again revisited the issue, extended the preclearance provisions for another 7 years, until August 1982, and brought

within their coverage for 10 years additional jurisdictions, in both the North and the South, having sizable language minorities.

Today the question is once again before Congress: Should these special provisions be extended yet a third time? In the administration's view, the answer to that question must be in the affirmative.

Measured by almost any yardstick, the results of the act are impressive. Literacy tests, poll taxes, and similar devices which led to the original Voting Rights Act have been effectively eliminated. Minorities, especially blacks in the South, have made dramatic gains in voter registration and election to public office.

For example, the U.S. Commission on Civil Rights estimates in 1965 that only 6.4 percent of eligible blacks were registered to vote in Mississippi. By 1976 that figure had reached 67.4 percent. Similarly, in South Carolina minority voter registration since 1965 has increased from 34.3 percent at the time the act was passed to 55.8 percent in 1980. In the South as a whole, black voter registration in 1976 was estimated to be nearly 60 percent. Moreover, the number of black elected officials in the South has increased dramatically, from fewer than 100 in 1965 to more than 2,000 in 1980. Louisiana and Mississippi, for example, rank among the top four States in the Nation in the number of black elected officials, and the Georgia State Assembly has the highest number of black members in the country.

Notable gains have also been achieved in a number of covered jurisdictions having sizable Hispanic populations. In Texas, voter registration among Hispanics has increased by two-thirds in recent years and the number elected to public office has increased by 30 percent since 1976. Even more dramatic is the case of Arizona, where Hispanics constitute 16.2 percent of the population and 13.2 percent of all elected officials.

These encouraging statistics are but a quantitative measure of a significant qualitative change for the better, especially in the South, since the Voting Rights Act became law almost 17 years ago. There is no doubt whatsoever that the act has contributed greatly toward the creation of a truly nondiscriminatory political and social environment.

Heartening as this news is, it is offset by the sad truth that racial discrimination in the electoral process still exists in certain covered jurisdictions. The Justice Department's enforcement experience in this area still demonstrates that some political jurisdictions in the country have made insufficient progress and that continued Federal oversight of those jurisdictions is necessary. There is thus no question that the special provisions of the Voting Rights Act should be extended for an additional period.

As the Senate considers the merits of the various legislative proposals before it, its deliberations should, in my view, be guided by four fundamental principles.

The first and plainly most important consideration is that the right to vote not be denied or abridged on account of race or membership in a language minority group. That principle is sacrosanct and must not be compromised in any way.

Second, it is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions

having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature.

That purpose was to encourage States and localities to bring blacks and other racial minorities into the mainstream of American political life. In revisiting the statute in 1982, the emphasis should be placed on the positive objectives of the legislation rather than dwelling on the chapter that led to passage of the act 17 years ago.

Third, even while deliberating on an extension of the act's special provisions, due recognition must be given to the very real progress made since the Voting Rights Act was enacted. This is not 1965, and the racial problems of that year are not, thankfully, those of 1982.

The march toward full equality in the electoral process continues. While we cannot disregard the distance yet to be traveled, we should also credit the milestones that have been met, not the least of which are the impressive gains in minority registration and representation to which I have just referred. Americans of all races can take pride in the fact that many jurisdictions against whom the act's special provisions are directed have made dramatic and lasting strides to correct past abuses.

Fourth, in the same breath that we speak of an extension of the act, we must also underscore its exceptional character. It vests extraordinary powers in the National Government over matters that, consistent with the principles of federalism, have traditionally rested within the province of States and local control.

Moreover, it establishes a dual pattern of enforcement, whereby some parts of the country are subjected to more stringent legal obligations than other areas. Based on the evidentiary record before it, Congress felt in 1965 that there was good and sufficient reason, which indeed there was, for differential treatment.

Even so, the Supreme Court, in sustaining the constitutionality of the act, took care to note the temporary nature of the special provisions, the fact that particular jurisdictions had been found by Congress to have violated their constitutional obligations, and the fact that these jurisdictions would be given an opportunity to get out from under the act's special burdens.

With these principles in mind, we at the Department of Justice, in response to a request that President Reagan made of me on June 15, 1981, undertook a comprehensive assessment of the act's history to date, extant or likely abuses of voting rights that may require special scrutiny, the adequacy of the Department's powers under the act, the desirability of making any changes in the existing legislation, and the feasibility of extending the act's coverage to voting rights infringements not now covered by the act.

As one element of this review, I and members of my staff met personally with a number of civil rights groups and other organizations, Members of Congress and their staffs, Governors, and other State and local representatives.

The results of our study can be simply stated. The Voting Rights Act of 1965 has worked well, but the need for its special protection continues. The President has therefore endorsed an extension of

the act in its present form for a period of 10 years. This is longer than any previous extension voted by Congress.

At the same time, the President pointed out, and our analysis of the history of enforcement under the act confirms, covered States or political subdivisions should have the opportunity to demonstrate that they have indeed removed past practices of racial discrimination from their electoral processes and have been in compliance with the law for many years.

Accordingly, if the Senate were to include in the act a provision allowing such governmental units to bail out prior to the expiration of the 10-year extension we are recommending, the administration would support such a modification. In this connection, there are now pending before this subcommittee two bills that would amend the current bailout provision in section 4 of the act to release jurisdictions from the preclearance requirements upon meeting specified criteria.

The Department will certainly work with this subcommittee in the weeks ahead to seek to devise from the various alternatives under consideration a workable and fair bailout provision to be included in the Senate bill.

On another point relevant to extension, let me say a few words about the bilingual election provisions of the act. The bilingual protections of sections 4 and 203 were added in 1975 to secure the right to vote for those citizens who are not fluent in the English language.

In our meetings with various groups last summer, we heard numerous expressions of support for the bilingual provisions. Citizens whose first language is not English have been afforded by these provisions the opportunity to participate effectively in the election process.

Our limited experience since 1975 indicates that the bilingual procedures have, by and large, worked well. As a result, we believe that Congress should place the bilingual provisions on the same footing as the special coverage provisions, uniformly extending the section 4 bailout eligibility date to 1992 and also similarly extending section 203.

In addressing the question of extending the life of the act to August 1992, let me make clear that only the special coverage of section 4 requires congressional attention, since only that coverage would be subject to termination in August of this year. Section 2 of the act is permanent legislation, and no action by Congress is needed to continue its protections.

The House has passed legislation that would dramatically change section 2 of the Voting Rights Act to permit proof of a violation based solely on election results. This change in the act's permanent provision runs counter to a Supreme Court ruling handed down in 1980.

As the plurality decision in *City of Mobile* v. *Bolden*—466 U.S. 55 (1980)—made clear, section 2 of the Voting Rights Act, like the 15th amendment, currently prohibits all States and local governments, both North and South, from employing any voting practice or procedure designed or purposefully maintained to discriminate on the basis of race or color. Proof that the challenged election practice was intended to discriminate against a racial minority is

essential to a claim under both the 15th amendment and section 2 of the Voting Rights Act.

The proposed replacement of a results or effects test for the existing intent standard in section 2 effectively imposes upon the entire country a legal test that since 1965 Congress has seen fit to apply only to certain jurisdictions that had been demonstrably derelict in their failure to protect minority voting rights and, even then, only as to voting changes adopted by those jurisdictions.

No evidence was presented either in testimony before the House committee or in the House floor debates that there have been voting rights violations throughout the country so as to justify nationwide application of an effects test. So major an amendment should not be endorsed by Congress without compelling and demonstrable reasons for doing so. The inclusion in section 2 of such a test would call into question the validity of State and local election laws and systems that have long been in existence, not just in the South, but in all of America. Any move by Congress in this direction should not be taken without full appreciation of all its ramifications.

In particular, under a nationwide effects test, any voting law or procedure in the country which produces election results that fail to mirror the population makeup in a particular community would be vulnerable to legal challenge under section 2.

Historic political systems incorporating at-large elections and multimember districts, which had never before been questioned under either the act or the Constitution, would suddenly be subject to attack. So, too, would be many redistricting and reapportionment plans.

Nor would the reach of an amended section 2 be limited to statewide legislative elections; it would apply as well to local elections such as those involving school boards and city and county governmental offices, and it would apply to existing voting practices and procedures of longstanding application as certainly as to the most recent voting change.

To entertain this kind of amendment to the act's permanent provisions is inevitably to invite years of extended litigation, leaving in doubt the validity of longstanding State and local election laws in the interim and inviting the Federal courts, on no more than a finding of disproportionate election results, to restructure governmental systems that have been in place for decades.

That prospect cannot be lightly dismissed. The Voting Rights Act in its present form has, by all accounts, worked extremely well. Its provisions have been subjected to the most meticulous judicial scrutiny in almost every context imaginable. Its reach and coverage are now well defined and generally understood.

In my meetings last summer with various civil rights groups, they were unwavering in their praise of the existing legislation as one of the most effective statutes ever passed by Congress. They, too, expressed concern that amendments would generate yet another prolonged period of disruptive and unsettling litigation. Their strongly held view at that time was: "If it is not broken, don't fix it." There is much commonsense to that admonition.

Mr. Chairman, the Voting Rights Act has opened up access to our political process for millions of minority citizens. It has proven

to be impressively effective, but the job is not yet finished. Consequently, a straight 10-year extension of the act is required to insure continued Federal protection of the cherished right to vote, as guaranteed by the 15th amendment.

In conclusion, I want to make clear that the administration will support any strong voting rights bill approved by the Senate, including either a straight 10-year extension of the current Voting Rights Act or a 10-year version of the House bill, provided it is modified so that it reflects the principles I have outlined in my testimony.

Thank you.

Senator HATCH. Thank you, Mr. Attorney General.

Can you summarize for this subcommittee the major differences between the administration's position on extension of the Voting Rights Act and the House-passed legislation?

Attorney General SMITH. Of course, the principal difference is section 2, which is the one I have just mentioned. Another difference, of course, is that the House bill is in perpetuity. We are recommending an extension of the act, as is, for 10 years. And, of course, there is the bailout provision.

With respect to that provision, as I have indicated in my testimony, we will be very happy to work with this subcommittee to work out a bailout provision that is fair and reasonable, and which would be acceptable to the President.

Section 2, I think, as has been said, is a very dramatic extension of the effects test, now only in section 5, nationwide. It is dramatic in another sense, and that is that it not only deals with changes in election laws and practices, as does section 5, but it also deals with existing election situations, practices, and procedures. That is a very dramatic change.

As I have stated in my testimony, this result has been arrived at in the House bill without any case having been made, so far as we can tell, of a need for that extension.

When section 5 was debated in 1965, a very compelling case was made for the dramatic change in the law, a dramatic intrusion of the Federal Government into State and local practices, which was very much warranted under the circumstances as then developed in extensive hearings before the Congress.

In this case, a change, which is also dramatic, has been made without any such case having been made. So far as I know, no evil has been pointed to which is needed to be corrected. Therefore, I would certainly urge this subcommittee to take a very strong look at what in fact this change in section 2 would accomplish and weigh that against whatever evil is intended to be corrected by that extensive change.

Senator HATCH. Do you consider this proposed change a radical change from present law?

Attorney General SMITH. It is certainly a very dramatic change. I think one could make a case that it is as dramatic, in a way, as some of the provisions in section 5.

Everybody recognizes that section 5, when it was passed, was designed to make a much needed correction to a problem that existed in the covered States. Here, however, we are extending it nationwide.

As a matter of fact, I think it is very interesting that when the House considered the extension of section 5 nationwide and rejected that, which would include of course the preclearance provisions, it determined at that point that that would not be a wise step to take.

As a matter of fact, in the House report rejecting the extension of section 5 nationwide, the following statements are made, which I think are very, very applicable to the proposed extension of the effects test nationwide. The House report says, "Without a precise showing of need, the expansion of section 5 coverage to include all counties, States, and local jurisdictions in the country seems arbitrary and wasteful, especially at a time when there is much concern about excessive governmental intrusion into State and local matters." I am now reading from the House report on the House bill.

It goes on to say, "In the absence of a detailed showing of need, serious constitutional questions are raised about applying this uncommon exercise of congressional power to the country as a whole.

"The United States Supreme Court, in *South Carolina* v. *Katzenbach* and *City of Rome* v. *United States,* upheld the constitutionality of section 5 precisely because it was tailored to address a specific problem about which Congress had amassed detailed evidence in its hearing record."

And again, "Nationwide preclearance would raise serious administrative burdens for the Department of Justice, especially since it must process all submissions within 60 to 120 days."

In this case, if section 2 were amended as proposed, instead of the Department of Justice, it would be the Federal judiciary that would be intruding itself in who knows how many State and local governmental situations, and all, as I say, without any showing, that I have seen, that there is a need for such a dramatic change. This is the basic reason that the administration has taken the position it has taken with respect to the change from the intents test to the effects test in section 2.

Senator HATCH. It is frequently claimed that the *Mobile* decision was a sharp departure from earlier interpretations of section 2 and the 15th amendment. By this line of argument, all that results proponents are doing is restoring the status quo that existed prior to *Mobile.* What is your view on this assertion frequently made by those who are proposing the dramatic effects test?

Attorney General SMITH. There has been a substantial misunderstanding of the law in this respect. The *Mobile* case did not change the law. As a matter of fact, the *Mobile* case was the first U.S. Supreme Court case to pass on section 2. That was the law as enunciated.

The misunderstanding seems to be that somehow section 2 in the past has been applied with an effects test. That is not the case. There may be one or two cases where the effects test was utilized under section 2, but to say——

Senator HATCH. Would those be lower court cases?

Attorney General SMITH. Lower court cases.

Senator HATCH. I see.

Attorney General SMITH. One or two. However, there has been so much misunderstanding, as indicated by a Washington Post editori-

al the day before yesterday, which made that contention that *Mobile* reversed the prior law and therefore *Mobile,* in turn, should be reversed to reinstate what went on before. It then cited two cases to establish what the pre-*Mobile* law had been. Both of those cases did not involve section 2 at all, and both of them, properly analyzed, involved an intent test.

Actually, it really does not require much more than a reading of the statute itself. When Congress passed this act in 1965, it very clearly expressed an intents test in section 2 and it very clearly expressed an effects test in section 5. If Congress at that time had intended to put an effects test in section 2, it could just as clearly have done so there as it did in section 5, but it chose not to do so.

As a matter of fact, the legislative history of that section shows that Senator Dirksen commented to the effect that section 2 was intended in effect to paraphrase the 15th amendment. Of course the 15th amendment, as we all know, has an intents test, as does the 14th amendment. As a matter of fact, the 14th amendment, under which so much progress has been made in the civil rights area, has always had an intents test. That really is the rule, not the exception, in this area.

Senator HATCH. I might mention that in the *Mobile* case the Supreme Court asserts in their ruling that there was no prior case that established the effects test.

Attorney General SMITH. Justice Stewart very well analyzed the law as it existed prior to the *Mobile* case and came to exactly the same conclusion—namely, that there has not been an effects test under section 2 at any time.

Senator HATCH. That is right.

How does the intents standard in the 15th amendment satisfy the objectives of that amendment, in your viewpoint?

Attorney General SMITH. I am afraid I do not understand the question.

Senator HATCH. Let me restate it. How does the intents standard, as you have described it, as applicable in the past and under *Mobile* satisfy the objectives of the 15th amendment in your view?

Attorney General SMITH. As I have said, as with the 14th amendment, I think that the protection of the right to vote has been extremely well established under the law as it exists now throughout the country.

It is true that with respect to the covered States there was a specific problem that needed to be addressed there, and it was to meet that problem that the effects test was put into section 5, and I think it is certainly doing its job there, although, as I have said in my statement, a good deal more needs to be done.

Senator HATCH. OK. To what extent is it necessary that section 2 continue to track the constitutional requirements of the 15th amendment? Do you see any constitutional problems in Congress altering the section 2 standard by statutorily overturning *Mobile*? Apparently that is what the intent of the proposed changes in section 2 is: To overturn a constitutionally based Supreme Court case, which seems somewhat ironic to me.

Attorney General SMITH. I think that if carried to its logical conclusion, proportional representation or, put another way, quotas, would be the end result. As a matter of fact, if you consider that

applying the effects test the way it would be applied under the House change, the only ultimate logical result could be proportional representation, and I do not see how anyone could seriously advocate that as an ultimate result.

Senator HATCH. Or as a constitutional principle.

Attorney General SMITH. It certainly is contrary to any of our basic principles of government.

Also underlying all of this is sort of an implication that blacks will only vote for black candidates and whites will only vote for white candidates. That of course is not true. One of the best examples of that is the city of Los Angeles, where a black mayor of course was elected with many white votes.

I think the concept, the idea, or the institutionalizing of a system which would be based upon the premise that blacks are going to vote for black candidates and whites are going to vote for white candidates is a very unfortunate scheme.

Senator HATCH. In the *Mobile* case, Justice Stewart had this to say: "The answer to the appellee's argument is that, as the district court expressly found, their freedom to vote has not been denied or abridged by anyone," which is what you are saying. "The 15th amendment does not entail the right to have negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. The 15th amendment prohibits only purposeful discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude." That is the position I think I understand you to be taking.

Attorney General SMITH. Certainly with that change, the emphasis is not on protecting the right to vote; the emphasis is on election results.

Senator HATCH. Are your concerns about the results test allayed by the disclaimer provision in section 2 of the House bill which states expressly that, "The fact that members of a minority group have not been elected in numbers equal to that group's proportion of the population shall not, in and of itself, constitute a violation"?

Attorney General SMITH. No, I do not think that that proviso would prevent the ultimate result of proportional representation. The way that proviso is now stated, it would in effect require—that is, section 2 would require that a system be put into place which would produce proportional representation.

Then—and this is where the proviso would come into effect—that system being in place, if in fact, for whatever reason, the blacks, let us say, did not put up a candidate, so that for that reason all of the members of a city council were white, then the proviso would come into play and say that is not a violation of section 2.

But that is quite a different thing from saying that that proviso would prevent a system producing proportional representation from coming into effect, because it would not. I think that proviso would have only that very limited application.

Senator HATCH. Do you agree with the Court, in *Mobile* and in the recent *Feeney* case, that discriminatory purpose "implies more than intent as awareness of consequences" and that it requires that a decisionmaker selected or reaffirmed a particular course of

action, at least in part, because of its adverse effects upon an identifiable group?

Attorney General SMITH. Would you restate that question?

Senator HATCH. Let me do it again. Do you agree with the Court in *Mobile* and in the recent *Feeney* case that discriminatory purpose implies "more than intent as awareness of consequences" and that it requires that a decisionmaker "selected or reaffirmed" a particular course of action, at least in part, "because of" its adverse effects upon an identifiable group?

Attorney General SMITH. I am afraid I would have to see that one in writing and probably give you a written answer to it.

Senator HATCH. All right, we will submit that in writing to you and perhaps get a written answer back.

[Material supplied follows:]

We agree with the discussion of "discriminatory purpose" in Justice Stewart's opinion in *Mobile* v. *Bolden*, 446 U.S. 55 (1980) and in the opinion for the Court in *Personnel Administrator* v. *Feener*, 442 U.S. 256 (1979). I would note also that in both cases the Court made it quite clear that evidence of effects or results is relevant to the ultimate question of discriminatory purpose.

Senator HATCH. Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I, along with Senator Mathias, had sponsored the legislation which is cosponsored now by 59 Members of the U.S. Senate, which is basically the House-passed bill. I had intended to make a comment on it in support of that legislation and will welcome the opportunity to do so.

I do not want to interfere with the Attorney General's time, but I either want to make sure that my statement is included in its entirety at an appropriate place in the record or otherwise have the opportunity to make that presentation during the course of the hearings.

We have many distinguished men and women who have traveled many miles and who have come here to testify, so I will accommodate the Chair on this issue, but I want to have assurances that we are going to have an opportunity, as we do in other committees, to make sure that we are able to have our statements included in their entirety.

Senator HATCH. If the Senator would yield, as soon as the Attorney General has finished, I plan on calling on Senator Mathias, then the distinguished Senator from Massachusetts, and then the distinguished Senator from Ohio. We have you right on order, but of course we wanted the first witness to be the administration.

Senator KENNEDY. I want to just make sure that the statement be in the record.

Senator HATCH. Of course. If you prefer to just put it in the record, we will do it that way.

Senator KENNEDY. General, I want to welcome you here before the committee again. I heard your comments on the Voting Rights Act stated with such assuredness about your understanding of what the legislative history was in the development of that legislation here this morning.

As someone who was involved with that legislation, I must say that that is not my understanding of the legislative history, but I

think during the course of the hearings we will hear testimony on that and also about the 15th and 14th amendments.

General, you are, I think, an extremely experienced lawyer, and I know that you are serving the President well, but I must say that you appear here before this subcommittee when there really is a very significant crisis of confidence in this administration in its commitment to the millions of people of this country—the majority who are women and the minority whose skins are not white.

I think in the kinds of assurances that you are giving to this subcommittee about the commitment of the administration in terms of full voting rights for the citizens of the Nation has to be viewed against a background where the administration has attempted to give encouragement to those who are committed to the concept of segregated schools by providing tax exemptions to them; against a background where the administration has fired the head of the Civil Rights Commission, a distinguished Republican who had served with great distinction in a previous Republican Cabinet; against a background where the administration nominated someone for the EEOC, which is an instrument of any administration to help assure that discrimination will not exist against minorities and against women in our society, who was completely unqualified and who had to be withdrawn by the administration itself; and against a track record which the Lawyers Committee on Civil Rights, made up of some of the most distinguished Republican and Democratic lawyers in this country, who have given tirelessly of themselves and volunteered to share the central concern of the people of this country for full voting rights for citizens of the Nation—the Lawyers Committee for Civil Rights evaluation of the record of this administration on voting rights is very negative; and I quote—"Although there has not been a complete abdication of Voting Rights Act enforcement, as evidenced by several objections, Justice Department voting rights enforcement has been increasingly marked by political interference and significant retreat from strict enforcement of the act."

When you look around this country you see that the heaviest burden of the administration's economic policy have fallen upon minority youths, where unemployment is virtually 42 to 45 percent. Given all these concerns, how can a significant group of Americans, whose skin is not white, let alone the majority of Americans, who care very deeply about what this country represents and what it is all about, have very much confidence that these alterations and changes that you are suggesting to us here today in terms of voting rights are really going to fulfill what I believe has been the national commitment, decided a number of years ago, to have a tough but fair voting rights statute that gives meaningful protection to all the citizens of this country that they were not going to be denied the right to vote?

Attorney General SMITH. Senator Kennedy, it is the injection of this kind of political rhetoric into a situation like this which makes it very difficult to analyze and diagnose a piece of legislation——

Senator KENNEDY. Do you want to take the statement piece by piece?

Senator HATCH. Why do you not let him answer the question, Senator?

Attorney General SMITH. I think we are talking here about section 2.

Senator KENNEDY. I thought we were talking about voting rights.

Attorney General SMITH. I do not think here it would be appropriate for me to go through step by step and rebut all of the statements that you have made, because that is not what, as I understand it, this arena is all about.

Some of the things that you stated are misstatements, particularly the one about tax exemptions for schools that discriminate.

Senator KENNEDY. Well, do you want to explain it then, General?

Attorney General SMITH. No, I do not think this is the time or the place——

Senator KENNEDY. If you are going to say that I have misstated——

Attorney General SMITH. Well, you have misstated——

Senator HATCH. Mr. Kennedy, let us let the Attorney General answer the question. Let him finish. You have just accused the administration of some things which he states are inaccurate. Let him finish showing you how inaccurate they are.

Senator KENNEDY. All right.

Attorney General SMITH. As a matter of fact, I do not see any point in my making a counter political speech in response, because I do not think that is what I am here for.

Senator HATCH. It might be a very good idea, Mr. Attorney General. [Laughter.]

Attorney General SMITH. It is certainly very much needed; there is no question about that.

Senator HATCH. I agee with you.

Attorney General SMITH. Because it is this kind of approach to problems that makes it very difficult to focus on what we are really talking about here. The amendment to section 2 is just bad legislation.

I yield not an inch to Senator Kennedy in my abhorrence of discrimination in any form. Nor do I yield to anyone else in that respect. And I think my record makes that very clear.

What we are talking about here is good versus bad legislation, and bad legislation is not made good through general, broad, political, rhetorical attacks. You can only legislate properly when you look at specifically what you are doing, and I think that is what this hearing is supposed to be all about.

There are so many other areas, too, where there have been just major distortions of the positions that the administration has taken, and so much so that you have to sort of pierce all of that cloud and persiflage and badinage in order to get down to the issues that we are really addressing.

Here, the issue I am addressing is whether the amendment to section 2 is good or bad. I think it is bad legislation for the reasons that I have stated, and it seems to me that in order to be constructive before this committee, those are the issues that we should be talking about.

As a matter of fact, I might say too that the President does not have a discriminatory bone in his body. He has never taken any action in his entire life——

[Laughter.]

Senator HATCH. We are going to have order in this room, or I will have the room cleared.

I agree with the Attorney General. This is too important a constitutional issue to have more heat than light. If we are going to discuss it, we are going to discuss it both on the legal principles and on fairness principles.

I am not going to tolerate any sneering or snide comments and remarks from either side in this issue. Let us understand that this is an important issue.

Senators Kennedy and Mathias have sponsored a bill that they consider to be extremely important. Some disagree with that bill. The principal representative of this administration has disagreed mightily here. We are going to show respect for him and, I might add, for the President of the United States, who I, too, know not to have a discriminatory bone in his body.

I resent some of the things that have been written and some of the things that have been said to distort the issues involved here. I think it is time to start talking about the real issues and not trying to make this into an emotional camouflage game.

If there is a side supporting this bill that can be presented, it is going to be presented. If there is a side opposing this bill, it, too, will be presented. Both sides will be given their opportunities. But I refuse to have any more outbursts of this kind from either side of this issue. It is an important issue, and both sides have important points to make. As long as I am chairman, both sides are going to be able to make those points without interruption. We are going to show respect for the Attorney General of the United States—Senators, participants, and audience.

Mr. Attorney General?

Senator MATHIAS. Mr. Chairman, just by way of correcting the record, the bill has not just been introduced by Senator Kennedy and myself. In fact, I am happy to be able to advise the subcommittee this morning that there are 62 Members of the Senate sponsoring the bill. The distinguished Senator from New Mexico, Mr. Schmitt, has become the 62d cosponsor. So it is not just the Senator from Massachusetts and the Senator from Maryland.

Senator HATCH. Senator Mathias, we list Senator Kennedy and yourself as the principal cosponsors. I would like to see 100 percent of the Senators sponsor a bill to extend the Voting Rights Act. But as you all know, the issue of this bill as the appropriate method of achieving that goal is not yet over.

Senator Kennedy?

Senator KENNEDY. Thank you.

General, you have mentioned in your testimony that you met in the course of the summer with a number of the civil rights groups, and, as I understand from your testimony on page 12, "they were unwavering of their praise of the existing legislation."

Can you tell me whether there is any civil rights group that is going to be supporting the administration's position as stated here before this subcommittee, and if so, which one?

Attorney General SMITH. Senator Kennedy, I can say that every civil rights group representative that I talked to in the spring, summer, and fall subscribed to exactly the position that the President is taking.

Part of our process in examining the history and the operation of the Voting Rights Act was to discuss this with groups across the spectrum. We talked at length to the various types of groups that I mentioned in my statement here. During that process I suggested various options, because this was the function that I had been assigned—how the act could be improved upon.

Without any exception that I can remember, the responses were that the Civil Rights Act is a crown jewel, it is one of the most successful pieces of legislation ever, "Don't change it; it should be extended as is."

I would suggest a change possibly in the preclearance provisions that would make some sense.

The response uniformly was, "Don't change it; section 5 is the Civil Rights Act—section 5 is the Civil Rights Act; it has been a highly successful piece of legislation as is; don't change it."

The answer to your question is a categorical yes.

Senator KENNEDY. We will have a chance to listen to many of those whom you met with. I happened to meet with them, and they uniformly expressed to me the importance of voting rights, but they uniformly expressed to me that they had expressed to you that there were going to have to be changes in section 2.

They can testify and will testify at the correct time, but if that was not the case and it was as you stated, then I think that is a matter of some significance. If it is as I stated, I think that is a matter of significance. We will have a chance to listen to them.

Attorney General SMITH. The focus was almost entirely on section 5.

Senator KENNEDY. Rather than my trying to anticipate what they said, we will have a chance to listen to them.

Attorney General SMITH. There might have been some reference to section 2, but if there were, I do not remember it. And have in mind, this was before the House bill was debated or passed.

After the House bill was passed, I can understand why their position would change. That is perfectly understandable. If I were they, my position would change too.

Senator KENNEDY. Why, if you were they—if you were representing the minorities, why would your position have changed? I think that is a very good point. Why would your position have changed?

Attorney General SMITH. Why would my position have changed?

Senator KENNEDY. Yes. You just stated that if you were the minorities, after the House-passed bill, your position would have changed on section 2 as well. Now, why?

Attorney General SMITH. Because I think as advocates, that would be the position probably to take at that point.

Senator KENNEDY. What kind of advocates?

Attorney General SMITH. As advocates, obviously.

Senator KENNEDY. Advocates of what?

Attorney General SMITH. Advocates of their particular position.

Senator KENNEDY. Of what position? Of minorities participating in the voting rights process of this country?

Attorney General SMITH. In negotiating with respect to legislation. That is perfectly understandable. There is nothing unusual about that.

I want to emphasize that I was talking about a time in the spring and summer, before the House bill was passed or before it was significantly debated, and these were the conversations that we had, and they were almost uniformly that the existing Voting Rights Act, as such, should be extended as such.

Senator KENNEDY. General, if the Senate were to accept the House-passed bill and present it to the President of the United States, would he sign it?

Attorney General SMITH. There is no way I can answer that, Senator. As a matter of fact——

Senator KENNEDY. You cannot give us assurance that a piece of legislation given strong bipartisan support—389 Members of the House of Representatives, the handful that opposed it—of which 62 Members of the Senate of the United States have indicated their support——

Attorney General SMITH. All of that is irrelevant to my response.

Senator KENNEDY. You cannot give us assurance that if we pass that——

Attorney General SMITH. There is no way that I could, or the President could, tell you what he will do until the bill hits his desk.

Senator KENNEDY. What is your recommendation?

Attorney General SMITH. I do not have a recommendation at this point. I do not make recommendations on hypothetical situations.

Senator KENNEDY. Do you think that is a hypothetical situation—that the bill that passed so overwhelmingly in the House of Representatives might be on the President's desk?

Attorney General SMITH. It certainly is hypothetical at this point.

Senator KENNEDY. I remember when you testified before this committee that you said, "It is up to the Congress to make the decision on voting rights." Now, if we were to make the decision on voting rights——

Attorney General SMITH. Of course it is up to Congress.

Senator KENNEDY. If I could finish, if I could finish.

Mr. Chairman, if I could finish my question?

Senator HATCH. Who is stopping you?

Senator KENNEDY. Well, I was interrupted.

Attorney General SMITH. It must have been a camera.

Senator KENNEDY. I thought we were given the assurance that this was going to be an issue that was going to be decided by the Congress of the United States. I think I can find those words in your earlier testimony before this committee, when we inquired of you during the confirmation process about what the position would be.

But do I understand now that, on the basis of this hearing this morning—and I think this is important for all Americans to understand—you are not prepared to give the assurance to the American people that if we pass legislation, which now has 62 Members of the United States and has passed the House overwhelmingly, your recommendation as the Attorney General of the United States would not be to urge the President to support it?

Attorney General SMITH. I am not taking any position on that question whatever, Senator, and it is a perfectly logical, reasonable

position to take, that I would not advise the President with respect to anything that has not yet been done.

I would say with respect to those 62 Senators, I certainly hope that they do listen to what goes on in these hearings and understand what the issues are that are being presented here, and will come to their conclusion after the testimony is all in, instead of before.

Senator KENNEDY. I have no other questions at this time, Mr. Chairman.

Senator HATCH. I appreciate that, Senator Kennedy.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Attorney General, in your statement you refer to the occurrence of dramatic gains and a significant qualitative change for the better in covered jurisdictions. You also point out that some political jurisdictions in the country have made insufficient progress and that continued Federal oversight of those jurisdictions is necessary.

I have three questions on this point. I might just ask them all and let you answer them. Do the exceptional conditions that were found to exist in the South in 1965 continue today? Are the conditions today the same as those in 1965? And are they widespread now?

Attorney General SMITH. The situation certainly is not the same as it was in 1965. A great deal of progress has been made, as I stated in my opening statement. Nevertheless, our experience shows that there are still sufficient reasons remaining for this act to be extended and to continue to operate as it has in the past for another number of years.

Senator THURMOND. With regard to the criteria for bailout found in S. 1992, the bill introduced by Senator Mathias, Senator Kennedy, and others, I would like your observations on several factual points. Does your Department encourage the settlement of cases brought pursuant to the Voting Rights Act?

Attorney General SMITH. Well, we always try to reach settlements, if that is possible, to avoid litigation.

Senator THURMOND. Should the law penalize parties for seeking to settle cases or consent to decrees without regard to the motivation for such settlements?

Attorney General SMITH. Usually no.

Senator THURMOND. Under the terms of the act, what is required to have Federal examiners appointed, and who appoints them?

Attorney General SMITH. The Federal examiners are appointed by the Office of Personnel Management upon a determination either by a court or by the Attorney General that there has been a reasonable showing made that this would be a desirable thing to do.

Senator THURMOND. Has the Department ever interposed an objection to a voting change and later withdrawn the objection?

Attorney General SMITH. Yes.

Senator THURMOND. Mr. Attorney General, you have offered to have your Department work with the subcommittee to devise a workable and fair bailout. We of course would appreciate your wise counsel. Would you give us your thoughts as to the concepts of a workable and fair bailout?

Attorney General SMITH. As I indicated in my opening statement, we think it is appropriate that, on a proper showing, a State or a covered jurisdiction should be able to bailout—that is, a proper showing extending over a significant number of years. We will be most happy to work with the subcommittee, as I indicated, in developing a fair and workable bailout provision.

Senator THURMOND. We would appreciate it if you would work with this subcommittee on a reasonable bailout provision.

I will defer other questions for the moment. Thank you, Mr. Chairman.

Senator HATCH. Senator Metzenbaum, did you intend to question the Attorney General, at this time?

Senator METZENBAUM. Please.

Senator HATCH. All right, that will be fine.

Senator METZENBAUM. General, I did not hear all of your testimony, but I have read through most of it, and I think the issue comes down to the matter of whether we use a results test or whether we require the proof of intent.

You were a very successful practicing attorney and a very pragmatic one therefore. As I sit here, I wonder why, putting aside the legalisms, putting aside all the legal nuances—you know and I know as former practicing lawyers that proving intent is so unbelievably difficult. If this act is to have the real effect that it should and that you claim the administration wants it to have, under those circumstances, and forgetting about the legalisms, I have difficulty in understanding why the administration is not on the side of the overwhelming majority of the House and obviously the overwhelming majority of the Senate on this issue. That is what is confounding me as I sit here—since I do not know why.

Attorney General SMITH. Senator, first of all, that is a surprising approach to intent when you consider the fact that the standard of proof under both the 14th amendment and the 15th amendment is just exactly that—intent. Some of the most dramatic advances in the civil rights area have been accomplished under the 14th amendment, with the standard of proof being intent.

Furthermore, in terms of what intent consists of, the Supreme Court and other courts have long since held that the standard of proof required for intent in civil rights areas is substantially less than in other situations. As has been pointed out, there is no need to show a smoking gun; indirect evidence is acceptable; so also is circumstantial evidence.

On top of all of that, what has been referred to as effects—the so-called Zimmer criteria—are themselves a large element in the establishment of intent.

So it seems rather strange to me at this point to say that intent has not served its purpose as a test, because it has. We are going beyond that. That is not the only question.

It seems to me that when you are talking about the change in section 2, you are talking about a good deal more than the question of intent; you are talking about what this would ultimately produce if that section is applied as its language would indicate that it should be applied, and that is ultimately proportional representation. I do not see how anybody can really subscribe to that as a test under our system of democracy.

Senator METZENBAUM. I do not think anybody does that.

Attorney General SMITH. We are talking about election results, not the right to vote, when you get into that area.

Senator METZENBAUM. You can have many other ways of proving effect rather than merely the election results. If there are no candidates for example, that is certainly a different kind of situation.

Representative Caldwell Butler of Virginia, certainly an able legal scholar, firmly opposed the House bill, but he candidly admitted that Bolden actually requires a smoking gun. In the House report Representative Butler wrote: "The intent test defined by the Court is a stringent standard which requires that a smoking gun test must be shown to successfully prove voting discrimination." He was an opponent of the bill, and he indicated that you do need the smoking gun.

With respect to the point that you make on the 14th and 15th amendments—some of the interpretation that you allude to come at an earlier point in our history and has been much changed by the Supreme Court. But again, that gets us into the legalisms.

I am asking you why an administration which has said publicly—and you very publicly, indicate strong commitment to effective civil rights legislation, civil rights support, and voting rights support—why, in view of the fact that all of the civil rights groups concerned with this legislation now are on the side of the 62 of us in the Senate and the 389 Members in the House, does the administration, under those circumstances, find it necessary to come here and really make the issue of proof that much more difficult? Because you are of course the administration, and in view of your commitment to the same end, why then does the administration not join with us and the civil rights groups who so much want to eliminate the intent requirement of the law?

Attorney General SMITH. Senator, first with respect to the smoking gun, I have a high respect for Caldwell Butler. However, the Court decisions themselves are very specific, saying that a smoking gun is not required in this case, in proving intent under circumstances such as this. I think that is very clear.

Senator HATCH. Would the Attorney General yield on that point?

Attorney General SMITH. Certainly.

Senator HATCH. I think that the *Arlington Heights* case makes it clear that no smoking gun is needed and that is the principal case to address this point.

Attorney General SMITH. That is right.

Senator HATCH. It says, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." Among the specific considerations that it mentions are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, the impact of a decision upon minority groups, et cetera, et cetera, et cetera.

Senator METZENBAUM. I respect what the Chair is saying, but I do want to point out that in the *Bolden* case the Court specifically rejected the use of circumstantial evidence, and that you have a totally different posture.

Senator HATCH. That is not true.

Attorney General SMITH. I think the law is settled in this area.

Senator METZENBAUM. If you would excuse me——

Senator HATCH. But that is not true, Senator.

Senator METZENBAUM. This Senator thinks he is a pretty good lawyer and has great respect for the Attorney General as a lawyer and for the chairman of this subcommittee, but this Senator wants his questioning to go only to the point of why, if the administration has the same goal we all share—to have an effective Voting Rights Act—why not join with all the civil rights groups, 62 Senators, 389 House Members and let's put this show on the road.

Attorney General SMITH. Senator, I am sorry you were not here earlier, but I would like to answer that question. As I have said before, I yield to no man as far as my abhorrence of discrimination is concerned. The easy thing to do here would be to do just exactly what you are proposing; that would be the easy thing to do; it would be the popular, happy thing to do. I think our function is to do more than that; it is to analyze whether this is good or bad legislation.

I want to point out, as I did earlier before you were here, that the extension nationwide of the effects test now confined to the covered States under section 5 is a very dramatic change. It not only is extended nationwide, it also, as distinguished from section 5, applies not only to changes in the election law and practices, it applies to existing situations, which means—now you can agree with this construction or not, but at least it is a reasonable construction of what the change in section 2 would do.

That is, with respect to any elected district, from school board, to water district, to county, to State—any one of those that did not mirror the racial makeup of their constituency would be subject to instant attack under section 2 as changed. You have to admit, that is a dramatic change.

What is the reason for the change? When section 5, a very intrusive measure, was passed in 1965, there was an extensive record which developed problems that needed to be corrected and extensive hearings in Congress. Those hearings produced evidence which made it very clear that extreme measures were necessary to correct that situation.

In this case, despite the fact that we have, in a very real sense, an act which is as dramatic as section 5, as I have just indicated, there has been no record whatever, that I know of, made to show that such a dramatic action has to be taken. Nobody has pointed to an evil elsewhere in the country that requires such a change as is being proposed here.

I say, in those circumstances, without any showing of an evil that needs to be corrected, with a change which is as dramatic as this one could be—proportional representation—I am sure there will be plenty here, a number of witnesses, who will say that is not what this will do, but that is certainly a reasonable construction of what it might do.

Any change that is that dramatic needs some kind of a record, some kind of evidence, or proof, or testimony, that there is an evil out there that needs that kind of remedy to correct. You know that as a lawyer; I know it as a lawyer. You do not come up with remedies to nonexistent problems.

True, I am sure, there will be cases here and there where a showing could be made, but this is a very dramatic, extensive change. And I want to read this again, because I think it is significant.

You will recall that in the House one of the options that was considered there was extending section 5 nationwide. The House considered that proposal and rejected it. Three of the five reasons they rejected that are as follows:

> Without a precise showing of need, the expansion of section 5 coverage to include all counties, States, and local jurisdictions in the country seems arbitrary and wasteful, especially at a time when there is much concern about excessive Government intrusion into State or local matters.

This is the House report on the House bill.

> Second, in the absence of a detailed showing of need, serious constitutional questions are raised about applying this uncommon exercise of congressional power to the country as a whole. The United States Supreme Court, in *South Carolina* v. *Katzenbach* and *City of Rome*, upheld the constitutionality of section 5 precisely because it was tailored to address a specific problem about which Congress has amassed detailed evidence in its hearing record.

And,

> Five, nationwide preclearance would raise serious administrative burdens for the Department of Justice, especially since it must process all submissions * * *

And so on, in this case, instead of the Department of Justice it would be the judiciary.

Now, as I say, the easy thing to do would be what you are suggesting. That would be the easy thing for the President to do, to get in line. We do not look upon it as being that kind of a process. We think that when we are dealing with very serious legislation of this kind, we should analyze it objectively, follow it all the way through to its ultimate conclusion, and then determine whether it is good or bad. That is why the administration is taking the position that it is taking.

Senator METZENBAUM. General, sometimes I find myself in the minority. Sometimes I question in those instances, if it is a vast majority on the opposite side, whether my position has validity. In this instance, not one of the civil rights groups in the country is on the side of the administration. Only 6 percent of the Members of the House who voted are on the side of the administration, and I would not doubt that by the time this comes to a vote, there would not be a much higher percentage of the Members of the Senate on the side of the administration.

The Nation is facing unbelievable economic challenges. We have tremendous problems overseas. There is no more basic right to Americans than the right to vote. And we who run for public office have concluded that it would be fair not to have the intent test. I know the President also runs for public office, but under those circumstances I wonder whether the administration could not see fit to reevaluate its position and give its time to much more important issues from the standpoint of the economy but certainly not much more important issues from the standpoint of the viability of our Democratic process.

I would strongly urge you to think again, reevaluate, put aside the legalistic approach, and think of the fact that maybe in this instance the administration has erred.

Mr. Chairman, I think it would be unfair for me to take further time. If I have additional questions, I will submit them in writing.

Senator HATCH. Thank you very much, Senator Metzenbaum.

Attorney General SMITH. Senator, if I could just say, it sounds to me as though you are urging us to do this irrespective of whether it is good or bad legislation. It does not seem to me that that is the appropriate approach.

Senator METZENBAUM. No, I do not think I am saying that. I am saying that maybe, even maybe in this instance, you might——

Attorney General SMITH. Even if it is bad legislation?

Senator METZENBAUM. No. Maybe you might have erred. You know, the question of good or bad with respect to legislation is a matter of subjective judgment, and I am saying that it is entirely possible that we who are legislators, even the President, and the Attorney General of the United States could err, and if they erred, it would be a good time to change positions, particularly in view of the fact that there were so many on the opposite side of the issue in this connection.

Attorney General SMITH. I appreciate your thoughts.

Senator HATCH. You never know. Maybe we here in the Congress occasionally err, too. This prospect seems to be supported when we look at all the past legislation, some of which has brought the country on its knees.

I might suggest a further reason why you may very well have decided to analyze this thoroughly is that we do have a separation of powers doctrine, and the executive branch has an obligation to uphold the law and Constitution of this great country. The conclusion to which your analysis has ultimately brought you, may not correspond with the so-called numbers in Congress, which are, of course, subject to change as people start to understand the import of your message.

Senator Grassley?

Senator GRASSLEY. Mr. Attorney General, in regard to bailout, when do you think a State should be allowed to bail out? Should it be when all the political subdivisions have postured themselves so that they can qualify for bailout, or should it be any time before that?

Attorney General SMITH. At this point, Senator Grassley, we have expressed a desire and willingness to work with this subcommittee developing an appropriate bailout provision. It is a very complicated subject. Each of the provisions is related to the others. I do not think it would be particularly helpful for me at this point to try to take a position on any particular aspect of it.

Senator HATCH. Can the administration help us with that though? If there is going to be a bailout provision, it has to be fair, and it has to be right. It would be very helpful if we could have some assistance from the administration.

Attorney General SMITH. Yes.

Senator GRASSLEY. You have really two issues on the bailout, as I see it: One, whether States can bail out, regardless of whether all of their political subdivisions have or not; and, two, under what basis can States and/or political subdivisions bail out, and what conditions must be met to satisfy that bailout? So you are speaking

in regard to both points; the administration does not have at this point any recommendations for us?

Attorney General SMITH. No, but as I said, we would certainly be glad to work with the subcommittee.

Senator GRASSLEY. OK. I had better state my position, that I feel as Senator Hatch does on that point as well.

I know that you have used most of your time, and the questions have dealt with, the intent provisions of the legislation. My intent is not to put you in the same position as in your response to Senator Kennedy, in which you feel you cannot state a position on recommending to the President now on hypothetical questions, but you have expressed so much opposition to the intent provisions. You still have not said the extent to which, if the House intent provisions were in there, that would be weighty on the subject of a veto or on the point of approval.

Let me ask it this way: Is the administration opposed to the effects provisions of the law, as they are in the House bill? You said all but that.

Attorney General SMITH. As I stated in my testimony, we think that the change from intents to effects is not a desirable change.

Senator GRASSLEY. Can you say that that would be a reason for the President to veto a bailout?

Attorney General SMITH. I could not comment on that.

Senator GRASSLEY. OK.

Attorney General SMITH. There is no way for the President to take a position until the bill is actually on his desk.

Senator GRASSLEY. OK. Then I would only ask you as a lawyer, in your consideration of this whole issue, whether or not you know of any standard that lies somewhere between an intent and effects test?

Attorney General SMITH. One thing I guess should be pointed out is the fact that the effects make up a good deal of what constitutes intent—the various elements that go into establishing or proving intent. Certainly, effects is one of those elements and a very significant element.

The intents test, as we discussed here a little while ago, is, in the civil rights area, less of a test than it is in other areas. Of course, we have intent throughout our criminal law and a host of other areas. In the area of civil rights, intent can be established by circumstantial evidence, indirect evidence—something less than the so-called smoking gun.

Senator GRASSLEY. Last, the provisions of the language portions of the existing legislation—you have no recommendations for change in those provisions of the existing law, except for the extension of the period of time?

Attorney General SMITH. The administration's position is in favor of the straight extension of the act as it is now for 10 years, with the proviso with respect to bailout.

Senator GRASSLEY. Thank you.

Senator HATCH. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

General, let me join with the other members of the committee in welcoming you here today. I am happy to have your advice and counsel.

I think it is worth the kind of attention that you have obviously given it, and although there has been some reference to political rhetoric here this morning, I hope I will not be accused of being partisan if I point out that this is a bill that has been closely associated with Republican Members of the Congress. It is a bipartisan bill of course, but there is a Republican imprimatur on it, and my thoughts particularly go to a very great Member of the Congress, the late William McCulloch of Ohio, who was the ranking minority member of the House Judiciary Committee for many years.

Representative McCulloch was particularly the champion of the voting rights bill. He made it a cause in which he devoted himself with a great deal of passion. I recall in the original enactment, when I was serving with him on the House Judiciary Committee in 1965 and some of the subsequent extension of the act, Representative McCulloch was a champion and one who was particularly successful in embodying the principles that he believed in this particular legislation.

I was glad that you raised the question of legislative history, because I think that is a form of guidance. My own recollections are now some 17 years old, and we can sometimes stray in our memories as to what did occur 17 years ago. But the legislative record is important.

Sitting in your chair at that time was Nicholas Katzenbach. The committee worked very closely with Attorney General Katzenbach, as I am confident we will work closely with you in this procedure.

As a part of the legislative history, there was a question asked. Actually, it was in this committee on the Senate side. The question was asked by Hiram Fong, our much beloved colleague from Hawaii.

In responding to Senator Fong, Attorney General Katzenbach said, "I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color." That would comport with my own memory, however faulty that may be, that we were dealing with effect. I wondered if your research had given you any opportunity to comment on that.

Attorney General SMITH. Senator Mathias, there is no question about the fact that the legislative history dealt a great deal with purpose and effect at that time, because that was the change that was being instituted through section 5. Section 5 does now have an effects test; there is no question about that.

I have not personally reviewed the legislative history myself, but I am sure that there is a great deal that would deal with the question of effect as it applied to section 5, because that at that time was a rather dramatic change. That is quite a different thing from effects as far as section 2 is concerned. Section 2 is just a completely different section and a different approach.

Congress at that time, according to Senator Dirksen, intended that section 2 would really be a paraphrase of the 15th amendment. Of course the 15th amendment, as with the 14th amendment, has always had an intents test. I might say that Justice Stewart, in the *Mobile* case, analyzed this history really quite well.

Senator METZENBAUM. Would the Senator from Maryland yield for 1 minute?

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Senator MATHIAS. I would be happy to, but——

Senator METZENBAUM. I will not ask any questions or anything.

Senator MATHIAS. Certainly.

Senator METZENBAUM. In the interests of time—and I am concerned about moving this matter forward—the Senator from Ohio will not make an oral statement but asks the chairman to put his statement in the record

Senator HATCH. We will be happy to put it in the record immediately following the statement of Senator Kennedy.

Senator METZENBAUM. Certainly. I do not wish to interrupt the Attorney General. I thank the Senator from Maryland, and I thank the Attorney General.

Senator MATHIAS. I believe, with deference to the Attorney General's research on this subject, that Hiram Fong's question did refer specifically to section 2.

Attorney General SMITH. I could not comment on that without seeing it.

Senator MATHIAS. The then-Attorney General's answer referred specifically to section 2.

Attorney General SMITH. If that were the case—as I say, Senator, I cannot comment on it without having seen it—it would be a rather dramatic result if anybody intended at that time to include an intents test in section 2 and did not do so. All you have to do is read the statute to see that when Congress intended to put an effects test in, they did so, and they did so in section 5, but they did not do so in section 2.

It is really not even necessary to look at the legislative history in a very real sense, because it is clear that when Congress wanted an effects test, it said so, and it did so in section 5. In those days it would not have been a matter of sloppy draftsmanship.

Senator MATHIAS. Not with Bill McCulloch around, it would not be sloppy draftsmanship.

Attorney General SMITH. So if somebody has some evidence that section 2 ever intended to use the effects test, it is something that escapes me, except, as I say, for one or two cases that may have come to that conclusion—lower court cases.

Senator MATHIAS. I think the Supreme Court was aware of Attorney General Katzenbach's views. In the *Allen* case, in reference to section 2, they quoted Attorney General Katzenbach, with apparent approval.

Attorney General SMITH. I believe that was a section 5 case.

Senator MATHIAS. Of course you are right about that; it was a section 5 case; but as we all know, the Court, like Members of the Senate and perhaps even Members of the Cabinet, strayed a little from the strict purview of the case to comment on section 2, and that was the point at which the Court referred to the Katzenbach opinion. I was interested in your comments on the *Mobile* case.

Attorney General SMITH. I have been calling it the *Mobile* case too. I think it is the *Mobile* case.

Senator MATHIAS. *Mobile*.

Senator HATCH. I think *Mobile* gets accused of enough things. [Laughter.]

Senator MATHIAS. If we call it the *Bolden* case, then we avoid that.

You said—and I would agree with you—that the law has worked well. I personally think it is the most important of that great series of steps that the Nation took in enacting civil rights legislation. You say that the Supreme Court did not change the law, and I am not going to debate that question with you. The Court, except in its reference to section 2 in the *Allen* case, really had not said very much about it, had it?

Attorney General SMITH. About section 2?

Senator MATHIAS. Yes.

Attorney General SMITH. There have not been many cases under section 2. As a matter of fact, the *Mobile* case is of course the first one that reached the Supreme Court. You can always make an argument to the contrary—we lawyers always can—but I think it is very clear to say that the *Mobile* case really did not change the law. The law had, in essence, been that way and would have been that way, just through a reading of the statute itself.

The idea of changing *Mobile* back—there is a question as to what do you change it back to. There has always been an intents test under section 2, as I say, starting with the language of the statute itself.

I might also say this: I want to emphasize, too, Senator, that we subscribe to your views with respect to the importance of the Voting Rights Act. It is a little difficult to be able to express an opinion on the merits of this particular change without having somehow, particularly in a political arena, this being converted into opposition to the Voting Rights Act itself, which it clearly is not.

Senator MATHIAS. I hold no such view. I think the President made it clear just as recently as last night that he was for an extension of the act.

Senator HATCH. Senator Mathias, would you yield on the point you are making here? I think what you were talking about relates back to those days when they originally debated this matter. When they talked about purpose and effect, they were talking about effect in the context of the *Gomillion* case, in which there was a gerrymander that managed to eliminate 99 percent of the minority citizens from a municipality. That was the effect of discrimination that Mr. Katzenbach was talking about. There was a clear inference of purpose during that debate. Intent was used solely to describe voting statutes and such that were discriminatory on their face. In other words, both intent and effect were used in the 1965 debate to refer to what we presently think of as intent.

I think you are right, Mr. Attorney General, that when they were talking about effects basically, it was in that context and also in the context of section 5. Nobody, but nobody, in my opinion, has made a good case that under the 14th and 15th amendments we should change the purpose or intents standard that has always applied to that amendment. The best case made, for preserving present law to date, has been made in *Mobile* v. *Bolden*.

Attorney General SMITH. Nobody has yet made a persuasive case, I do not think, that there was anything other than the intents test under section 2 from the time it was passed. *Mobile* merely confirmed that; it did not change anything.

Senator MATHIAS. Let me come back to that, if I may. When the chairman says "what they were saying in those days," I find it a little bit difficult to cope with the fact that what he really means is "what we were saying in those days."

I had been a city attorney, and as a city attorney I had to cope with some of these civil rights questions. Any city attorney worth his salt is not going to allow his mayor or his board of aldermen to be caught with a visible intent to discriminate. So you have to deal with results. That is what leads me to the conclusion that I have reached in connection with this legislation. I have been there.

Attorney General SMITH. Senator, actually, as I said before, effects, in a good many cases, makes up a large part of intent, not all of it. The Supreme Court, again in *Mobile,* made that very clear, that proving intent does not require going into somebody's mind in this area. In this area it can be established through indirect testimony—circumstantial evidence.

Senator MATHIAS. But much more difficult. I do not see this as a punitive kind of statute. It seems to me this is a remedial statute. It merely tries to identify a condition, which the American people find unacceptable, and to remedy that condition.

Attorney General SMITH. But Senator, once again—I do not think you were here when I was discussing this with Senator Metzenbaum—you have to look much beyond intent and effect to see what ultimately this change would do. It can be argued either way. You can say that it ultimately has to end up in proportional representation, or you can say it is something less than that. In any case, that is certainly a reasonable conclusion.

That means that this statute is now spread across the entire United States, and yet there has not been any showing at all that there is an evil out there needed to be corrected in those uncovered States which would warrant this kind of an extreme measure. You can call it extreme; I should not call it extreme, certainly extensive, certainly dramatic in a sense, if you do look upon this as a possible approval of political quotas or mirroring of the racial makeup of a constituency or as proportional representation. That is a pretty dramatic thing if that is even a possible interpretation of this statute.

Senator MATHIAS. It is not certainly an interpretation with me. In my own experience, I carried the city of Baltimore in the last election, a city which is predominantly a black city. I carried the black precincts of that city, so you know that could not be my motivation.

Attorney General SMITH. If this is not the ultimate result, what is the ultimate result? What is the purpose of having an effects test if it is not ultimately going to do that? If you have an effects test, certainly a reasonable construction of this statute as it is now worded is that if an elected entity—school board or whatever—does not reflect or mirror the racial makeup of that constituency, it is in violation of this statute? If it does not do that, what does it do?

Senator MATHIAS. It seems to me you look at the results of some municipal action, State action, or whatever unit you are dealing with and see how it excludes citizens from the electoral process, not how the citizens act within that process.

Attorney General SMITH. We are not talking about the covered States, we are talking about the uncovered States. What is the evil out there that this amendment is trying to correct? Where has the case been made that this kind of a change is necessary nationwide in order to correct? Covered States, obviously—hence the President's position. Where has the case been made that this kind of a change in the statute is needed nationwide? We have not seen it.

Senator MATHIAS. I think that, of course, is one of the very subjects that we are here to discuss. The case was made in the extended hearings before the House committee——

Attorney General SMITH. Not on the uncovered section.

Senator MATHIAS. The case I am sure will be made here.

One of the instructive documents on this very subject is the brief filed in the United States Court of Appeals for the Fifth Circuit in the case of *Lodge* v. *Buxton* on appeal from the U.S. District Court for the Southern District of Georgia.

In the brief filed by the Department of Justice there is a long reference to the colloquy between Senator Fong and Attorney General Katzenbach. They quote Attorney General Katzenbach as I just have, but the brief goes on to say that:

> Attorney General Katzenbach's testimony on other provisions of the act shows that his use of the purpose or effects standard to describe the prohibition was not a casual, unconsidered response to a question directed toward the issue of coverage. In a response to inquiries at the hearings before the Senate and the House, Attorney General Katzenbach stated time and again that the purpose or effect standard of proof imposed by sections 4 and 5 merely shifted the burden to the covered jurisdictions to show that their past practices or proposed changes did not violate the 15th amendment * * *

And so forth. But it is an interesting discussion of this very point.

Attorney General SMITH. Section 5.

Senator HATCH. Mr. Attorney General and Senator Mathias, would you both yield to me for a second?

You know, the *Buxton* case is a perfect illustration why you do not need the effects test. If it is so difficult to prove intent, then I would like to ask my distinguished colleague from Maryland why two major voting rights cases—the *Escambia County* and the *Lodge* v. *Buxton* cases have been decided since the *Mobile* case, both of which have found adequate evidence to satisfy the intents standard as defined by *Mobile*? In both cases a violation was established under presently existing law. It is obviously not difficult to prove intent. It certainly is not an impossible standard by any stretch of the imagination.

I might also add that Mr. Katzenbach, when being questioned by Senator Kennedy, said, "If I could have the attention of the Senator from North Carolina"—he was referring to Senator Ervin at the time—"that observation is not correct, because you have to go back to the all-inclusive section in this bill, which is section 2. It says that no voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color. That is a restatement, in effect, of the 15th amendment."

Completely apart from the fact that the Voting Rights Act has been an effective tool for combating voter discrimination under the present standard, it seems to me that it is debatable whether or

not an appropriate standard would be fashioned on the basis of what facilitates successful prosecutions. My gosh, that certainly is not our system of jurisprudence in this country. Elimination of the "beyond a reasonable doubt" standard in criminal cases, for example, would certainly facilitate convictions, but it would fly in the face of everything that we have ever believed in as far as constitutional criminal law is concerned.

My position is that we have chosen not to do away with the "beyond a reasonable doubt" standard in criminal cases because there are competing values. If I understand you correctly, Mr. Attorney General, you are saying that there are competing values, that the 15th amendment requires an intents standard—*Mobile* as well as other cases, has established that—and we can prove these cases by using an intents standard.

When we talk about criminal cases, the Government has the burden of proving intent beyond a reasonable doubt. This is true in every State and for the Federal Government. In civil cases intent is proven by a preponderance of the evidence.

Under the present law, prior to the House bill, you could prove intent by a mere preponderance of the evidence, not by the criminal case standard of "beyond a reasonable doubt". The proof of intent would involve the examination by the court of direct or indirect evidence, circumstantial evidence, or otherwise, including evidence of effects or disparate impact.

Do you disagree with that analysis?

Attorney General SMITH. No, I think that generally states it.

Senator HATCH. The *Lodge* case, as well as the *Escambia County* case, is a perfect illustration of why we shouldn't be altering the 15th amendment standard in section 2.

Senator MATHIAS. You will have prevailing, overwhelming reason by the time we get to February 25.

Senator HATCH. We will have to have.

Senator MATHIAS. General, I think we could go on for a long time. I find this a very instructive colloquy. But we do have a lot of witnesses who are waiting, so I will hold at this point.

Senator HATCH. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Attorney General, there is room for wide-ranging debate when you talk about legislative history or whether the *Mobile* case changed or did not change the prior law, and what the smoking gun theory really requires, but I was very interested in your comments about the language of the amendment itself.

My question is, What in the language of the amendment, which might be worthwhile reading—the 15th amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." What in that language is dispositive or requires intent or motivation, as you read it?

Attorney General SMITH. As a matter of fact, I do not think it is how I read it; it is how the courts have read it. The courts have long since determined that an intents test is necessary under not only the 15th amendment but the 14th as well.

Of course, as I have said before, the fact that there is an intents test there is significant in view of the fact that it is under the 14th

amendment that so many advances have been made in the civil rights area.

Senator SPECTER. The question of interpretation is one which can go either way. I thought you had testified that the language itself of the 15th amendment carried with it an intent test on its face.

Attorney General SMITH. No, I do not believe that is what I was talking about.

Senator SPECTER. You were referring only to the issue of the interpretation of the 15th amendment?

Attorney General SMITH. You may be referring to what I said about section 2 versus section 5.

Senator SPECTER. I am about to come to that, but I thought you had said that as well, as to the 15th amendment itself.

Attorney General SMITH. I do not recall referring to the specific language.

Senator SPECTER. All right. With respect to the two sections, section 2 and section 5, is there anything in the language itself of section 2 that requires an intent test as opposed to the language of section 5, which does refer to an effects test?

You have referred to section 5, but section 5 in the operative language has both the language of purpose and the language of effect. It says, in referring to the declaratory judgment in the U.S. District Court for the District of Columbia, that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote," et cetera. So that in section 5 it is not really simply an effect test; it talks about motivation and effect.

Attorney General SMITH. Right.

Senator SPECTER. So the language of effect in section 5, in addition to the language of motivation, really does not say anything at all, does it, about whether section 2 would or would not have had language of effect?

Attorney General SMITH. I am not sure I understand that question.

Senator SPECTER. My point is that the language of section 5 does not have merely the language of effect; it has the language of motivation, as well.

Senator HATCH. Would the Senator yield?

Senator SPECTER. Wait just a minute.

Senator HATCH. Yes; but he does not know the language to which you are referring.

Senator SPECTER. Excuse me?

Senator HATCH. Why do you not quote the language to the Attorney General; it says "purpose or effect," whatever that means.

Senator SPECTER. I just did quote the language.

Senator HATCH. Oh, I see.

Senator SPECTER. But I would be glad to quote it again.

Senator HATCH. Would you quote the actual language to the Attorney General?

Senator SPECTER. The language which I just read says, in a long provision, "may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridg-

ing the right to vote on account of race, color, or in contravention of the guarantees set forth in section 4(f)(2)."

My question is this: Section 5 does not have simply language of effect, which would distinguish it from section 2, which does not have any language at all. So what is there, if anything, in section 2, on its face, which suggests that section 2 looks to an intent test?

Attorney General SMITH. For one thing, the Supreme Court has said it does. For another, it was quite clear, I think, when section 2 was being debated here that it was intended to be a paraphrase of the 15th amendment. The 15th amendment has long been held to require an intent test. I do not think that is the significant aspect, however. The significant aspect of section 2 is that it does not have an effects test.

Senator SPECTER. I quite agree with the conclusion of the *Mobile* case, and the issue of legislative history is very complex and can go either way on the arguments, as may the smoking gun issue. I was just really probing to see if you had meant that there was something on the face of the language itself which would be dispositive of this issue.

Attorney General SMITH. Only in that section 2 itself does not have an effects test; section 5 does, which certainly demonstrates that at the time this act was considered, Congress well knew the difference between the two and chose to put effects in one section and not in the other.

Senator SPECTER. In section 5, which has language of effect, it also has language of motivation.

Attorney General SMITH. That is right.

Senator SPECTER. One other consideration, Mr. Attorney General—the Senate is wrestling this year with two issues which have some substantial similarities, the Agents Identity Act and the act which we are talking about today. In the Intelligence Identities Protection Act, the debate has raged over whether there should be specific intent shown to establish a basis for conviction of violation of someone who discloses the identity of a CIA agent, for example, or whether reason to know or the so-called negligence standard would be sufficient.

The tradition of the criminal law has been that, in seeking to convict somebody for a crime and impose those sanctions, intent has customarily been required before we imposed that kind of a sanction.

On the civil side, it is not required customarily—intent. On the civil side, it usually turns on the effect on the allegedly wronged party—what the consequence is or what the deprivation is or, to use the word, what the effect is on the injured party.

The administration has taken the position, as I know you have personally, that when it comes to the Intelligence Identities Protection Act, you are not looking for the standard of intent. And that is a criminal case which, as I say, has traditionally required specific intent for conviction. On the act which we are discussing today, your position has been that there ought to be evidence of intent in order to trigger the requirements of the act. I am just wondering if there is not some inconsistency in the approach in these two positions.

Attorney General SMITH. No; I do not think there is any inconsistency at all, because various standards have been used in various statutes; for example, the "reason to believe" in the Foreign Corrupt Practices Act. There are varying standards that have been used throughout our whole legislative scheme, depending upon the particular circumstances, the particular problem that is intended to be met, and so on.

My position here with respect to intent is not necessarily that that is the standard that should be applied. I am saying that that is the standard that has been applied in the past. The *Mobile* case confirmed that. The Voting Rights Act has been a highly successful act. Without a showing of some need for a change outside of the covered States, which showing has not yet been made so far as I know, I can see no reason to change the standard from what it has been up to now, particularly when to change it could cause very extensive changes in our State and local governmental systems, and when no case has been made to show that such a problem exists or should be corrected in this fashion.

Once again, we have a highly successful statute, and it seems to me that anybody who wants to change it should have a pretty good reason for doing so. We have not seen that reason.

Senator SPECTER. Thank you very much, Mr. Attorney General. Thank you, Mr. Chairman.

Senator GRASSLEY [acting chairman]. Our next witness is Senator Mathias.

Senator HATCH. Mr. Attorney General, thank you so much for appearing. We appreciate your testimony, and we appreciate the lengthy time that we have taken away from your busy day. This is an important issue, and we appreciate your according it the attention it deserves.

[Additional material submitted by the Department of Justice follows:]

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 8, 1982

Honorable Orrin G. Hatch
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of December 2, 1981, requesting information on enforcement of the Voting Rights Act and an analysis of certain provisions of H.R. 3112, the House-passed bill to amend the Act. Set out below are our answers to your requests for factual information. Our responses to the other questions will be sent to you in the near future.

> 1-3. These items request "[a]ll written regulations and guidelines" regarding "effects," "intent," and "denial or abridgement."

The Department has not issued any guidelines or regulations regarding the above matters. The only guidelines that we have issued under the Voting Rights Act relate to implementation of Section 5 1/ and the bilingual-election requirements of Section Section 203(c). 2/ See Attachments A and B to this letter.

> 4. Describe in full the mechanics of considering a Section 5 application: To whom is it first referred? Under what circumstances is it reviewed by the Chief of the Voting Section? the Assistant Attorney General? the Attorney General?

The Voting Section is the entity within the Civil Rights Division which reviews Section 5 submissions. There follows a description of our current practice.

1/ 28 C.F.R. Part 51, 46 Fed. Reg. 870, 9570(1981).

2/ 28 C.F.R. Part 55.

The Section 5 Unit of the Voting Section is headed by a lawyer (the Director) who supervises the Associate Director and 13 Equal Opportunity Specialists. When a Section 5 submission is received, it is placed on a computerized docketing system and assigned to an Equal Opportunity Specialist. The guidelines for Section 5 submissions indicate the type of information that should be included for various types of voting changes. If a submission is incomplete, the Department writes the jurisdiction and requests more information.

The specialist reviews the information that has been sent and usually contacts members of the local community, including minority groups, to obtain facts that might indicate whether the change is potentially discriminatory. This information is summarized in a memorandum which recommends whether an objection should be entered. If the initial recommendation on a simple, noncontroversial submission is no objection and if, after a review of the memorandum and the underlying information, the Director of the Section 5 Unit agrees, the Voting Section sends a no-objection letter to the jurisdiction. Where no objection is proposed to a change that is complex, controversial or otherwise non-routine, a no-objection response is sent only after review by or consultation with the Section Chief. After a no-objection letter is sent, the jurisdiction is then free to implement the proposed change, with the caveat, provided by the statute, that a failure to object does not bar subsequent judicial action to enjoin enforcement of the change.

If it appears to the Equal Opportunity Specialist that an objection may be warranted, the specialist consults the Director of the Section 5 Unit. If an objection would be appropriate, the specialist prepares a memorandum of decision setting forth the factual basis for the objection, to which the Director adds a legal analysis, and a proposed objection letter is drafted. These documents are reviewed by the Chief of the Voting Section who notes his concurrence or disagreement thereon and forwards them to a Deputy Assistant Attorney General and finally the Assistant Attorney General of the Civil Rights Division, the official to whom the Attorney General's authority for Section 5 enforcement has been delegated. If the Assistant Attorney General concurs with the recommendation to object to the change, he sends the jurisdiction an objection letter detailing the factual and legal basis for the decision and, whenever feasible, indicating possible changes in the proposed voting practice which might alleviate its discriminatory potential. 3/

3/ If the jurisdiction decides to alter its proposed voting change to remove the basis for an objection, it can submit a modified proposal which, being a new change, is then treated as a new submission.

If the Director is uncertain whether an objection is warranted, or if a particular change deserves special attention, the Chief of the Voting Section and, at his discretion, the Assistant Attorney General will review the facts and the law regarding the change. At the discretion of the Assistant Attorney General, questions regarding particular submissions may be raised with the Deputy Attorney General or the Attorney General.

A jurisdiction that receives an objection has the option of filing a declaratory judgment action in the District Court for the District of Columbia, which will hear the matter de novo. Another possible course, if the jurisdiction has further information which it believes substantiates its claim that the proposed change is nondiscriminatory, is for the jurisdiction to ask this Department to reconsider the objection. The jurisdiction can submit this new information by mail or at a conference with Department officials. If the additional information indicates that the proposed change does not have a discriminatory purpose or effect, or if the applicable legal principles have changed since the objection letter was issued, the objection is withdrawn.

The Department has 60 days from the date of receipt of a Section 5 submission to respond to the submission. The response can be that the Department objects to the change, has no objection, will not review the submission (because it is premature, insufficient, or not subject to Section 5), or needs more information before a determination can be made. Our policy is to respond to all submissions within the 60-day period. However, if the Department does not issue any response within the 60-day period, this operates as a "no-objection" response, and the jurisdiction is free to implement the change.

If the Department asks for more information with respect to the initial submission, the 60-day period will not begin to run until the jurisdiction submits the additional information that is necessary to making a determination. 4/ There is no statutory requirement that the covered jurisdiction submit the additional information within any specified period of time. However, a protracted failure to submit this information can be considered a failure by the jurisdiction to satisfy its burden of proof and may serve as the basis for an objection. If the jurisdiction responds by providing some information, but fails to provide enough information before the 60-day period expires to show that the change will not have a discriminatory purpose or effect, this, too, can serve as the basis for an objection.

4/ The Department may make only one such request with the effect of postponing the running of the 60-day period.

5. A discussion of our policy regarding annexations will be supplied in our second reply.

6. A discussion of our policy concerning reapportionment will be provided in our second reply.

7. List all reapportionments pursuant to the 1980 census to which the Department has objected. Describe in detail the basis for such objections with reference to the regulations, guidelines, statutory provisions, and Supreme Court decisions cited above.

The Department has objected to eight reapportionments based on the 1980 Census, involving submissions by jurisdictions in five states. See Attachment C-1. The basis for these objections is stated in the respective objection letters, copies of which are attached (Attachment C-2).

8. The Department's policy concerning institution of voting suits will be discussed in our second reply.

9. List all suits to protect voting rights initiated by the Department since 1975. Describe in detail in each case how the criteria described above were applied.

Since January 1, 1975, we have initiated 52 suits to protect voting rights. Fourteen of these suits alleged unlawful dilution. Thirty involved Section 5 enforcement (either to obtain compliance with an objection or to enjoin enforcement of a change until it is precleared). The remaining suits related to other issues. See Attachment D, for a chronological list of the suits. The criteria for lawsuits will be discussed in our second reply.

10. List all suits for bailout filed under the Act since 1965. Describe the criteria used by the Department in determining whether to consent to bailout. Describe how the Department's actions in each case complied with those criteria.

Sixteen Section 4(a) bailout suits have been brought since 1965. Nine of these resulted in bailout from the special provisions of the Voting Rights Act, all with the consent of the Attorney General (in one case, the suit was later reopened and the jurisdiction recovered). See Attachment E. There have been, over the same period of time, four Section 203(c) bailout suits, one of which resulted in partial bailout. See Attachment F. Criteria for Department action will be discussed in our second reply.

11. Has the Department ever objected to a Section 5 submission because of a finding of discrimination against white voters? If so, describe each such case in detail.

To date, none of the Department's objections to a Section 5 submission has been based on a finding of discrimination against white voters.

12. List all States and political subdivisions to which the Department has assigned federal examiners during the last ten years. Describe in detail the criteria, including written regulations and guidelines, used by the Department in determining whether to assign such examiners.

Section 6 of the Voting Rights Act authorizes the Attorney General to send into covered jurisdictions federal examiners who determine the voting qualifications of prospective voters. For this purpose, examiners have been used in three counties since January 1, 1972, all in Mississippi. See Attachment G.

Examiners are also used to receive complaints during elections where federal observers are present. The use of observers since 1972, by state, is shown in Attachment H.

We will provide criteria for the assignment of federal examiners in our second reply.

13-17. In our second reply, we will respond to the questions concerning operation of the bailout standards of H.R. 3112, Departmental policy regarding settlements, interpretation of certain language contained in H.R. 3112, resource requirements for bailout suits, and venue for bailout litigation. In partial response to Question 13, the jurisdictions covered by Section 4(b) of the Act are listed in the appendix to the Section 5 guidelines, Attachment A. (In addition, two counties--Escambia County, Florida, and Thurston County, Nebraska--are covered by the preclearance provisions of Section 3(c) of the Act, as the result of court orders.)

I hope that this initial response will be useful to you.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 51

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Revision of Procedures

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: Procedures with respect to the administration of Section 5 of the Voting Rights Act of 1965, as amended, the "preclearance" requirement of the Voting Rights Act, were established in 1971. 36 FR 18186 (Sept. 10, 1971), 28 CFR Part 51. As a result of experience under these Procedures, changes mandated by the 1975 Amendments to the Voting Rights Act, and interpretations of Section 5 contained in judicial decisions, it was decided that revisions were required. Proposed revised Procedures were published for comments on March 21, 1980 (45 FR 18009).

EFFECTIVE DATE: January 5, 1981.

FOR FURTHER INFORMATION CONTACT: David H. Hunter, Attorney, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530, (202) 724–7189.

SUPPLEMENTARY INFORMATION: In response to the March 21, 1980 request, 22 comments were received, including 1 from a Federal agency, 7 from representatives of State governments, 6 from representatives of local governments, 6 from private organizations, 1 from a political science professor, and 1 from a private citizen. (These comments are available for inspection at the Department of Justice.) All comments have been studied carefully, and a number of changes have been made in the Procedures as a result of the comments.

The discussion that follows focuses first on a number of general issues raised by the comments and second on a number of specific topics that were the subject of comments.

Scope. A number of commenters were concerned with issues outside the scope of the Procedures, for example, procedures and substantive standards required by statute, the legal consequences of the absence of preclearance, the Department's litigation policy, the Department's policy under the Freedom of Information Act (for which see 28 CFR 16.9), and the interests of particular jurisdictions.

Formality. To satisfy some commenters would require an increase in the formality of the preclearance process. They advocate, for example, requiring a limitation on telephone communication between Department personnel and submitting authorities, the inclusion of interested individuals and groups in any informal meetings held with submitting authorities, the preparation of transcripts of conferences held under § 51.46, adherence to the rules of evidence in the information gathering process, and increased notice requirements. Because submission of changes to the Attorney General was designed to be an expeditious alternative to declaratory judgement actions brought in the U.S. District Court for the District of Columbia, we believe the level of formality suggested is not appropriate.

Exercise of discretion. Some commenters sought assurance that the Attorney General would not abuse his discretion. Concern was expressed, for example, with respect to what would

constitute "good cause" justifying expedited consideration by the Attorney General (§ 51.32) or with respect to the possibility of the Attorney General's using an unjustified request for additional information (under § 51.35) to extend the 60-day period. Although written procedures can establish standards, they cannot by themselves guarantee reasonableness. To some extent, however, safeguards or alternatives do exist. For instance, submitting authorities always have the option of an action for a declaratory judgment (§ 51.3). On the other hand, interested individuals and groups are given the opportunity to participate in the preclearance process by the various notice requirements provided (see "Role of third parties" below) and, although a decision by the Attorney General not to object is not subject to judicial review (§ 51.48), independent actions otherwise available are preserved by the statute.

Misinterpretation. Misinterpretation of the intent of the proposed Procedures may be evidence of a lack of clarity. Where a commenter has failed to discern the intended meaning, we have given close scrutiny to whether that meaning could be more effectively communicated.

Some commenters misinterpreted the Procedures by reading one section in isolation from the remainder or by overlooking the section that addressed a particular issue. For example, one commenter believed that the Attorney General would not consider a change that must be adopted by referendum until after the referendum is held; this commenter failed to note that § 51.20 excepts from the finality requirement measures subject to a referendum requirement.

Role of third parties. Providing an opportunity for interested persons to express their views with respect to a submitted change is an important part of our preclearance procedures. A number of sections have been revised to indicate more clearly the practice of the Attorney General in this regard (see §§ 51.31, 51.35, 51.43, 51.44, 51.45, and 51.47). To summarize, the submitting authority is requested to provide names of minority contacts (§ 51.28(f)) and evidence of publicity and public participation (51.28(e)) and may be requested to publicize a reconsideration request (§ 51.44(c)), and the Attorney General may publicize a submission in some circumstances (§ 51.36(b)). Persons who have commented on a submission or who have requested notification with respect to action taken on a specific submission are sent copies of letters requesting further information (§ 51.35(b)), letters of no objection (§ 51.40(c)), letters of objection (§ 51.43(d)), and letters following reconsiderations of objections (§ 51.47(d)). Such persons are also notified of reconsideration requests (§ 51.44(c)), reconsiderations at the instance of the Attorney General (§ 51.45(b)), and requests for conferences (§ 51.46(c)). Interested individuals and groups registered under § 51.30 are given notice of submissions (§ 51.31), requests for expedited consideration (§ 51.32(c)), additional information requests and receipts of additional information (§ 51.35(d)), objections (§ 51.43(e)), reconsiderations of objections (§§ 51.44(c) and 51.45(b)), and decisions after reconsideration (§ 51.47(e)). The 1971 Procedures had specified that "prompt" notice of submissions be given to registrants (§ 51.15); this was changed in the proposed Procedures (§ 51.31) to "regular" notice. In response to one comment, "weekly" notice, which has been the normal practice, is now specified.

One commenter objected to the maintenance of a registry of interested individuals and groups. Other commenters believe that the present notice system is inadequate. We believe the notice system as revised and described in the Procedures is both necessary and sufficient for the efficient and fair administration of the preclearance program.

Delegation of authority. §§ 51.2(b), 51.3. Two commenters, both representing States, expressed reservations with respect to the delegation of authority from the Attorney General to the Assistant Attorney General, Civil Rights Division, and opposed any delegation below the level of the Assistant Attorney General. As a practical matter, given the volume of Section 5 submissions, such delegation is unavoidable. It should be noted, however, that the Assistant Attorney General is the final decisionmaker when a determination adverse to a submitting authority is made.

Political parties. § 51.7. In response to one query, this section and § 51.21 have been revised to make it clear that a political party can make a submission on its own behalf.

Further clarification of what changes by political parties are subject to Section 5 has not been attempted. § 51.7 delineates in a general way which "political party" changes are covered; where there is uncertainty with respect to the applicability of Section 5, determinations should be made on a case-by-case basis.

Computation of time. § 51.8. Two commenters questioned the clarity and propriety of the method of determining when 60 days have elapsed. The method employed is identical to that of Rule 6(a) of the Federal Rules of Civil Procedure.

It was suggested that the 60-day period commence with the date of mailing of the submission rather than the date of receipt by the Attorney General, and that the date of the Attorney General's response be the date of receipt by the submitting authority rather than the date of mailing by the Attorney General. Section 5, however, provides for a 60-day period for review by the Attorney General, and it is proper for the Procedures to allow a full 60 days for review by the Attorney General. This would not be the case if delivery time for the submission and delivery time for the decision were counted in the 60-day period. In our view, the full period is necessary for proper administration. See also § 51.32.

Examples of changes. § 51.12. One commenter objected to including, as an example of a change cover by Section 5, a change with respect to vote-counting procedures. Such changes, however, are covered by Section 5. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 563–68 (1969). Moreover, the submission requirement does not operate to prevent State and local governments from implementing voting changes which they decide are desirable.

A new subsection k has been added, based on experience since *Dougherty County, Board of Education* v. *White*, 439 U.S. 32 (1978), to clarify that governmental regulation of employee political activity is covered by Section 5. *Recurrent practices, enabling legislation, and procedural changes. §§ 51.13, 51.14, 51.15.* These sections constitute an attempt to clarify what constitutes a change, when a change has occurred, and what the consequences of preclearance of a change are. It is hoped that § 51.13 will result in the reduction of submissions made unnecessarily. For example, a county which always conducts voter registration at extra locations prior to elections does not have to make a submission prior to each election; a submission would be required only when the practice is first instituted or is changed. Sections 51.14 and 51.15 do not require that local implementation of a precleared State requirement of general, noncontingent application be precleared. For example, were a State to lower its voting age from 18 to 17, only one submission, by the State, would be required. (See also § 51.21) On the other hand, if a State were to pass legislation making a 17-

year voting age a matter of local option, the preclearance of exercise of the option would be required (§ 51.14).

Court-ordered changes. § 51.19. Requested clarification of the exemption, from the preclearance requirement, of changes ordered by Federal courts has not been attempted. This section is designed only to alert affected jurisdictions and the public to the existence of this exemption. Its exact scope can only be determined through the application of the developing case law in this area to the particular situation in question. See *Sanchez* v. *McDaniel*, 615 F. 2d 1023 (5th Cir. 1980), application for stay pending consideration of petition for certiorari granted, —— U.S. —— (Aug. 14, 1980) (Powell, Circuit Justice).

The issue of the status of changes resulting from orders of State courts is not addressed in the Procedures. The reference in § 51.20 to approval by State courts is to the system in some States by which courts have an administrative role in the approval of some voting changes.

Premature Submissions. § 51.20. This section has been expanded to conform to present practice under which we consider unripe for review proposed changes which are based upon or are otherwise directly related to other voting changes which have not been precleared.

Contents of submissions. §§ 51.24, 51.25, 51.26. A number of commenters complained of the burden imposed on jurisdictions by these sections; some commenters sought additional clarity. The specific requests for information contained in §§ 51.25 and 51.26 should be read in conjunction with the general provisions of § 51.24. See especially § 51.24(c) and (e). Providing the information requested should usually not be burdensome for the submitting authority but will result in more prompt and efficient handling of submissions, fewer requests under § 51.35, and fewer objections. For example, in many instances, "the anticipated effect of the change on members of racial or language minority groups" (§ 51.25(m)) could be provided by a brief statement. Also, in our view, identifying minority group contacts (§ 51.26(f)) does not place an undue burden on the submitting authority. Moreover, we do not expect jurisdictions with insignificant minority populations routinely to provide the names of minority contacts.

Because legal descriptions are generally integral parts of acts or ordinances, excluding them from a submission will frequently be a greater inconvenience than including them; accordingly, the exception for legal descriptions has been dropped from § 51.25(a). Revisions to increase clarity and specificity have been made in § 51.26.

Obtaining information. § 51.35(c). One commenter noted that we did not specify the event that triggers the beginning of the 60-day period when information necessary to complete a submission is obtained from a source other than the submitting authority. § 51.35 has been revised to indicate that the 60-day period begins on the date on which the Attorney General sends notification to the submitting authority of the receipt of the information.

Failure to complete submission. § 51.38. Two commenters were critical of the discretion allowed by § 51.38. That section provides that, if requested additional information is not received within 60 days, "the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 * * * may object to the change * * *." One commenter advocated the substitution of "shall" for "may", explaining that in order to postpone an adverse determination, political subdivisions will deliberately fail to provide additional information requested by the Department of Justice. To the extent that such a problem may exist, we believe that the practice described in § 51.38 provides a sufficient remedy. Ordinarily, the schedule by which requested information is provided is of greater interest to the submitting authority than to the Attorney General.

Burden of proof. § 51.39(e). One commenter opposed placing the burden of proof on the submitting authority. In our view, the burden of proof described in § 51.39(e) is consistent with and required by the scheme of Section 5. See *Georgia* v. *United States*, 411 U.S. 526, 538–39 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); see also *Evers* v. *State Board of Election Commissioners*, 327 F. Supp. 640 (S.D. Miss. 1971), appeal dismissed 405 U.S. 1001 (1972). *No objection. §§ 51.40, 51.42, 51.48.* Concern with respect to the finality of a decision not to interpose an objection was expressed by one commenter. However, Section 5 itself states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." It is the practice of the Attorney General, reflected in § 51.40, to notify submitting authorities of this provision. The "subsequent action" referred to could not be under Section 5 but would have to have some other legal basis and could not constitute judicial review of the action of the Attorney General (see § 51.48). Accordingly, the Attorney General's reservation of the right to reexamine within the 60-day period a decision not to object (§ 51.42) is necessary if the Attorney General is to continue the practice of accommodating jurisdictions by making decisions as early as possible within the 60-day period.

Failure to respond. § 51.41 One commenter asserted that there would be insufficient procedural safeguards if preclearance were accomplished by the failure of the Attorney General to respond within the 60-day period. As § 51.41 was intended to make clear, it is the practice of the Attorney General to respond within the 60-day period. This section was added to clarify the rare occasions when, through the failure of administrative mechanisms, no response is made. Another commenter considered the provisos contained in the section inappropriate. The first proviso, that the submission be properly addressed, is necessary to assure that the submission can be routed to the proper unit within the Department of Justice. The second proviso, that response on the merits be appropriate, only makes clear that, if Section 5 does not apply (for one of the reasons listed in § 51.33), no preclearance is possible. In response to concern expressed by a number of commenters, § 51.41 has been changed to indicate explicitly (what was implicit in § 51.8(c)) that actions of the Attorney General under Section 5 are in writing.

Objections and Reconsiderations. §§ 51.43, 51.44, 51.45, 51.46, 51.47. The sections relating to notification of the decision to interpose an objection and the procedures for the reconsideration of objections have been reorganized and renumbered, without substantive change, to improve the clarity of presentation.

Accordingly, 28 CFR Part 51 is revised to read as set forth below.

Dated: December 18, 1980.

Benjamin R. Civiletti,
Attorney General.

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

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Authority: The provisions of this Part 51 are issued under 5 U.S.C. 301, 28 U.S.C. 509, 510, and 42 U.S.C. 1973c.

Subpart A—General Provisions

§ 51.1 Purpose.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by Section 4(b) of the Act, 42 U.S.C. 1973(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either (1) a declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or (2) it has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission. In order to make clear the responsibilities of the Attorney General under Section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of Section 5.

§ 51.2 Definitions.

As used in this part—

(a) "Act" means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, and the Voting Rights Act Amendments of 1975, 89 Stat. 400, 42 U.S.C. 1973 *et seq.* Section numbers, such as "Section 14(c)(3)," refer to sections of the Act.

(b) "Attorney General" means the Attorney General of the United States or the delegate of the Attorney General.

(c) "Vote" and "voting" are used, as defined in the Act, to include "all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." Section 14(c)(1).

(d) "Change affecting voting" means any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage under Section 4(b) and includes, *inter alia*, the examples given in § 51.12.

(e) "Political subdivision" is used, as defined in the Act, to refer to " * * * any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." Section 14(c)(2).

(f) "Covered jurisdiction" is used to refer to a State, where the determination referred to in § 51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis.

(g) "Preclearance" is used to refer to the obtaining of the declaratory judgment described in Section 5 or to the failure of the Attorney General to interpose an objection pursuant to Section 5.

(h) "Submission" is used to refer to the written presentation to the Attorney General by an appropriate official of any change affecting voting.

(i) "Submitting authority" means the jurisdiction on whose behalf a submission is made.

(j) "Language minority" or "language minority group" is used, as defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. Section 14(c)(3). See 28 CFR Part 55, Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups.

§ 51.3 Delegation of authority.

The responsibility and authority for determinations under Section 5 have been delegated by the Attorney General to the Assistant Attorney General, Civil Rights Division. With the exception of objections and decisions following the reconsideration of objections, the Chief of the Voting Section is authorized to act on behalf of the Assistant Attorney General.

§ 51.4 Date used to determine coverage; list of covered jurisdictions.

(a) The requirement of Section 5 takes effect upon publication in the Federal Register of the requisite determinations

of the Director of the Census and the Attorney General under Section 4(b). These determinations are not reviewable in any court. Section 4(b).

(b) Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972. A list of covered jurisdictions, together with the applicable date used to determine coverage, is contained in the appendix to this part. Any additional determinations of coverage will be published in the Federal Register.

§ 51.5 Termination of coverage.

A covered jurisdiction may terminate the application of Section 5 by obtaining the declaratory judgment described in Section 4(a) of the Act.

§ 51.6 Political subunits.

All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of Section 5.

§ 51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of Section 5. A change affecting voting effected by a political party is subject to the preclearance requirement (1) if the change relates to a public electoral function of the party and (2) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of Section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of Section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

§ 51.8 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in §§ 51.35, 51.37, and 51.41 the 60-day period shall commence upon receipt by the Department of Justice of a submission.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

§ 51.9 Requirement of action for declaratory judgment or submission to the Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change must either (1) obtain a judicial determination from the U.S. District Court for the District of Columbia that denial or abridgment of the right to vote on account of race, color, or membership in a language minority group is not the purpose and will not be the effect of the change or (2) make to the Attorney General a proper submission of the change to which no objection is interposed. It is unlawful to enforce a change affecting voting without obtaining preclearance under Section 5. The obligation to obtain such preclearance is not relieved by unlawful enforcement.

§ 51.10 Right to bring suit.

Submission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change affecting voting does not have the prohibited discriminatory purpose or effect.

§ 51.11 Scope of requirement.

Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

§ 51.12 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

§ 51.13 Recurrent practices.

Where a jurisdiction implements a practice or procedure periodically or upon certain established contingencies, a change occurs (1) the first time such a practice or procedure is implemented by the jurisdiction, (2) when the manner in which such a practice or procedure is implemented by the jurisdiction is changed, or (3) when the rules for determining when such a practice or procedure will be implemented are changed. The failure of the Attorney General to object to a recurrent practice or procedure constitutes preclearance of the future use of the practice or procedure if its recurrent nature is clearly stated or described in the submission or is expressly recognized in the final response of the Attorney General on the merits of the submission.

§ 51.14 Enabling legislation and contingent or nonuniform requirements.

(a) The failure of the Attorney General to interpose an objection to legislation (1) that enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institue a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

(b) Such legislation includes for example, (1) legislation authorizing counties, cities, or school districts to institute any of the changes described in § 51.12, (2) legislation requiring a political subunit that chooses a certain form of government to follow specified election procedures, (3) legislation requiring or authorizing political subunits of a certain size or a certain location to institute specified changes, (4) legislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary.

§ 51.15 Distinction between changes in procedure and changes in substance.

The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement. For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.

§ 51.16 Court-ordered changes.

Changes affecting voting that are specifically ordered by a Federal court as a result of the court's equitable jurisdiction over an adversary proceeding are not subject to the preclearance requirement of Section 5. However, subsequent changes necessitated by the court order but decided upon by the jurisdiction are subject to the preclearance requirement. For example, although a court-ordered districting plan may not be subject to the preclearance requirement, changes in voting precincts and polling places made necessary by the new plan remain subject to Section 5.

§ 51.17 Request for notification concerning voting litigation.

A jurisdiction subject to the preclearance requirement of Section 5 that becomes involved in any litigation concerning voting is requested promptly to notify the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. Such notification will not be considered a submission under Section 5.

Subpart B—Procedures for Submission to the Attorney General

§ 51.18 Form of submissions.

Submissions may be made in letter or any other written form.

§ 51.19 Time of submissions.

Changes affecting voting should be submitted as soon as possible after they become final.

§ 51.20 Premature submissions.

The Attorney General will not consider on the merits (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received Section 5 preclearance. However, with respect to a change for which approval by referendum, a State court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

§ 51.21 Party and jurisdiction responsible for making submissions.

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation of local applicability) or other changes undertaken or required by the State shall be submitted by the State.

(b) A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party.

§ 51.22 Address for submissions.

Changes affecting voting shall be mailed or delivered to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page of the submission shall be clearly marked: Submission under Section 5 of the Voting Rights Act.

§ 51.23 Withdrawal of submissions.

If while a submission is pending the submitted change is repealed, altered, or declared invalid or otherwise becomes unenforceable, the jurisdiction may withdraw the submission. In other circumstances, a jurisdiction may withdraw a submission only if it shows good cause for such withdrawal.

Subpart C—Contents of Submissions

§ 51.24 General.

(a) The source of any information contained in a submission should be identified.

(b) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

(c) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

(d) A submitting authority that desires the Attorney General to consider any information supplied as part of an earlier submission may incorporate such information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

(e) Where information requested by this subpart is relevant but not known or available, or is not applicable, the submission should so state.

§ 51.25 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order or regulation embodying a change affecting voting.

(b) If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(c) The name, title, address, and telephone number of the person making the submission.

(d) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(e) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(f) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(h) The date of adoption of the change affecting voting.

(i) The date on which the change is to take effect.

(j) A statement that the change has not yet been enforced or administered, or an explanation of wh such a statement cannot be m

(k) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(l) A statement of the reasons for the change.

(m) A statement of the anticipated effect of the change on members of racial or language minority groups.

(n) A statement identifying any past or pending litigation concerning the change or related voting practices.

(o) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(p) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.26 and is most likely to be needed with respect to redistricting, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.35.

§ 51.26 Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by § 51.25.

(a) *Demographic information.* (1) Total and voting age population of the affected area before and after the change by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.

(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(b) *Maps.* Where any change is made that revises the constitutency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

(1) The prior and new boundaries of the voting unit or units.

(2) The prior and new boundaries of voting precincts.

(3) The location of racial and language minority groups.

(4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

(5) The location of prior and new polling places.

(6) The location of prior and new voter registration sites.

(c) *Election returns.* Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

(1) The name of each candidate.

(2) The race or language group of each candidate, if known.

(3) The position sought by each candidate.

(4) The number of votes received by each candidate, by voting precinct.

(5) The outcome of each contest.

(6) The number of registered voters, by race and language group, for each voting precinct for which election returns a furnished. Information with respect to elections held during the last ten years will normally be sufficient.

(d) *Language usage.* Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Act. The Attorney General's interpretation of the minority language requirements of the Act is contained in Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 CFR Part 55.

(e) *Publicity and participation.* For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

(1) Copies of newspaper articles discussing the proposed change.

(2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings or that announce submission to and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).

(3) Minutes or accounts of public hearings concerning the proposed change.

(4) Statements, speeches, and other public communications concerning the proposed change.

(5) Copies of comments from the general public.

(6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(f) *Minority group contacts.* For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members who can be expected to be familiar with the proposed change or who have been active in the political process.

Subpart D—Communications From Individuals and Groups

§ 51.27 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which Section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

(b) The communications should be mailed to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page should be marked: Comment under Section 5 of the Voting Rights Act.

(c) Comments by individuals or groups concerning any change affecting voting may be sent at any time; however, individuals and groups are encouraged to comment as soon as they learn of the change.

(d) Department of Justice officials and employees shall comply with the request of any individual that his or her identity not be disclosed to any person outside the Department, to the extent permitted by the Freedom of Information Act, 5 U.S.C. 552. In addition, whenever it appears to the Attorney General that disclosure of the identity of an individual who provided information regarding a change affecting voting "would constitute a clearly unwarranted invasion of personal privacy" under 5 U.S.C. 552(b)(6), the identity of the individual shall not be disclosed to any person outside the Department.

(e) When an individual or group desires the Attorney General to consider information that was supplied in connection with an earlier submission, it is not necessary to resubmit the information but merely to identify the earlier submission and the relevant information.

§ 51.28 Action on communications from individuals or groups.

(a) If there has already been a submission received of the change affecting voting brought to the attention of the Attorney General by an individual or group, any evidence from the individual or group shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If such a submission has not been received, the Attorney General shall advise the appropriate jurisdiction of the requirement of Section 5 with respect to the change in question.

§ 51.29 Communications concerning voting suits.

Individuals and groups are urged to notify the Assistant Attorney General Civil Rights Division, of litigation concerning voting in jurisdictions subject to the requirement of Section 5.

§ 51.30 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups, which shall contain the name and address of any individual or group that wishes to receive notice of Section 5 submissions. Information relating to this registry and to the requirements of the Privacy Act of 1974, 5 U.S.C. 552a *et seq.*, is contained in Justice/CRT-004, 43 FR 44678 (Sept. 28, 1978).

Subpart E—Processing of Submissions

§ 51.31 Notice to registrants concerning submissions.

Weekly notice of submissions that have been received will be given to the individuals and groups who have registered for this purpose under § 51.30.

§ 51.32 Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it necessary to implement a change within the 60-day period following submission, it may request that the submission be given expedited consideration. The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under § 51.30.

§ 51.33 Disposition of inappropriate submissions.

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include the submission of changes that do not affect voting (see, e.g., § 51.12), the submission of standards, practices, or procedures that have not been changed (see, e.g., §§ 51.4, 51.13), the submission of changes that affect voting but are not subject to the requirement of Section 5 (see, e.g., § 51.16), premature submissions (see § 51.20), and submissions by jurisdictions not subject to the requirement of Section 5 (see §§ 51.4, 51.5).

§ 51.34 Release of information concerning submissions.

The Attorney General shall have the discretion to call to the attention of the submitting authority or any interested individual or group information or comments related to a submission.

§ 51.35 Obtaining information from the submitting authority.

(a) If a submission does not satisfy the requirements of § 51.25, the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission and no later than the 60th day following its receipt.

(b) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(c) If, after a request for further information is made pursuant to this section, the information requested becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority, and the 60-day period will commence upon the date of such notification.

(d) Notice of the request for and receipt of further information will be given to interested parties registered under § 51.30.

§ 51.36 Obtaining information from others.

(a) The Attorney General may at any time request relevant information from governmental jurisdictions and from interested groups and individuals and may conduct any investigation or other inquiry that is deemed appropriate in making a determination.

(b) If a submission does not contain evidence of adequate notice to the

public, and the Attorney General believes that such notice is essential to a determination, steps will be taken by the Attorney General to provide public notice sufficient to invite interested or affected persons to provide evidence as to the presence or absence of a discriminatory purpose or effect. The submitting authority shall be advised when any such steps are taken.

§ 51.37 Supplementary submissions.

When a submitting authority provides documents and information materially supplementing a submission (or a request for reconsideration of an objection) or, before the expiration of the 60-day period, makes a second submission such that the two submissions cannot be independently considered, the 60-day period for the original submission will be calculated from the receipt of the supplementary information or the second submission.

§ 51.38 Failure to complete submissions.

If after 60 days the submitting authority has not provided further information in response to a request made pursuant to § 51.35(a), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 described in § 51.39(e), may object to the change, giving notice as specified in § 51.43.

§ 51.39 Standards for determination by the Attorney General.

(a) Section 5 provides for submission to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(b) Guided by the relevant judicial decisions, the Attorney General shall base a determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

(c) If the Attorney General determines that a submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(d) If the Attorney General determines that a submitted change has the prohibited purpose or effect, an objection shall be interposed to the change.

(e) The burden of proof in a submission case is clear: when it submits a change to the Attorney General is the same as it would be if the change was the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. Therefore, if the evidence as to the purpose or effect of a change is conflicting and the Attorney General is unable to determine that the submitted change does not have the prohibited purpose or effect, an objection shall be interposed to the change.

§ 51.40 Notification of decision not to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose no objection to a submitted change affecting voting.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.41 Failure of the Attorney General to respond.

It is the practice and intention of the Attorney General to respond to each submission within the 60-day period. However, the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change, provided the submission is addressed as specified in § 51.22 and is appropriate for a response on the merits as described in § 51.33.

§ 51.42 Reexamination of decision not to object.

After notification to the submitting authority of a decision to interpose no objection to a submitted change affecting voting has been given, the Attorney General may reexamine the submission if, prior to the expiration of the 60-day period, information indicating the possibility of the prohibited discriminatory purpose or effect is received. In this event, the Attorney General may interpose an objection provisionally and advise the submitting authority that examination of the change in light of the newly raised issues will continue and that a final decision will be rendered as soon as possible.

§ 51.43 Notification of decision to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose an objection. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider an objection upon a request by the submitting authority.

(c) The submitting authority shall be advised further that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited discriminatory purpose or effect.

(d) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision to interpose an objection will be given to interested parties registered under § 51.30.

§ 51.44 Request for reconsideration.

(a) The submitting authority may at any time request the Attorney General to reconsider an objection.

(b) Requests may be in letter or any other written form and should contain relevant information or legal argument.

(c) Notice of the request will be given to any party who commented on the submission or requested notice of the Attorney General's action thereon and to interested parties registered under § 51.30. In appropriate cases the Attorney General may request the submitting authority to give local public notice of the request.

§ 51.45 Reconsideration of objection at the insistance of the Attorney General.

(a) Where there appears to have been a substantial change in operative fact or relevant law, an objection may be reconsidered, if it is deemed appropriate, at the insistance of the Attorney General.

(b) Notice of such a decision to reconsider shall be given to the submitting authority, to any party who commented on the submission or requested notice of the Attorney General's action thereon, and to interested parties registered under § 51.30, and the Attorney General shall decide whether to withdraw or to continue the objection only after such persons have had a reasonable opportunity to comment.

§ 51.46 Conference.

(a) A submitting authority that has requested reconsideration of an

objection pursuant to § 51.44 may request a conference to produce information or legal argument in support of reconsideration.

(b) Such a conference shall be held at a location determined by the Attorney General and shall be conducted in an informal manner.

(c) When a submitting authority requests such a conference, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any notice of a request for reconsideration shall be notified and given the opportunity to confer.

(d) The Attorney General shall have the discretion to hold separate meetings to confer with the submitting authority and other interested groups or individuals.

(e) Such conferences will be open to the public or to the press only at the discretion of the Attorney General and with the agreement of the participating parties.

§ 51.47 Decision after reconsideration.

(a) The Attorney General shall within the 60-day period following the receipt of a reconsideration request or following notice given under § 51.45(b) notify the submitting authority of the decision to continue or withdraw the objection, provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide. The reasons for the decision shall be stated.

(b) The objection shall be withdrawn if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group.

(c) If the objection is not withdrawn, the submitting authority shall be advised that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited purpose or effect.

(d) A copy of the notification shall be sent to any party who has commented on the submission or reconsideration or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision after reconsideration will be given to interested parties registered under § 51.30.

§ 51.48 Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. However, Section 5 states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

§ 51.49 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a Section 5 file for each submission, containing the submission, related written materials, correspondence, memoranda, investigative reports, notations concerning conferences with the submitting authority or any interested individual or group, and copies of any letters from the Attorney General concerning the submission.

(b) Objection files: Brief summaries regarding each submission and the general findings of the Department of Justice investigation and decision concerning it will be prepared when a decision to interpose, continue, or withdraw an objection is made. Files of these summaries, arranged by jurisdiction and by the date upon which such decision is made, will be maintained.

(c) Computer file: Records of all submissions and of their dispositions by the Attorney General shall be electronically stored and periodically retrieved in the form of computer printouts.

(d) The contents of the above-described files shall be available for inspection and copying by the public during normal business hours at the Civil Rights Division, Department of Justice, Washington, D.C. Materials that are exempt from inspection under the Freedom of Information Act, 5 U.S.C. 552(b), may be withheld at the discretion of the Attorney General. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.27(d) shall be available only as provided by § 51.27(d). Applicable fees, if any, for the copying of the contents of these files are contained in the Department of Justice regulations implementing the Freedom of Information Act, 28 CFR 16.9.

Subpart F—Sanctions

§ 51.50 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including Section 5. See Section 12(d).

(b) Certain violations may be subject to criminal sanctions. See Sections 12 (a) and (c).

§ 51.51 Enforcement by private parties.

Private parties have standing to enforce Section 5.

Subpart G—Petition To Change Procedures

§ 51.52 Who may petition.

Any jurisdiction or interested individual or group may petition to have these procedural guidelines amended.

§ 51.53 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name, address, and telephone number of the petitioner, the change requested, and the reasons for the change.

§ 51.54 Disposition of petition.

The Attorney General shall promptly consider and dispose of a petition under this subpart and give notice of the disposition, accompanied by a simple statement of the reasons, to the petitioner.

Appendix—Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The date in parentheses is the date that was used to determine coverage for the jurisdiction it follows.

Alabama (statewide) (Nov. 1, 1964)
Alaska (statewide) (Nov. 1, 1972)
Arizona (statewide) (Nov. 1, 1972)
(The following Arizona counties were covered individually through the use of earlier dates.)
Apache County (Nov. 1, 1968)
Cochise County (Nov. 1, 1968)
Coconino County (Nov. 1, 1968)
Mohave County (Nov. 1, 1968)
Navajo County (Nov. 1, 1968)
Pima County (Nov. 1, 1968)
Pinal County (Nov. 1, 1968)
Santa Cruz County (Nov. 1, 1968)
Yuma County (Nov. 1, 1964
California (the following counties only)
Kings County (Nov. 1, 1972)
Merced County (Nov. 1, 1972)
Monterey County (Nov. 1, 1968)
Yuba County (Nov. 1, 1968)
Colorado (the following county only)
El Paso (Nov. 1, 1972)
Connecticut (the following towns only)
Groton Tow. (Nov. 1, 1968)
Mansfield Town (Nov. 1, 1968)
Southbury Town (Nov. 1, 1968)
Florida (the following counties only)
Collier County (Nov. 1, 1972)
Hardee County (Nov. 1, 1972)
Hendry County (Nov. 1, 1972)

Hillsborough County (Nov. 1, 1972)
Monroe County (Nov. 1, 1972)
Georgia (statewide) (Nov. 1, 1964)
Hawaii (the following county only)
Honolulu County (Nov. 1, 1964)
Idaho (the following county only)
Elmore County (Nov. 1, 1968)
Louisiana (statewide) (Nov. 1, 1964)
Massachusetts (the following towns only)
Amherst Town (Nov. 1, 1968)
Ayer Town (Nov. 1, 1968)
Belchertown (Nov. 1, 1968)
Bourne Town (Nov. 1, 1968)
Harvard Town (Nov. 1, 1968)
Sandwich Town (Nov. 1, 1968)
Shirley Town (Nov. 1, 1968)
Sunderland Town (Nov. 1, 1968)
Wrentham Town (Nov. 1, 1968)
Michigan (the following townships only)
Buena Vista Township (Saginaw County) (Nov. 1, 1972)
Clyde Township (Allegan County) (Nov. 1, 1972)
Mississippi (statewide) (Nov. 1, 1964)
New Hampshire (the following political subdivisions only)
Antrim Town (Nov. 1, 1968)
Benton Town (Nov. 1, 1968)
Boscawen Town (Nov. 1, 1968)
Millsfield Township (Nov. 1, 1968)
Newington Town (Nov. 1, 1968)
Pinkhams Grant (Nov. 1, 1968)
Rindge Town (Nov. 1, 1968)
Stewartstown (Nov. 1, 1968)
Stratford Town (Nov. 1, 1968)
Unity Town (Nov. 1, 1968)
New York (the following counties only)
Bronx County (Nov. 1, 1968)
Kings County (Nov. 1, 1968)
New York County (Nov. 1, 1968)
North Carolina (the following counties only)
Anson County (Nov. 1, 1964)
Beaufort County (Nov. 1, 1964)
Bertie County (Nov. 1, 1964)
Bladen County (Nov. 1, 1964)
Camden County (Nov. 1, 1964)
Caswell County (Nov. 1, 1964)
Chowan County (Nov. 1, 1964)
Cleveland County (Nov. 1, 1964)
Craven County (Nov. 1, 1964)
Cumberland County (Nov. 1, 1964)
Edgecombe County (Nov. 1, 1964)
Franklin County (Nov. 1, 1964)
Gaston County (Nov. 1, 1964)
Gates County (Nov. 1, 1964)
Granville County (Nov. 1, 1964)
Greene County (Nov. 1, 1964)
Guilford County (Nov. 1, 1964)
Halifax County (Nov. 1, 1964)
Harnett County (Nov. 1, 1964)
Hertford County (Nov. 1, 1964)
Hoke County (Nov. 1, 1964)
Jackson County (Nov. 1, 1972)
Lee County (Nov. 1, 1964)
Lenoir County (Nov. 1, 1964)
Martin County (Nov. 1, 1964)
Nash County (Nov. 1, 1964)
Northampton County (Nov. 1, 1964)
Onslow County (Nov. 1, 1964)
Pasquotank County (Nov. 1, 1964)
Perquimans County (Nov. 1, 1964)
Person County (Nov. 1, 1964)
Pitt County (Nov. 1, 1964)
Robeson County (Nov. 1, 1964)
Rockingham County (Nov. 1, 1964)
Scotland County (Nov. 1, 1964)
Union County (Nov. 1, 1964)
Vance County (Nov. 1, 1964)
Washington County (Nov. 1, 1964)
Wayne County (Nov. 1, 1964)
Wilson County (Nov. 1, 1964)
South Carolina (statewide) (Nov. 1, 1964)
South Dakota (the following counties only)
Shannon County (Nov. 1, 1972)
Todd County (Nov. 1, 1972)
Texas (statewide) (Nov. 1, 1972)
Virginia (statewide) (Nov. 1, 1964)
Wyoming (the following county only)
Campbell County (Nov. 1, 1968)

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DEPARTMENT OF JUSTICE

28 CFR Part 51

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Revision of Procedures; Correction

AGENCY: Department of Justice.

ACTION: Final rule; correction.

SUMMARY: The Attorney General published as a final rule, effective January 5, 1981, a revision of 28 CFR, Part 51, (Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended) (FR Doc. 81-125, appearing at 46 FR 870 January 5, 1981). That rule requires correction and is corrected as shown below.

EFFECTIVE DATE: January 5, 1981.

FOR FURTHER INFORMATION CONTACT: David H. Hunter, Attorney, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530, (202) 724-7189.

1. The rule is assigned Attorney General Order No. 921-80.

2. In the Table of Contents, the headings for §§ 51.27 and 51.28 (both appearing at 46 FR 873, first column) should be changed to correspond to the headings as set forth in the text of the rule.

3. (a) The heading to § 51.45 (appearing at 46 FR 873, first column and 878, third column) should read: "§ 51.45 Reconsideration of objection at the instance of the Attorney General."

(b) In § 51.45(a) (appearing at 46 FR 878, third column), in the fifth line "insistance" should read "instance."

4. In § 51.14(a) (appearing at 46 FR 875, first column), in the third line "permists" should read "permits" and in the sixth line "institue" should read "institute."

5. In numbered clause (6) of paragraph (c) of § 51.28 (appearing at 46 FR 876, second column), the phrase "for which election returns a furnished" should read "for which election returns are furnished."

6. In § 51.39(d), the third line (appearing at 46 FR 878, second column) should read "prohibited purpose or effect, an" or rather than "prohibited purpose or effect, and."

7. In the Appendix, in the list of North Carolin a counties in which the preclearance requirement of Section 5 of the Voting Rights Act applies (appearing at 46 FR 880, first column) "Craven County" should read "Craven County."

Stephen J. Wilkinson,

Department of Justice, Federal Register Liaison Officer (Alternate).

[FR Doc. 81-[illegible] Filed 1-28-81; 8:45 am]

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DOJ-1981-02

Attachment B

PART 55—IMPLEMENTATION OF THE PROVISIONS OF THE VOTING RIGHTS ACT REGARDING LANGUAGE MINORITY GROUPS

Subpart A—General Provisions

Sec.
55.1 Definitions.
55.2 Purpose; standards for measuring compliance.
55.3 Statutory requirements.

Subpart B—Nature of Coverage

55.4 Effective date; list of covered jurisdictions.
55.5 Coverage under Section 4(f)(4).
55.6 Coverage under Section 203(c).
55.7 Termination of coverage.
55.8 Relationship between Section 4(f)(4) and Section 203(c).
55.9 Coverage of political units within a county.
55.10 Types of elections covered.

Subpart C—Determining the Exact Language

55.11 General.
55.12 Language used for written material.
55.13 Language used for oral assistance and publicity.

Subpart D—Minority Language Materials and Assistance

55.14 General.
55.15 Affected activities.
55.16 Standards and proof of compliance.
55.17 Targeting.
55.18 Provision of minority language materials and assistance.
55.19 Written materials.
55.20 Oral assistance and publicity.
55.21 Record keeping.

Subpart E—Preclearance

55.22 Requirements of Section 5 of the Act.

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55.23 Enforcement by the Attorney General.

Subpart G—Comment on This Part

55.24 Procedure.

APPENDIX—Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.

AUTHORITY: 5 U.S.C. 301, 28 U.S.C. 509, 510, Pub. L. 94-73.

SOURCE: Order No. 655-76, 41 FR 29998, July 20, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 55.1 Definitions.

For purposes of this Part—

(a) "Act" means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Voting Rights Act Amendments of 1970, 84 Stat. 314, and the Voting Rights Act Amendments of 1975, Pub. L. 94-73, 42 U.S.C. 1973 *et seq.* Section numbers, such as "Section 14(c)(3)," refer to the Act.

(b) "Attorney General" means the Attorney General of the United States.

(c) "Language minority" or "Language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. Sections 14(c)(3), 203(e). For the purposes of the Act the following Asian American groups are considered language minority groups: Chinese Americans, Filipino Americans, Japanese Americans, and Korean Americans. As used in this Part, "applicable language minority group" refers to the group or groups listed in the determinations as to coverage published in the FEDERAL REGISTER. As used in this Part, each of the seven following groups is considered a "single language minority group": American Indians, Alaskan Natives, persons of Spanish heritage, Chinese Americans, Filipino Americans, Japanese Americans, and Korean Americans.

(d) "Political subdivision" means: "* * * any county or parish, except that where registration for voting is

not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." Section 14(c)(2).

§ 55.2 Purpose; standards for measuring compliance.

(a) The purpose of this Part is to set forth the Attorney General's interpretation of the provisions of the Voting Rights Act, as amended by Public Law 94-73 (1975), which require certain States and political subdivisions to conduct elections in the language of certain "language minority groups" in addition to English.

(b) In the Attorney General's view the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process. This Part establishes two basic standards by which the Attorney General will measure compliance: (1) That materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities; and (2) that an affected jurisdiction should take all reasonable steps to achieve that goal.

(c) The determination of what is required for compliance with Section 4(f)(4) and Section 203(c) is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

(d) Jurisdictions covered under Section 4(f)(4) of the Act are subject to the preclearance requirements of Section 5. See Part 51 of this Chapter. Such jurisdictions have the burden of establishing to the satisfaction of the Attorney General or to the United States District Court for the District of Columbia that changes made in their election laws and procedures in order to comply with the requirements of Section 4(f)(4) are not discriminatory under the terms of Section 5. However, Section 5 expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the changes.

(e) Jurisdictions covered solely under Section 203(c) of the Act are not subject to the preclearance requirements of Section 5, nor is there a Federal apparatus available for preclearance of Section 203(c) compliance activities. The Attorney General will not preclear jurisdictions' proposals for compliance with Section 203(c).

(f) Consideration by the Attorney General of a jurisdiction's compliance with the requirements of Section 4(f)(4) occurs in the review pursuant to Section 5 of the Act of changes with respect to voting, in the consideration of the need for litigation to enforce the requirements of Section 4(f)(4), and in the defense of suits for termination of coverage under Section 4(f)(4). Consideration by the Attorney General of a jurisdiction's compliance with the requirements of Section 203(c) occurs in the consideration of the need for litigation to enforce the requirements of Section 203(c).

(g) In enforcing the Act—through the Section 5 preclearance review process, through litigation, and through defense of suits for termination of coverage under Section 4(f)(4)—the Attorney General will follow the general policies set forth in this Part.

(h) This Part is not intended to preclude affected jurisdictions from taking additional steps to further the policy of the Act. By virtue of the Supremacy Clause of Art. VI of the Constitution, the provisions of the Act override any inconsistent State law.

§ 55.3 Statutory requirements.

The Act's requirements concerning the conduct of elections in languages in addition to English are contained in Section 4(f)(4) and Section 203(c). These sections state that whenever a jurisdiction subject to their terms "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in • • • English. • • •"

Subpart B—Nature of Coverage

§ 55.4 Effective date; list of covered jurisdictions.

(a) The 1975 Amendments took effect upon the date of their enactment, August 6, 1975.

(1) The requirements of Section 4(f)(4) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General. Such determinations are not reviewable in any court.

(2) The requirements of Section 203(c) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census. Such determinations are not reviewable in any court.

(b) Jurisdictions determined to be covered under Section 4(f)(4) or Section 203(c) are listed, together with the language minority group with respect to which coverage was determined, in the Appendix to this Part. Any additional determinations of coverage under either Section 4(f)(4) or Section 203(c) will be published in the FEDERAL REGISTER.

§ 55.5 Coverage under Section 4(f)(4).

(a) *Coverage formula.* Section 4(f)(4) applies to any State or political subdivision in which (1) over five percent of the voting-age citizens were, on November 1, 1972, members of a single language minority group, (2) registration and election materials were provided only in English on November 1, 1972, and (3) fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.

All three conditions must be satisfied before coverage exists under Section 4(f)(4).[1]

(b) Coverage may be determined with regard to Section 4(f)(4) on a statewide or political subdivision basis.

(1) Whenever the determination is made that the bilingual requirements of Section 4(f)(4) are applicable to an entire State, these requirements apply to each of the State's political subdivisions as well as to the State. In other words, each political subdivision within a covered State is subject to the same requirements as the State.

(2) Where an entire State is not covered under Section 4(f)(4), individual political subdivisions may be covered.

§ 55.6 Coverage under Section 203(c).

There are two ways in which coverage under Section 203(c) may be established.[2]

(a) Under the first method, a preliminary determination is made by the Director of the Census of States in which more than five percent of the voting-age citizens are members of a single language minority group the illiteracy rate of which, in the particular State, is greater than the national illiteracy rate. In these States, a particular political subdivision is covered with respect to the State's applicable language minority group if five percent or more of the voting-age citizens of the political subdivision are members of the applicable language minority group.

(b) The second method of establishing coverage is used with respect to language minority groups not reached by the preliminary determination based on statewide data. Under the second method, covered political subdivisions are those in which more than five percent of the voting-age citizens are members of a single language minority group the illiteracy rate of which, in the particular political subdivision, is greater than the national illiteracy rate.

(c) For the purpose of determinations of coverage under Section 203(c), "illiteracy means the failure to complete the fifth primary grade." Section 203(b).

§ 55.7 Termination of coverage.

(a) *Section 4(f)(4).* A covered jurisdiction may terminate coverage under Section 4(f)(4) (via Section 4(a)) by obtaining from the United States District Court for the District of Columbia a declaratory judgment that there has been no discriminatory use of a test or device for a period of ten years. The term "test or device" is defined in

[1] Coverage is based on Sections 4(b) (third sentence), 4(c), and 4(f)(3).

[2] The criteria for coverage are contained in Section 203(b).

Section 4(c) and Section 4(f)(3). When an entire State is covered in this regard, only the State, and not individual political subdivisions within the State, may bring an action to terminate coverage.

(b) *Section 203(c).* The requirements of Section 203(c) apply until August 6, 1985. A covered jurisdiction may terminate such coverage earlier if it can prove in a declaratory judgment action in a United States district court, that the illiteracy rate of the applicable language minority group is equal to or less than the national illiteracy rate.

§ 55.8 Relationship between Section 4(f)(4) and Section 203(c).

(a) The statutory requirements of Section 4(f)(4) and Section 203(c) regarding minority language material and assistance are essentially identical.

(b) Jurisdictions subject to the requirements of Section 4(f)(4)—but not jurisdictions subject only to the requirements of Section 203(c)—are also subject to the Act's special provisions, such as Section 5 (regarding preclearance of changes in voting laws) and Section 6 (regarding Federal examiners).[3] See Part 51 of this Chapter.

(c) Although the coverage formulas applicable to Section 4(f)(4) and Section 203(c) are different, a political subdivision may be included within both of the coverage formulas. Under these circumstances, a judgment terminating coverage of the jurisdiction under one provision would not have the effect of terminating coverage under the other provision.

§ 55.9 Coverage of political units within a county.

Where a political subdivision (e.g., a county) is determined to be subject to Section 4(f)(4) or Section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.

[3] In addition, a jurisdiction covered under Section 203(c) but not under Section 4(f)(4) is subject to the Act's special provisions if it was covered under Section 4(b) prior to the 1975 Amendments to the Act.

§ 55.10 Types of elections covered.

(a) *General.* The language provisions of the Act apply to registration for and voting in any type of election, whether it is a primary, general or special election. Section 14(c)(1). This includes elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums. Federal, State and local elections are covered as are elections of special districts, such as school districts and water districts.

(b) *Elections for statewide office.* If an election conducted by a county relates to Federal or State offices or issues as well as county offices or issues, a county subject to the bilingual requirements must insure compliance with those requirements with respect to all aspects of the election, i.e., the minority language material and assistance must deal with the Federal and State offices or issues as well as county offices or issues.

(c) *Multi-county districts.* Regarding elections for an office representing more than one county, e.g., State legislative districts and special districts that include portions of two or more counties, the bilingual requirements are applicable on a county-by-county basis. Thus, minority language material and assistance need not be provided by the government in counties not subject to the bilingual requirements of the Act.

Subpart C—Determining the Exact Language

§ 55.11 General.

The requirements of Section 4(f)(4) or Section 203(c) apply with respect to the languages of language minority groups. The applicable groups are indicated in the determinations of the Attorney General or the Director of the Census. This Subpart relates to the view of the Attorney General concerning the determination by covered jurisdictions of precisely the language to be employed. In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions for use in the electoral process

enable members of applicable language minority groups to participate effectively in the electoral process. It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective.

§ 55.12 Language used for written material.

(a) *Language minority groups having more than one language.* Some language minority groups, for example, Filipino Americans, have more than one language other than English. A jurisdiction required to provide election materials in the language of such a group need not provide materials in more than one language other than English. The Attorney General will consider whether the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(b) *Languages with more than one written form.* Some languages, for example, Japanese, have more than one written form. A jurisdiction required to provide election materials in such a language need not provide more than one version. The Attorney General will consider whether the particular version of the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(c) *Unwritten Languages.* Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten.

§ 55.13 Language used for oral assistance and publicity.

(a) *Languages with more than one dialect.* Some languages, for example, Chinese, have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects. (See § 55.20.)

(b) *Language minority groups having more than one language.* In some jurisdictions members of an applicable language minority group speak more than one language other than English. Where a jurisdiction is obligated to provide oral assistance in the language of such a group, the jurisdiction's obligation is to ascertain the languages that are commonly used by members of that group in the jurisdiction and to provide oral assistance in such languages. (See § 55.20.)

Subpart D—Minority Language Materials and Assistance

§ 55.14 General.

(a) This Subpart sets forth the views of the Attorney General with respect to the requirements of Section 4(f)(4) and Section 203(c) concerning the provision of minority language materials and assistance and some of the factors that the Attorney General will consider in carrying out his responsibilities to enforce Section 4(f)(4) and Section 203(c). Through the use of his authority under Section 5 and his authority to bring suits to enforce Section 4(f)(4) and Section 203(c), the Attorney General will seek to prevent or remedy discrimination against members of language minority groups based on the failure to use the applicable minority language in the electoral process. The Attorney General also has the responsibility to defend against suits brought for the termination of coverage under Section 4(f)(4) and Section 203(c).

(b) In discharging these responsibilities the Attorney General will respond to complaints received, conduct on his own initiative inquiries and surveys concerning compliance, and undertake other enforcement activities.

(c) It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with

the requirements of Section 4(f)(4) and Section 203(c) and to carry out these actions.

§ 55.15 Affected activities.

The requirements of Sections 4(f)(4) and 203(c) apply with regard to the provision of "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." The basic purpose of these requirements is to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities. Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

§ 55.16 Standards and proof of compliance.

Compliance with the requirements of Section 4(f)(4) and Section 203(c) is best measured by results. A jurisdiction is more likely to achieve compliance with these requirements if if has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group. In planning its compliance with Section 4(f)(4) or Section 203(c), a jurisdiction may, where alternative methods of compliance are available, use less costly methods if they are equivalent to more costly methods in their effectiveness.

§ 55.17 Targeting.

The term "targeting" is commonly used in discussions of the requirements of Section 4(f)(4) and Section 203(c). "Targeting" refers to a system in which the minority language materials or assistance required by the Act are provided to less than all persons or registered voters. It is the view of the Attorney General that a targeting system will normally fulfill the Act's minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.

§ 55.18 Provision of minority language materials and assistance.

(a) *Materials provided by mail.* If materials provided by mail (or by some comparable form of distribution) generally to residents or registered voters are not all provided in the applicable minority language, the Attorney General will consider whether an effective targeting system has been developed. For example, a separate mailing of materials in the minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials may be sufficient.

(b) *Public notices.* The Attorney General will consider whether public notices and announcements of electoral activities are handled in a manner that provides members of the applicable language minority group an effective opportunity to be informed about electoral activities.

(c) *Registration.* The Attorney General will consider whether the registration system is conducted in such a way that members of the applicable language minority group have an effective opportunity to register. One method of accomplishing this is to provide, in the applicable minority language, all notices, forms and other materials provided to potential registrants and to have only bilingual persons as registrars. Effective results may also be obtained, for example, through the use of deputy registrars who are members of the applicable language minority group and the use of decentralized places of registration, with minority language materials available at places where persons who

need them are most likely to come to register.

(d) *Polling place activities.* The Attorney General will consider whether polling place activities are conducted in such a way that members of the applicable language minority group have an effective opportunity to vote. One method of accomplishing this is to provide all notices, instructions, ballots, and other pertinent materials and oral assistance in the applicable minority language. If very few of the registered voters scheduled to vote at a particular polling place need minority language materials or assistance, the Attorney General will consider whether an alternative system enabling those few to cast effective ballots is available.

(e) *Publicity.* The Attorney General will consider whether a covered jurisdiction has taken appropriate steps to publicize the availability of materials and assistance in the minority language. Such steps may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations.

[Order No. 655-76, 41 FR 29998, July 20, 1976, as amended by Order No. 733-77, 42 FR 35970, July 13, 1977]

§ 55.19 Written materials.

(a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and petitions.

(b) *Accuracy, completeness.* It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials.

(c) *Ballots.* The Attorney General will consider whether a jurisdiction provides the English and minority language versions on the same document. Lack of such bilingual preparation of ballots may give rise to the possibility, or to the appearance, that the secrecy of the ballot will be lost if a separate minority language ballot or voting machine is used.

(d) *Voting machines.* Where voting machines that cannot mechanically accommodate a ballot in English and in the applicable minority language are used, the Attorney General will consider whether the jurisdiction provides sample ballots for use in the polling booths. Where such sample ballots are used the Attorney General will consider whether they contain a complete and accurate translation of the English ballots, and whether they contain or are accompanied by instructions in the minority language explaining the operation of the voting machine. The Attorney General will also consider whether the sample ballots are displayed so that they are clearly visible and at the same level as the machine ballot on the inside of the polling booth, whether the sample ballots are identical in layout to the machine ballots, and whether their size and typeface are the same as that appearing on the machine ballots. Where space limitations preclude affixing the translated sample ballots to the inside of polling booths, the Attorney General will consider whether language minority group voters are allowed to take the sample ballots into the voting booths.

§ 55.20 Oral assistance and publicity.

(a) *General.* Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

(b) *Assistance.* The Attorney General will consider whether a jurisdiction

has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.

(c) *Helpers.* With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his own choice. The basic standard is one of effectiveness.

§ 55.21 Record keeping.

The Attorney General's implementation of the Act's provisions concerning language minority groups would be facilitated if each covered jurisdiction would maintain such records and data as will document its actions under those provisions, including, for example, records on such matters as alternatives considered prior to taking such actions, and the reasons for choosing the actions finally taken.

Subpart E—Preclearance

§ 55.22 Requirements of Section 5 of the Act.

For many jurisdictions, changes in voting laws and practices will be necessary in order to comply with Section 4(f)(4) or Section 203(c). If a jurisdiction is subject to the preclearance requirements of Section 5 (see § 55.8(b)), such changes must either be submitted to the Attorney General or be made the subject of a declaratory judgment action in the United States District Court for the District of Columbia. Procedures for the administration of Section 5 are set forth in Part 51 of this Chapter.

Subpart F—Sanctions

§ 55.23 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including Section 4 and Section 203. See Sections 12(d) and 204.

(b) Also, certain violations may be subject to criminal sanctions. See Sections 11(a)–(c) and 205.

Subpart G—Comment on This Part

§ 55.24 Procedure.

These guidelines may be modified from time to time on the basis of experience under the Act and comments received from interested parties. The Attorney General therefore invites public comments and suggestions on these guidelines. Any party who wishes to make such suggestions or comments may do so by sending them to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530.

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Alaska	Alaskan Natives [1].	
Election District 1.		Alaskan Natives.
Election District 2.		Do.
Election District 3.		Do.
Election District 4.		Do.
Election District 5.		Do.
Election District 13.		Do.
Election District 14.		Do.
Election District 15.		Do.
Election District 16.		Alaskan Natives [1].

See footnote at end of table.

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Election District 17	.....	Do.
Election District 18	.....	Do.
Election District 19	.....	Do.
Election District 21	.....	Do.
Election District 22	.....	Do.
Arizona	Spanish heritage [1]	
Apache County	American Indian	Spanish heritage, American Indian.
Cochise County	.....	Spanish heritage.
Coconino County	American Indian	American Indian, Spanish heritage.
Gila County	.....	Do.
Graham County	.....	Do.
Greenlee County	.....	Spanish heritage.
Maricopa County	.....	Do.
Mohave County	.....	Do.
Navajo County	American Indian	American Indian, Spanish heritage.
Pima County	.....	Spanish heritage.
Pinal County	American Indian	American Indian, Spanish heritage
Santa Cruz County	.....	Spanish heritage.
Yavapai County	.....	Do.
Yuma County	.....	Do.
California:		
Alameda County	.....	Do.
Amador County	.....	Do.
Colusa County	.....	Do.
Contra Costa County	.....	Do.
Fresno County	.....	Do.
Imperial County	.....	Do.
Inyo County	.....	American Indian.
Kern County	.....	Spanish heritage.
Kings County	Spanish heritage	Do.
Lassen County	.....	Do.
Los Angeles County	.....	Do.
Madera County	.....	Do.
Merced County	Spanish heritage	Do.
Monterey County	.....	Do.
Napa County	.....	Do
Orange County	.....	Do.
Placer County	.....	Do

[1] See footnote at end of table.

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Riverside County	.....	Spanish heritage.
Sacramento County	.....	Do.
San Benito County	.....	Do.
San Bernardino County	.....	Do.
San Diego County	.....	Do.
San Francisco County	.....	Spanish heritage, Chinese American.
San Joaquin County	.....	Spanish heritage.
San Luis Obispo County	.....	Do.
San Mateo County	.....	Do.
Santa Barbara County	.....	Do.
Santa Clara County	.....	Do.
Santa Cruz County	.....	Do.
Sierra County	.....	Do.
Solano County	.....	Do.
Sonoma County	.....	Do.
Stanislaus County	.....	Do.
Sutter County	.....	Do.
Tulare	.....	Do.
Tuolumne County	.....	Do.
Ventura County	.....	Do.
Yolo County	.....	Do.
Yuba County	Spanish heritage	Do.
Colorado:		
Adams County	.....	Do.
Alamosa County	.....	Do.
Archuleta County	.....	Do.
Bent County	.....	Do.
Boulder County	.....	Do.
Chaffee County	.....	Do.
Clear Creek County	.....	Do.
Conejos County	.....	Do.
Costilla County	.....	Do.
Crowley County	.....	Do.
Delta County	.....	Do.
Denver County	.....	Do.
Eagle County	.....	Do.
El Paso County	Spanish heritage	Do.
Fremont County	.....	Do.
Huerfano County	.....	Do.
Jackson County	.....	Do.
Lake County	.....	Do

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
La Plata County		Spanish heritage.
Las Animas County.		Do.
Mesa County		Do.
Moffat County		Do.
Montezuma County.		Spanish heritage. American Indian.
Montrose County.		Spanish heritage.
Morgan County		Do.
Otero County		Do.
Provers County.		Do.
Pueblo County		Do.
Rio Grande County.		Do.
Saguache County.		Do.
San Juan County.		Do.
San Miguel County.		Do.
Sedgwick County.		Do.
Weld County		Do.
Connecticut:		
Bridgeport Town (Fairfield County).		Do.
Florida:		
Collier County	Spanish heritage.	Do.
Dade County		Do.
Glades County		American Indian.
Hardee County	Spanish heritage.	Spanish Heritage.
Hendry County	Spanish heritage.	Do.
Hillsborough County.	Spanish heritage.	Do.
Monroe County		Do.
Hawaii:		
Hawaii County	Spanish heritage.	Filipino American. Japanese American.
Honolulu County.		Chinese American. Filipino American.
Kauai County		Filipino American. Japanese American.
Maui County		Do.
Idaho		
Bingham County		American Indian.
Cassia County		Spanish heritage
Kansas		
Finney County		Do
Grant County		Do.
Wichita County		Do

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Louisiana:		
St. Bernard Parish.		Spanish heritage.
Maine:		
Passamaquoddy Pleasant Point Indian Reservation (Washington County).		American Indian.
Michigan:		
Clyde Township (Allegan County).		Spanish heritage.
Orangeville Township (Barry County).		Do.
Sugar Island Township (Chippewa County).		American Indian.
Imlay Township (Lapeer County).		Spanish heritage.
Adrian City (Lenawee County).		Do.
Madison Township (Lenawee County).		Do.
Grant Township (Newaygo County).		Do.
Buena Vista Township (Saginaw County).	Spanish heritage.	Do.
Saginaw City (Saginaw County).		Do.
Minnesota:		
Beltrami County		American Indian.
Cass County		Do.
Mississippi:		
Neshoba County		Do.
Montana:		
Blaine County		Do.
Glacier County		Do.
Hill County		Do.
Lake County		Do.
Roosevelt County.		Do.
Rosebud County		Do.
Valley County		Do.
Nebraska		
Scotts Bluff County.		Spanish heritage
Thurston County.		American Indian

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Nevada:		
Elko County		Spanish heritage, American Indian.
Mineral County		American Indian.
Nye County		Spanish heritage.
White Pine County.		Do.
New Mexico:		
Bernalillo County.		Do.
Catron County		Do.
Chaves County		Do.
Colfax County		Do.
Curry County		Do.
De Baca County		Do.
Dona Ana County.		Do.
Eddy County		Do.
Grant County		Do.
Guadalupe County.		Do.
Harding County		Do.
Hidalgo County		Do.
Lea County		Do.
Lincoln County		Do.
Los Alamos County.		Do.
Luna County		Do.
McKinley County.		American Indian, Spanish heritage.
Mora County		Spanish heritage.
Otero County		Do.
Quay County		Do.
Rio Arriba County.		American Indian, Spanish heritage.
Roosevelt County.		Spanish heritage.
Sandoval County.		American Indian, Spanish heritage.
San Juan County.		Do.
San Miguel County.		Spanish heritage.
Santa Fe County		Do.
Sierra County		Do.
Socorro County		Do.
Taos County		American Indian, Spanish heritage.
Torrance County		Spanish heritage.
Union County		Do.
Valencia County		American Indian, Spanish heritage.
New York:		
Bronx County	Spanish heritage.	Spanish heritage.
Kings County	do	Do.
New York County.		Do.
North Carolina:		
Hoke County		American Indian.
Jackson County	American Indian.	Do.
Robeson County		Do.
Swain County		Do.
North Dakota:		
Benson County		Do.
Dunn County		Do.
McKenzie County.		Do.
Mountrail County.		Do.
Rolette County		Do.
Oklahoma:		
Adair County		Do.
Beline County		Do.
Caddo County		Do.
Cherokee County.		Do.
Choctaw County	American Indian.	Do.
Coal County		Do.
Craig County		Do.
Delaware County.		Do.
Harmon County		Spanish heritage.
Hughes County		American Indian.
Johnston County.		Do.
Latimer County		Do.
McCurtain County.	American Indian.	Do.
McIntosh County.		Do.
Mayes County		Do.
Okfuskee County.		Do.
Okmulgee County.		Do.
Osage County		Do.
Ottawa County		Do.
Pawnee County		Do.
Pushmataha County.		Do.
Rogers County		Do.
Seminole County.		Do.
Sequoyah County.		Do.
Tillman County		Spanish heritage.
Oregon:		
Jefferson County.		American Indian
Malheur County		Spanish heritage.

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
South Dakota		
Bennett County		American Indian.
Charles Mix County		Do.
Corson County		Do.
Lyman County		Do.
Mellette County		Do.
Shannon County	American Indian	Do.
Washabaugh County		Do.
Todd County	American Indian.	Do.
Texas	Spanish heritage [1].	
Andrews County		Spanish heritage.
Aransas County		Do.
Atascosa County		Do.
Bailey County		Do.
Bandera County		Do.
Bastrop		Do.
Bee County		Do.
Bell County		Do.
Bexar County		Do.
Blanco County		Do.
Borden County		Do.
Brazoria County		Do.
Brazos County		Do.
Brewster County		Do.
Briscoe County		Do.
Brooks County		Do.
Burleson County		Do.
Burnet County		Do.
Caldwell County		Do.
Calhoun County		Do.
Cameron County		Do.
Castro County		Do.
Cochran County		Do.
Coke County		Do.
Colorado County		Do.
Comal County		Do.
Concho County		Do.
Coryell County		Do.
Cottle County		Do.
Crane County		Do.
Crockett County		Do.
Crosby County		Do.
Culberson County		Do.
Dallam County		Do.
Dawson County		Do.
Deaf Smith County		Do.
De Witt County		Do.
Dickens County		Do.
Dimmit County		Do.
Duval County		Do.
Ector County		Do.
Edwards County		Do.
Ellis County		Do.
El Paso County		Spanish heritage.
Falls County		Do.
Fisher County		Do.
Floyd County		Do.
Foard County		Do.
Fort Bend County		Do.
Frio County		Do.
Gaines County		Do.
Galveston County		Do.
Garza County		Do.
Gillespie County		Do.
Glasscock County		Do.
Goliad County		Do.
Gonzales County		Do.
Grimes County		Do.
Guadalupe County		Do.
Hale County		Do.
Hall County		Do.
Hansford County		Do.
Harris County		Do.
Haskell County		Do.
Hays County		Do.
Hidalgo County		Do.
Hockley County		Do.
Howard County		Do.
Hudspeth County		Do.
Jackson County		Do.
Jeff Davis County		Do.
Jim Hogg County		Do.
Jim Wells County		Do.
Jones County		Do.
Karnes County		Do.
Kendall County		Do.
Kenedy County		Do.
Kerr County		Do.
Kimble County		Do.
Kinney County		Do.
Kleberg County		Do.
Knox County		Do.
Lamb County		Do.
Lampasas County		Do.
La Salle County		Do.
Live Oak County		Do.
Lubbock County		Do.
Lynn County		Do.
McCulloch County		Do.
McLennan County		Do.

APPENDIX—*Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975.*—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
McMullen County		Spanish heritage.
Madison County		Do.
Martin County		Do.
Mason County		Do.
Matagorda County		Do.
Maverick County		Do.
Medina County		Do.
Menard County		Do.
Midland County		Do.
Milam County		Do.
Mitchell County		Do.
Moore County		Do.
Nolan County		Do.
Nueces County		Do.
Parmer County		Do.
Pecos County		Do.
Potter County		Do.
Presidio County		Do.
Reagan County		Do.
Real County		Do.
Reeves County		Do.
Refugio County		Do.
Robertson County		Do.
Runnels County		Do.
San Patricio County		Do.
San Saba County		Do.
Schleicher County		Do.
Scurry County		Do.
Sherman County		Do.
Starr County		Do.
Sterling County		Do.
Sutton County		Do.
Swisher County		Do.
Taylor County		Do.
Terrell County		Do.
Terry County		Do.
Throckmorton County		Do.
Tom Green County		Do.
Travis County		Do.
Upton County		Do.
Uvalde County		Do.
Val Verde County		Do.
Victoria County		Do.
Ward County		Do.
Webb County		Do.
Wharton County		Do.
Willacy County		Do.
Williamson County		Do.
Wilson County		Spanish heritage.
Winkler County		Do.
Yoakum County		Do.
Zapata County		Do.
Utah:		
Carbon County		Spanish heritage.
San Juan County		American Indian.
Tooele County		Spanish heritage.
Uintah County		American Indian.
Virginia: Charles City County		Do.
Washington:		
Adams County		Spanish heritage.
Columbia County		Do.
Grant County		Do.
Okanogan County		American Indian.
Yakima County		Spanish heritage.
Wisconsin:		
Nashville Town (Forest County)		American Indian.
Bovina Town (Outagamie County)		Spanish heritage.
Oneida Town (Outagamie County)		American Indian.
Hayward City (Sawyer County)		Do.
Wyoming:		
Carbon County		Spanish heritage.
Fremont County		American Indian.
Laramie County		Spanish heritage.
Sweetwater County		Do.
Washakie County		Do.

Statewide coverage.

[Order No. 655-76, 41 FR 29998, July 20, 1976, as amended by Order No. 733-77, 42 FR 35971, July 13, 1977] Statewide coverage.

ADDENDUM

Corrections to APPENDIX

Jurisdiction	Coverage Under Sec. 4(f)(4)	Coverage Under Sec. 203(c)
Florida:		
Monroe County	Do. (Spanish Heritage)	Do. (Spanish Heritage)
Hawaii:		
Maui	----------	Filipino American
Michigan:		
Clyde Township (Allegan County)	Spanish Heritage	Spanish Heritage
Oklahoma:		
Choctaw County	----------	Do.
McCurtain County	----------	Do.

Attachment C-1

SECTION 5 OBJECTIONS TO REAPPORTIONMENT SUBMISSIONS
BASED ON THE 1980 CENSUS
THROUGH DECEMBER 11, 1981

Submitting Jurisdiction	Type	Date of Objection
Alabama		
Barbour County	County Commission	7/21/81
Barbour County	County Commission	11/16/81
New York		
New York City	Councilmanic (Kings, Bronx, and New York Counties)	10/27/81
North Carolina		
State	U.S. Congressional	12/7/81
State	State Senate	12/7/81
South Carolina		
State	State House	11/18/81
Virginia		
State	State Senate	7/17/81
State	State House	7/31/81

U.S. Department of Justice

Attachment C-2

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

T.W. Thagard, Jr., Esq.
Smith, Bowman, Thagard,
Crook and Culpepper
Post Office Box 78
Montgomery, Alabama 36101

21 JUL 1981

Dear Mr. Thagard:

This is in reference to the change in the method of election for members of the Barbour County Commission from six single-member districts and one county-wide district to election from seven single-member districts and to the redistricting plan for those seven districts for Barbour County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on May 27, 1981.

The Attorney General does not interpose any objection to the change to a plan that provides that all seven members of the County Commission be elected from single-member districts. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

With regard to the redistricting plan, we have given careful consideration to the information you have provided as well as to that available from the Bureau of the Census and from other interested parties. Our analysis shows that most districts are not compact, do not follow natural and recognizable boundaries in many instances and, with respect to Districts 1 and 4, are noncontiguous. In addition, District 3 merges the 83.5 percent black Springhill/Comer area with a 72 percent white portion of the City of Eufaula resulting in a district which appears to have a majority white voting age population.

Our analysis also reveals that the county's submitted plan divides the predominantly black population concentrations in the northern and western portions of the county among three districts (Districts 3, 5, and 6) and the areas of

black population concentration within the City of Eufaula among three districts (Districts 1, 2 and 4). This fragmentation of black population concentrations results in a plan that contains no district in which a majority of the voters are black, even though the County is 44 percent black, according to the 1980 Census. Specifically, although the plan provides for districts with nominal black population majorities of 55.7, 55.8 and 57.6 percent (Districts 1, 3 and 6), the County has not provided any information regarding voting age population. Unless the ratio of black to white voting age population has radically changed since 1970, two of the above districts have a white majority voting age population and the third is only slightly over 50 percent black. Even in that district, whites constitute a majority of registered voters. In addition, apparent racial bloc voting and the majority vote requirement further impinge on black voting strength.

Since the prior plan is unconstitutionally malapportioned, Forte v. Barbour County Commission, Civil Action No. 79-537-N (M. D. Ala., Dec. 17, 1979), our standard of comparison under Beer v. United States, 374 F. Supp. 363, rev'd, 425 U.S. 130 (1976), is "options for properly apportioned single-member district plans." Wilkes County v. United States, 450 F. Supp. 1171, 1178, Conclusion 10 (D. D.C. 1978), aff'd, 439 U.S. 999 (1978). In this regard, our analysis reveals that readily apparent alternatives would provide at least two viable majority black districts, one in the northwestern portion of the county and one in the City of Eufaula, with black populations of well over 60 percent each. Such districts would be natural, compact and contiguous, would satisfy the Fourteenth Amendment requirement of one person, one vote and most likely such a plan could include a third district of nearly a 60 percent black population. The county has not provided any information to show that its choice of the submitted redistricting plan, in preference to the available alternatives, does not have the purpose or effect of discriminating against black voters.

In addition, there is evidence pertinent to the question of an impermissible racial purpose. Barbour County has a long history of failing to comply with the preclearance provisions of the Voting Rights Act. This submission itself is the result of court action stemming from such a failure. While the white community was consulted regarding this plan, it is our understanding that leaders of the black community were not consulted concerning the placement of the new district lines, and the County has provided no evidence of any systematic effort to involve blacks in its deliberations. As noted above, racially polarized voting appears to exist in Barbour County, the proposed districts are not natural, compact or contiguous and the electoral scheme would maintain black voting strength at a minimum level, although readily available alternatives would provide a fair chance for meaningful minority participation. These facts all bear on the question of an impermissible racial purpose in the adoption of the plan. See Wilkes County v. United States, supra.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of proving that a submitted change has no discriminatory purpose or effect. See, e.g., Georgia v. United States, 411 U.S. 526 (1973); see also Section 51.39(e) of the Procedures for the Administration of Section 5 (46 Fed. Reg. 878). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that that burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the redistricting plan for election of the Barbour County Commissioners.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the redistricting plan legally unenforceable.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter what course of action Barbour County plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

We are sending a copy of this letter to the Honorable Robert E. Varner, Judge, United States District Court, Middle District of Alabama.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

16 NOV 1981

T. W. Thagard, Jr., Esq.
Smith, Bowman, Thagard,
Crook & Culpepper
Post Office Box 78
Montgomery, Alabama 36101

Dear Mr. Thagard:

This is in reference to the redistricting plan for the seven single-member districts for members of the Barbour County Commission of Barbour County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on September 16, 1981.

At the outset we note that on July 21, 1981, an objection was interposed on behalf of the Attorney General to the plan previously submitted. We found that the districts in that plan were "not compact, do not follow natural and recognizable boundaries . . . and . . . are noncontiguous." We further found that the plan evidenced dilution of black voting strength in Barbour County by drawing new district lines in such a way as to cause needless fragmentation of black population concentrations. In the context of Barbour County, including as it does racial bloc voting, a majority vote requirement, and a substantially lower voting age population and voter registration rate among blacks than among whites, we were unable to conclude that black voting strength had been maintained at a level that would have allowed blacks to participate fully and fairly in the electoral process. Accordingly, we advised the county that it had failed to sustain its burden under the Voting Rights Act and an objection was interposed.

As noted in our July 21 letter of objection, since the pre-existing plan was found to be unconstitutionally malapportioned, Forte v. Barbour County Commission, Civil Action No. 79-537-N (M.D. Ala., Dec. 17, 1979), the proper standard of comparison under Beer v. United States, 425 U. S. 130 (1976), is to compare the submitted plan with "options for properly apportioned single-member

district plans." Wilkes County v. United States, 450 F. Supp. 1171, 1178, Conclusion 19 (D. D.C. 1978), aff'd, 439 U.S. 999 (1978). Such a comparison necessarily must take into account the existence of racially polarized voting in Barbour County. Also important to our analysis is the wide discrepancy in voting age population between blacks and whites in Barbour County. Weighing in the balance these and other considerations we must in the end determine whether your submitted plan was designed "to minimize . . . the voting strength of racial . . . elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439.

With this background in mind we have given careful consideration to the information you have supplied as well as that available from our files, the Bureau of the Census and other interested parties. Our analysis shows that even though the districts in the new proposal appear to be contiguous, some continue to be drawn in a manner designed to fragment black population concentrations. This is particularly the case in the City of Eufaula where the boundaries of District 3 are drawn in a convoluted and distorted fashion that "carves out" of the district three virtually all-black areas while drawing into the district elsewhere two all-white areas. The information that you have supplied does not indicate any governmental interest served by this configuration and we have received no explanation to suggest a reason other than to minimize black voting strength in District 3 over what one would naturally expect had a more evenly drawn, unfragmented plan been adopted.

In addition, with respect to the boundary line between Districts 1 and 2, predominantly black voting Precinct 10, which has the second highest percentage of black registered voters in the county, seems to be split unnecessarily between Districts 1 and 2. This fragmentation also results in what seems to be an unnecessary splitting of a Census Enumeration District and the attending unreliability of statistics that such splitting engenders. In fact, our analysis shows that the unreliability of the data resulting from the split in this instance may be exacerbated by the methodology used, which assumed equal distribution of population by race throughout the ED and which made no distinction in the number of persons per household whether white or black. Census experience has shown that these are not realistic assumptions.

Under Section 5 of the Voting Rights Act the submitting authority has the burden of proving that a submitted change has no discriminatory purpose or effect. See, e.g., Georgia v. United States, 411 U.S. 526 (1973); see also Section 51.39(e) of the Procedures for the Administration of Section 5 (46 Fed. Reg. 878). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the county has carried

its burden of showing that the plan here under submission is free of any purpose to abridge the right to vote on account of race or color. Accordingly, on behalf of the Attorney General, I must interpose an objection to the redistricting plan contained in the instant submission.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court obtained, the effect of the objection by the Attorney General is to make the redistricting plan for Barbour County legally unenforceable.

Since this matter is related to the litigation pending in the federal district court, I am taking the liberty of forwarding a copy of this letter to Judge Varner. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Chief Judge Robert E. Varner

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

27 OCT 1981

Fabian Palomino, Esq.
Counsel, New York City Council
Redistricting Commission
City Hall
New York, New York 10007

Dear Mr. Palomino:

This is in reference to your submission to the Attorney General, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, of Local Law 47 (1981) of the City of New York providing for the increase in the number of single-member councilmanic districts, and the redistricting of the 35 single-member districts and related election district changes occasioned by the local law. Additional information was received on September 21, 1981. Since that date, the city has supplemented the submission with further information. The submission was completed on the date of the receipt of the last supplement on October 19, 1981.

We have given careful consideration to the materials which the city has submitted as well as information and comments from interested parties and information contained in other Section 5 submissions made by the city. The Attorney General does not interpose an objection to the increase in the number of members of the city council elected from single-member districts. However, on the basis of our review of the city's submission, available demographic data and comments received concerning this submission, we are unable to conclude that the city has satisfied its burden of proving that the submitted plan, as drawn, has neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

93-758 O - 83 -- 10

Consequently, the Attorney General does interpose an objection to the councilmanic redistricting plan involving Bronx, Kings and New York Counties. Furthermore, because the proposed changes in the election districts are dependent on the objectionable councilmanic district changes, the Attorney General must also interpose an objection to the changes in election districts.

As you know, under Section 5, the city bears the burden of proving the absence of both discriminatory purpose and effect in the proposed councilmanic redistricting plan. City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980); Beer v. United States, 425 U.S. 130, 140-41 (1976). In order to prove the absence of a racially discriminatory effect, the City of New York must demonstrate, at a minimum, that the proposed councilmanic redistricting plan would not lead to a retrogression in the position of racial minorities with respect to the effective exercise of their electoral franchise. Beer v. United States, supra, 425 U.S. at 140-41. While the city is under no obligation to maximize minority voting strength, the District Court for the District of Columbia has required that the city demonstrate that the plan "fairly reflects the strength of [minority] voting power as it exists." Mississippi v. United States, 490 F. Supp. 569, 581 (D.D.C. 1979), citing Beer v. United States, supra, 425 U.S. at 139 n.11 and 141; and City of Richmond v. United States, 422 U.S. 358, 362 (1975).

In studying the issue of retrogression, we have compared the projected impact of the proposed plan with the expected election results if the city were to continue to conduct elections under the 1977 plan. While we recognize that the city disagrees with our use of 1980 Census data to conduct this analysis, we are obligated to conduct the analysis "from the perspective of the most current available population data," City of Rome v. United States, supra, 446 U.S. at 186, and the 1980 Census data provides the most reliable basis for measuring the projected results of implementation of the new plan as compared with continued use of the 1977 plan. Also, because the existing councilmanic districts are severely malapportioned in light of the

dramatic population shifts which have occurred in the last decade, we have studied possible alternative reapportionment plans faithful to nonracial criteria established by the city (i.e., compact, contiguous districts; efforts to avoid interborough districts; efforts to maintain existing boundaries to the extent possible). Cf. Wilkes County v. United States, 450 F. Supp. 1171, 1178 (D.D.C. 1978), aff'd, 439 U.S. 999 (1978); Donnell v. United States, C.A. No. 78-0392 (D.D.C., July 31, 1979), aff'd, 444 U.S. 1059 (1980).

Our analysis, under both methods, has resulted in a conclusion that the proposed plan will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise and that the plan does not fairly reflect minority voting strength as it currently exists. As explained below, the retrogression found to exist in each covered county results primarily from the city's departure from its own nonracial plan-drawing criteria. Since no nonracial justification has been offered for these departures, and in light of the obvious effect, we are also unable to conclude that the city has satisfied its burden of demonstrating that the plan was drawn without a racially discriminatory purpose. Donnell v. United States, supra, slip op. at 10; Mississippi v. United States, supra, 490 F. Supp. at 581-82.

Our analysis of relevant demographic data and election returns has revealed significant minority concentrations in the three covered counties and the existence of a clear pattern of racial bloc voting. These findings do not support the city's assertions that the minority population is so widely dispersed as to preclude the creation of additional minority districts under a fairly drawn plan and that racial bloc voting is not apparent in elections in the city. Our analysis of the plan as it affects each covered county follows.

The single-member districts in the northern portion of New York County do not appear to be drawn in accordance with the city's stated objectives. For example, District 6 is unusually shaped, is six miles long and, for almost half its length, it measures only three blocks wide. Also, the plan for New York County proposes a second interborough district between Bronx County and New York County, when the population characteristics of New York County would allow seven districts wholly within Manhattan. While these deviations from the city's stated plan-drawing criteria do not, by themselves, constitute a violation of the Section 5 standard, each deviation has resulted in a fragmentation of minority residential areas and a corresponding dilution of minority voting strength. Thus, if District 6 would have been drawn compactly to include the northern portion of Manhattan, it seems likely that that district would be 65% minority or more. Similarly, if interborough districts between Bronx and New York Counties were not used, the likely result would be increased minority voting strength in both counties. In sum, our analysis indicates that if the city's stated objectives were utilized in Manhattan, seven districts wholly within Manhattan could be drawn and three of those districts would be 65% minority or greater.

With respect to Bronx County, a significant minority population concentration in the Morris Heights-Fordham section of the county is divided among four of the six councilmanic districts, thus minimizing minority voting strength by frustrating the creation of an additional district in which minority voters would have a fair opportunity to elect a candidate of their choice. We note that District 13, one of the fragmenting districts, is not compact but rather is drawn in a convoluted manner, and the unusual shape of the district contributes to the fragmentation of minority voting strength. We have not been presented with any compelling justification for such fragmentation of a substantial minority population concentration, and our analysis reveals none. Moreover, it appears that other rational and compact redistricting alternatives are available to achieve population equality without such a prohibited discriminatory impact. Also, as mentioned above, the elimination of interborough districts between New York and Bronx Counties would not only further the city's stated objectives but would also help avoid the dilution of minority voting strength.

In Kings County, we have noted a similar departure from nonracial plan-drawing criteria, which departure has resulted in a fragmentation and dilution of minority voting strength. District 24, rather than being compact, is approximately five miles long (north-south) and, in places, less than one-half mile wide. Our analysis, as well as information we have received, indicates that the configuration of this district results from efforts to maintain neighboring District 25 as a district which would be controlled by white voters. If compact districts were utilized in this area of the county (e.g., districts which run on an east-west axis as District 25 previously ran) it appears likely that the minority community in Kings County would have a reasonable opportunity to elect candidates of its choice in at least four districts; as a result of the city's departure from its nonracial plan-drawing criteria, the minority community in Kings County has a reasonable opportunity of electing candidates of its choice in only three districts. Additionally, if the unnecessary fragmentation of other minority population concentrations (e.g., East New York) could be avoided, the end result might be that minority voters would have a realistic opportunity to elect candidates of their choice in five districts.

Under these circumstances, I am unable to conclude, as I must under the Voting Rights Act, that the presently proposed councilmanic district lines for Bronx, Kings and New York Counties were drawn without any discriminatory racial purpose or effect. Accordingly, I must, on behalf of the Attorney General, interpose an objection to Local Law 47 (1981) of the City of New York insofar as Bronx, Kings and New York Counties are concerned.

Of course, as provided by Section 5 of the Voting Rights Act of 1965, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or

membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the effect of the objection by the Attorney General is to make the reapportionment of the New York City Council legally unenforceable with respect to Bronx, Kings and New York Counties.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the City of New York plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section. Because this decision pertains to the issues raised in Herron v. Koch, No. 81 Civ. 1956 (E.D.N.Y.); Andrews v. Koch, No. 81 Civ. 2542 (E.D.N.Y.); and Gerena-Valentin v. Koch, No. 81 Civ. 5468 (S.D.N.Y.), I am taking the liberty of sending a copy of this letter to the members of the three-judge district court. Moreover, in light of requests which we have received for a copy of the decision in this matter, we are making copies of the letter available on request.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Edward N. Costikyan

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

7 DEC 1981

Mr. Alex K. Brock
Executive Secretary-Director
State Board of Elections
Suite 801 Raleigh Building
5 West Hargett Street
Raleigh, North Carolina 27601

Dear Mr. Brock:

This is in reference to Chapter 894 (S.B. No. 87, 1981) and Chapter 821 (S.B. No. 313, 1981), providing for the reapportionment of United States Congressional districts and for the reapportionment of the North Carolina Senate. Your submission, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, was initially received on July 16, 1981, and was supplemented with requested additional information on October 6, 1981.

Under Section 5, the State bears the burden of proving the absence of both discriminatory purpose and effect in proposed redistricting plans. City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980); Beer v. United States, 425 U.S. 130, 140-41 (1976). In order to show the absence of a racially discriminatory effect, the State of North Carolina must demonstrate, at a minimum, that the proposed redistricting plans will not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, supra, 425 U.S. at 141. While the State is under no obligation to maximize minority voting strength, the State must demonstrate that the plan "fairly reflects the strength of [minority] voting power as it exists." Mississippi v. United States, 490 F. Supp. 569, 581 (D.D.C. 1979), citing Beer v. United States, supra, 425 U.S. at 139 n.11 and 141; and City of Richmond v. United States, 422 U.S. 358, 362 (1975).

We have given careful consideration to all of the forwarded materials, as well as past legislative reapportionment plans, comments from interested citizens, and other information available to us. With regard to the Senate plan, we note at the outset that the proposed redistricting plan was developed by the North Carolina Legislature pursuant to a 1968 amendment to the North Carolina Constitution which provides that no county shall be divided in the formation of a Senate or Representative district. As you know, on November 30, 1981, the Attorney General interposed an objection to that amendment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, because "[o]ur analysis show[ed] that the prohibition against dividing the 40 covered counties in the formation of Senate and House districts predictably requires, and has led to the use of, large multi-member districts." Our review of the 1968 amendment also showed "that the use of such multi-member districts necessarily submerges cognizable minority population concentrations into large white electorates." Accordingly, we have reviewed the Senate plan not only to determine whether the proposed plan would lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," Beer, supra 425 U.S. at 141, but also to see whether it fairly reflects minority voting strength as it exists today. State of Mississippi v. United States, 490 F. Supp. 569 (D.D.C. 1979).

Our analysis of the Senate plan shows that in several counties covered by the Voting Rights Act's special provisions, such as in Guilford, Wilson, Nash, Bertie, Edgecomb and Martin, there are cognizable concentrations of minority persons whose political strength is diluted as a result of the use of multi-member districts in the proposed redistricting plan. In Guilford, for example, the State has proposed the creation of a three-member district with a black population percentage of only 25 percent. Yet, under a fairly-drawn system of single-member districts in that area, one such district likely would be majority black and, therefore, would better recognize the potential of blacks to elect representation of their choice.

Likewise, in Wilson, Nash, Edgecomb, Martin and several of the counties in proposed District 1 which are covered jurisdictions, the State proposes to create multi-member districts in which black voters seem to have no opportunity to elect candidates of their choice. Here again, fairly-drawn single-member districts would likely result in Senate districts that would not, as the proposed Senate plan does, minimize the voting potential of black voters in those covered counties.

Understandably, these effects of the proposed Senate reapportionment plan well may have been the result of the State's adherence to the 1968 constitutional amendment which, as we have already found, necessarily requires a submerging of sizeable black communities into large multi-member districts. In view of the concerns discussed above, however, I am unable to conclude, as I must under the Voting Rights Act, that the proposed Senate redistricting plan is free of a racially discriminatory purpose or effect. Accordingly, on behalf of the Attorney General, I must interpose an objection to the Senate plan under Section 5 of the Voting Rights Act of 1965 as it relates to the covered counties.

With respect to the Congressional redistricting, we have also completed review of that submission. During the course of our review, we were presented with allegations that the decision to exclude Durham County from Congressional District No. 2 had the effect of minimizing minority voting strength and in addition was motivated by racial considerations, i.e., the desire to preclude from that district the voting influence of the politically-active black community in Durham. On the basis of the information that has been made available to us, we remain unable to conclude that the State's decision to draw District No. 2 was wholly free from discriminatory purpose and effect. In this connection we find particularly troublesome the "strangely irregular" shape of Congressional District No. 2 (see Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)), which appears designed to exclude Durham County from that district contrary to the House Congressional Redistricting Committee's recommendation.

We note also that, over the past several redistrictings, the black population percentage in District 2 has been decreased. Prior to the State's 1971 redistricting District No. 2 was approximately 43 percent black. Under the 1971 reapportionment plan, District 2 decreased to 40.2 percent black population. The 1981 submitted plan would reduce further the black population in the district to 36.7 percent. This reduction in black population percentage, occurring despite a statewide increase in the black population, is especially crucial in District 2, because it occurs in the only district where black voters could have the potential for electing a candidate of their choice.

We recognize that the State may want to respond further to the claims that a racially discriminatory purpose and effect were involved in the Legislature's decision to circumvent Durham. However, because of the time constraints imposed on the Attorney General by Section 5, and the unanswered questions still remaining, I cannot conclude that the burden imposed on the State by Section 5 has been sustained. Accordingly, I must interpose an objection also to the Congressional redistricting insofar as it affects the covered counties. However, should the state desire to present to us information relating to the configuration of District 2 which would address the allegations mentioned above, we stand ready to reconsider this determination as provided in the Section 5 guidelines.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the Congressional redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the Congressional redistricting plan legally unenforceable in the covered counties.

If you have any questions concerning this matter, please feel free to call Carl W. Gabel (202/724-7439), Director of the Section 5 Unit of the Voting Section. As always, we stand ready to assist you in any way possible in your reapportionment effort.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

18 NOV 1981

Honorable Daniel R. McLeod
Attorney General
Wade Hampton Office Building
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. McLeod:

This is in reference to Act No. R249 (1981), providing for the reapportionment of the South Carolina House of Representatives. Your submission, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, was received on September 19, 1981, and supplemented thereafter with additional materials forwarded to us by Mr. Robert J. Sheheen, Chairman of the House Judiciary Committee.

We have given careful consideration to all of the forwarded materials, as well as other information available to us. The submitted reapportionment includes 124 single-member districts, the overwhelming majority of which are unobjectionable. We are, however, unable at this time to preclear the reapportionment plan since there are a limited number of districts which fail to satisfy the requirement under the Act that they be drawn in a manner that does not have a discriminatory effect.

Under Section 5, the State bears the burden of proving the absence of both discriminatory purpose and effect in the proposed House redistricting plan. City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980); Beer v. United States, 425 U.S. 130, 140-41 (1976). In order to prove the absence of a racially discriminatory effect, the State of South Carolina must demonstrate, at a minimum, that the proposed House redistricting plan will not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, supra, 425 U.S. at 141. While the State is

under no obligation to maximize minority voting strength, the State must demonstrate that the plan "fairly reflects the strength of [minority] voting power as it exists." Mississippi v. United States, 490 F. Supp. 569, 581 (D.D.C. 1979), citing Beer v. United States, supra, 425 U.S. at 139 n.11 and 141; and City of Richmond v. United States, 422 U.S. 358, 362 (1975).

On the basis of our review of the proposed reapportionment plan we find certain districts drawn in a manner that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, supra, 425 U.S. at 141. In this regard, we have carefully analyzed the submitted plan in comparison to the prior reapportionment plan as drawn in 1974. In examining the "old" plan, we have, as the law requires, viewed the districts "from the perspective of the most current available population data," City of Rome v. United States, supra, 446 U.S. at 186 (i.e., the 1980 census data). On that basis, we have found noticeable dilution or fragmentation of the minority vote in Florence County (Proposed District Nos. 59, 62, 63), Richland County (Proposed District Nos. 70, 72, 73, 74, 75, 76, 79), Lee County (Proposed District Nos. 50, 65, 66), Allendale-Bamberg-Barnwell Counties (Proposed District Nos. 90, 91), and Jasper-Beaufort Counties (Proposed District No. 122).

We are aware that alternate proposals were presented which would have avoided the fragmentation and dilution of minority voting strength in each of the referenced areas, and we have received complaints alleging that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that reasonably available alternative plans for each of these districts could be drawn which would avoid the fragmentation and dilution of minority voting strength and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. In these circumstances, and in light of the existing patterns of racial bloc voting in South Carolina and the current underrepresentation of blacks in the South Carolina House of Representatives, we are unable to conclude that the State has met its burden of proving that the plan, at least as it affects the referenced areas, meets the requirements of the Act.

Since I am unable to conclude that Act No. R249 (1981) providing for the reapportionment of the South Carolina House of Representatives was enacted by the Legislature without a racially discriminatory purpose or effect, I must, on behalf of the Attorney General, interpose an objection to Act No. R249 pursuant to Section 5 of the Voting Rights Act of 1965.

Of course, as provided by Section 5 of the Voting Rights Act, you may seek a declaratory judgment from the United States District Court for the District of Columbia that the House reapportionment plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, the Procedures for the Administration of Section 5 (Sec. 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. Until the objection is withdrawn or unless a declaratory judgment from the District Court for the District of Columbia is obtained, the effect of the Attorney General's objection is to render the reapportionment of the South Carolina House of Representatives legally unenforceable.

If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439) Director of the Section 5 Unit in our Voting Section. You can be assured that we are prepared to assist you in any way possible in connection with your reapportionment efforts.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

17 JUL 1981

Perkins Wilson, Esq.
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Dear Mr. Wilson:

This is in reference to the reapportionment of the Virginia Senate by Chapter 2, 1981 Acts of the General Assembly (Special Session), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on May 19, 1981.

We have given careful consideration to the materials you have submitted, as well as information and comments of other interested parties and information contained in other Department files. On the basis of our review, the Attorney General does not interpose any objection to the Senate reapportionment except with respect to the districts discussed below.

At the outset, we note that on May 7, 1971, the Attorney General found it necessary to interpose an objection to the division line between Senate districts 5 and 6 in the City of Norfolk. At that time the Department concluded that "[t]he division of Senate districts 5 and 6, which divides concentrations of Negro voters, appears contorted and does not conform to natural boundaries", while more natural boundaries appeared feasible, which would have avoided such an adverse effect on the black voting strength. As a result of that objection the 1971 legislation was amended to relocate the boundary between districts 5 and 6 in such a way as to eliminate substantially the bifurcation of black concentrations in the city. As so modified, the plan was precleared on August 13, 1971.

The precleared plan was not implemented because of the lack of accurate data regarding the residence of Naval personnel. Instead, the federal court ordered an interim plan combining districts 5, 6, and 7 into one multi-member district. That plan was to stay in effect until the General Assembly enacted a single-member district plan consistent with legal requirements. See Mahon v. Howell, 410 U.S. 315 (1973).

Our current analysis shows that one of the most striking elements of the plan presently under submission is the similarity of its characteristics to those of the plan objected to in 1971 insofar as districts 5 and 6 are concerned. Our inquiry has revealed that the boundary between districts 5 and 6 in the 1981 plan cuts through the black community in such a way that neither district has more than a 37-percent black population. At the same time, our analysis shows that the Senate rejected an alternative configuration which would have combined contiguous black neighborhoods, producing a district in which black persons would have constituted a majority. There is substantial information that this choice of district lines was made with the full awareness and expectation that it would fragment the black electorate and create two majority white districts.

In its consideration of the current plan, the Virginia Senate was aware that in 1971 the Attorney General had found it necessary to interpose an objection to the then proposed configuration of districts 5 and 6 because those lines appeared unnecessarily to fragment concentrations of black voters, and that that objection had been overcome by the reconstruction of those districts in a way which did not divide the black concentration in the southern part of the city. The Commonwealth has presented no plausible non-racial justification for its choice of district lines in Norfolk, strikingly similar to the unacceptable 1971 plan.

Under these circumstances I am unable to conclude, as I must under the Voting Rights Act, that the presently proposed district lines within Norfolk were drawn without any discriminatory racial purpose or effect. Accordingly, I must, on behalf of the Attorney General, interpose an objection to Chapter 2, 1981 Acts of the Virginia General Assembly (Special Session) insofar as districts 5 and 6 of the plan are concerned.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor the effect of

denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the reapportionment of the Virginia Senate legally unenforceable with respect to the districts in question.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the State of Virginia plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Perkins Wilson, Esq.
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

JUL 31 1981

Dear Mr. Wilson:

This is in reference to the reapportionment of the Virginia House of Delegates by Chapter 5, 1981 Acts of the General Assembly (Special Session), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on July 2, 1981. In accordance with your request, this submission has been reviewed on an expedited basis.

Under Section 5, the Commonwealth of Virginia has the burden of proving that its proposed reapportionment does not represent a retrogression in the position of its black residents, and that the new plan was adopted without any racially discriminatory purpose. See Beer v. United States, 425 U.S. 130 (1976). We have carefully reviewed the material you submitted and for the most part find the proposed reapportionment plan to have neither the purpose nor effect of diluting or abridging the voting rights of black citizens.

However, there is one general area where the proposed plan appears to dilute and fragment black voting strength unnecessarily. According to the 1980 census the southern part of the Commonwealth contains five contiguous rural counties with black population majorities (Brunswick, Greensville, Sussex, Surry and Charles City). The nearby City of Petersburg also has a majority black population of 61.09%. Under the pre-existing apportionment plan four of the five black majority counties were grouped together with New Kent County to make up District 45, which by 1980 census figures was 53.09% black. In the proposed plan each of the five majority black counties is combined with one or more predominently white counties in such a way that there is a black minority in each of the resulting districts (Nos. 26, 27, 35, 41 and 46). We note that one of the resulting districts (No. 27), which combines Nottaway, Dinwiddie and Greensville Counties and Emporia City, connected only by a two mile stretch of the Nottaway River, does not seem to comply with the Commonwealth's standard of compactness.

Testimony prepared for the pending lawsuits indicate that the legislature was aware that dispersing the majority black counties that were in former district 45 would necessarily dilute the voting strength of blacks in this area.

Similarly, the City of Peterburg is combined in the plan with the virtually all white city of Colonial Heights resulting in a district (No. 28) which is 43.66% black. This district was formed notwithstanding the fact that Colonial Heights had historically been associated with Chesterfield County and, in fact, had been combined under the 1971 plan with Chesterfield to form District No. 36 which, with a population of 157,881, could have been continued as a viable three-member district in the new plan. This latter approach was supported by representatives of the Colonial Heights city government. Material submitted to us indicates there are a number of options available that would not have the effect of diluting the voting strength of the black citizens of Petersburg.

Accordingly, after careful consideration of the materials you have submitted, as well as comments and information provided by other interested parties, I am unable to conclude, as I must under the Voting Rights Act, that the submitted plan for the reapportionment of the House of Delegates is free of any racially discriminatory purpose or effect in the described area. For that reason, I must, on behalf of the Attorney General, interpose an objection to Chapter 5 of the 1981 Acts of the General Assembly of Virginia (Special Session) as it affects the district lines in the SouthsidePetersburg area.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect

of the objection by the Attorney General is to make the reapportionment of the Virginia House of Delegates legally unenforceable with respect to the districts in question.

We are aware that there is a severe time problem if the Commonwealth is to hold timely elections for the General Assembly. Please be assured that we stand ready to do all we can to assure that any future review of such limited changes as may be necessary to comply with the requirements of Section 5 is accomplished in the most expeditious way possible. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Attachment D

VOTING RIGHTS SUITS INITIATED BY THE UNITED STATES
FROM JANUARY 1, 1975 THROUGH DECEMBER 11, 1981

Case	Type */	Date Filed	Prevailing Party **/
United States v. Grenada County (Mississippi), C.A. No. WC-75-44-K (N.D. Miss., May 30, 1975)	§5	5/14/75	Plaintiff
United States v. Bolivar County (Mississippi), C.A. No. DC 75-52-K (N.D. Miss., March 29, 1976)	§5	6/4/75	Plaintiff
United States v. Board of Supervisors of Forrest County (Mississippi), C.A. No. H75-71(C)(S.D. Miss., July 6, 1979)	D,§5	7/21/75	Plaintiff
United States v. City of Albany (Dougherty County, Georgia), 437 F. Supp. 137 (M.D. Ga. 1977)	D	7/21/75	Plaintiff
United States v. The Democratic Executive Committee of Noxubee County, Mississippi, C.A. No. E75-39(N) (S.D. Miss., June 25, 1976)	O	7/29/75	Defendant
United States v. Board of Commissioners of Bessemer (Jefferson County, Alabama), C.A. No. 76-H-470-S (N.D. Ala., July 17, 1978)	§5	4/2/76	Defendant
United States v. Hale County Commission (Alabama), C.A. No. 76-403-P (S.D. Ala.), aff'd, 430 U.S. 924 (1977)	§5	7/29/76	Plaintiff

*/ "D" denotes a dilution suit; "§5" denotes Section 5 enforcement actions; "O" denotes other types of cases.

**/ The plaintiff is listed as the prevailing party where the suit achieved its desired objective even though, for example, the lawsuit awaits final resolution of some issues or ultimately was resolved by consent of the parties.

Case	Type	Date Filed	Prevailing Party
United States v. Board of Commissioners of Sheffield, Alabama (Colbert County), 435 U.S. 110 (1978)	§5	8/9/76	Plaintiff
United States v. East Baton Rouge Parish School Board, C.A. No. 76-252 (M.D. La., June 6, 1980)	D	8/17/76	Plaintiff
United States v. Georgia, C.A. No. C76-1531A (N.D. Ga.), aff'd, 436 U.S. 941 (1978)	§5	9/17/76	Defendant
United States v. St. Landry Parish School Board (Louisiana), C.A. No. 76-1062 (W.D. La., December 5, 1979)	O	10/6/76	Plaintiff
United States v. State of Texas (Waller County), 445 F. Supp. 1248 (S.D. Tex.), aff'd, 439 U.S. 1105 (1979)	O	10/14/76	Plaintiff
United States v. The New York State Board of Elections, C.A. No. 76-Civ-440 (N.D. N.Y., November 4, 1976 and November 10, 1980)	O	10/30/76	Plaintiff
United States v. Board of Trustees of Westheimer I.S.D. (Texas), 494 F. Supp. 738 (S.D. Tex. 1980), aff'd, 450 U.S. 901 (1981)	§5	1/20/77	Plaintiff
United States v. Board of Trustees of Midland I.S.D. (Midland County, Texas), C.A. No. MO-77-CA-17 (W.D. Tex., June 2, 1978)	§5	3/24/77	Plaintiff
United States v. Hawkins I.S.D. (Wood County, Texas), C.A. No. TY-77-81-CA (E.D. Tex., August 5, 1979)	§5	3/26/77	Plaintiff
United States v. Board of Trustees of Trinity I.S.D. (Trinity County, Texas), C.A. No. H-77-487 (S.D. Tex., March 28, 1978)	§5	3/28/77	Plaintiff

Case	Type	Date Filed	Prevailing Party
United States v. Board of Trustees of Chapel Hill I.S.D. (Smith County, Texas), C.A. No. TY-77-137-CA (E.D. Tex., December 21, 1978)	§5	5/6/77	Plaintiff
United States v. City of Kosciusko, Mississippi (Attala County), C.A. No. EC-77-72-K (N.D. Miss., October 3, 1977)	D,§5	5/9/77	Plaintiff
United States v. City Commission of Texas City (Galveston County, Texas), C.A. No. G-77-78 (S.D. Tex., February 17, 1978)	D	5/12/77	Plaintiff
United States v. Uvalde Consolidated I.S.D. (Texas), C.A. No. DR-77-CA-20 (W.D. Tex.)	D	9/19/77	Pending
United States v. Temple I.S.D. (Bell County, Texas), C.A. No. W-78-CA-10 (W.D. Tex., May 20, 1978)	D	1/12/78	Plaintiff
United States v. Town of Bartelme (Shawano County, Wisconsin), C.A. No. 78-C-101 (E.D. Wis., October 11, 1978)	O	2/15/78	Plaintiff
United States v. Village of Dickinson (Galveston County, Texas), C.A. No. G-78-35 (S.D. Tex., May 2, 1979)	§5	2/17/78	Plaintiff
United States v. Board of Trustees of Somerset I.S.D. (Atascosa and Bexar Counties, Texas), C.A. No. SA-78-CA-84 (W.D. Tex., December 26, 1978)	§5	3/10/78	Plaintiff
United States v. South Dakota and Fall River County, 636 F.2d 241 (8th Cir. 1980), cert. denied, 49 U.S.L.W. 3926 (1981)	O	4/4/78	Plaintiff
United States v. County Council of Chester County (South Carolina), C.A. No. 78-881 (D.S.C., November 12, 1979)	§5	6/1/78	Plaintiff

Case	Type	Date Filed	Prevailing Party
United States v. Sumter County Council (South Carolina) C.A. No. 78-883 (D.S.C.)	§5	6/2/78	Pending
United States v. County Council of Charleston County (South Carolina), 473 F. Supp. 541 (D.S.C. 1979)	§5	6/2/78	Defendant
United States v. Board of Commissioners of Colleton County (South Carolina), C.A. No. 78-903-8 (D.S.C., February 17, 1981)	§5	6/2/78	Plaintiff
United States v. Marengo County Commission (Alabama), C.A. No. 78-474-H (S.D. Ala.)	D	8/25/78	Pending
United States v. Thurston County (Nebraska), C.A. No. 78-0-380 (D. Neb., May 9, 1979)	D	8/30/78	Plaintiff
United States v. Humboldt County, Nevada, C.A. No. 78-144 (D. Nev., January 19, 1979)	O	9/7/78	Plaintiff
United States v. Barbour County Commission (Alabama), C.A. No. 78-348-N (M.D. Ala., October 23, 1979)	§5	9/8/78	Plaintiff
United States v. City of Hattiesburg (Forrest County, Mississippi), C.A. No. H-78-0147(C)(S.D. Miss.)	D	10/2/78	*/
United States v. Dallas County Commission and School Board (Alabama), C.A. No. 78-578 H (S.D. Ala.)	D	10/19/78	Pending
United States v. City and County of San Francisco, C.A. No. C-78-2521-CFP (N.D. Calif., May 19, 1980)	O	10/27/78	Plaintiff
United States v. Tripp County (South Dakota), C.A. No. 78-3045 (D.S.D., November 1, 1978)	§5	11/1/78	Plaintiff

*/ Voluntarily dismissed by plaintiff.

Case	Type	Date Filed	Prevailing Party
United States v. City of Houston (Harris County, Texas), C.A. No. 78-H-2407 (S.D. Tex., July 19, 1979)	§5	12/13/78	Plaintiff
United States v. Pike County Commission (Alabama), C.A. No. 79-245-N (M.D. Ala., October 12, 1979)	§5	5/29/79	Plaintiff
United States v. County of San Juan (New Mexico), C.A. No. 79-507 JB (D. N.Mex., April 8, 1980)	D	6/21/79	Plaintiff
United States v. County of San Juan, New Mexico, C.A. No. 79-508 JB (D. N.Mex., April 8, 1980)	O	6/21/79	Plaintiff
United States v. State of South Dakota, C.A. No. 79-3039 (D.S.D., May 21, 1980)	§5	6/26/79	Plaintiff
United States v. State of South Carolina and Horry County, C.A. No. 79-2467-5 (D.S.C., April 4, 1980)	§5	12/21/79	Plaintiff
United States v. County School Trustees of Harris County (Texas), C.A. No. H-80-143 (S.D. Tex., June 11, 1980)	§5	1/18/80	Plaintiff
United States v. City of Port Arthur (Jefferson County, Texas), C.A. No. B-80-216-CA (E.D. Tex., August 3, 1981)	§5	3/14/80	Plaintiff
United States v. State of South Carolina, C.A. No. 80-730-8 (D. S.C.)	D	4/18/80	*/
United States v. Clarke County Commission (Alabama), C.A. No. 80-0547-H (S.D. Ala., April 17, 1981)	D,§5	9/2/80	Plaintiff

*/ Voluntarily dismissed by plaintiff.

Case	Type	Date Filed	Prevailing Party
United States v. County of Santa Clara (California), C.A. No. C-80-4103 WWS (N.D. Calif., March 25, 1981)	O	11/4/80	Plaintiff
United States v. Florida, C.A. No. TCA-1055 (N.D. Fla., November 6, 1980)	O	11/6/80	Plaintiff
United States v. Board of Registrars of Sumter County (Alabama), C.A. No. CV-81-P-1075-W (N.D. Ala.)	§5	7/14/81	Pending
United States v. Louisville Municipal Separate School District, C.A. No. EC 81-318-LS-P (N.D. Miss.)	§5	12/1/81	Pending

Attachment E

"BAILOUT" SUITS FILED UNDER SECTION 4(a) OF THE VOTING RIGHTS ACT OF 1965, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
Apache, Navajo and Coconino Counties, Arizona v. United States, 256 F.Supp. 903 (1966)	2/4/66	Plaintiff (7/26/66) */
Elmore County, Idaho v. United States, C.A. No. 320-66	2/9/66	Plaintiff (9/22/66)
Alaska v. United States, C.A. No. 101-66	4/28/66	Plaintiff (8/17/66)
Wake County, N.C. v. United States, C.A. No. 1198-66	5/9/66	Plaintiff (6/23/67)
Nash County, N.C. v. United States, C.A. No. 1702-66	6/27/66	Defendant (9/26/69)
Gaston County, N.C. v. United States, 395 U.S. 285 (1969)	8/11/66	Defendant (6/2/69)
Alaska v. United States, C.A. No. 2122-71	10/26/71	Plaintiff (3/10/72)
New York v. United States, C.A. No. 2419-71	12/3/71	Plaintiff (4/3/72) **/
Commonwealth of Virginia v. United States, 386 F.Supp. 1319 (1974), affirmed, 420 U.S. 901 (1975)	6/5/73	Defendant (1/27/75)

*/ With respect to all suits in which the plaintiff prevailed, the Attorney General consented to the bailout.

**/ Reopened 11/5/73, and recovered 1/10/74.

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
New York v. United States, C.A. No. 2419-71	11/5/73	Defendant (1/10/74)***/
Maine v. United States, C.A. No. 75-2125	11/25/75	Plaintiff (9/17/76)
Yuba County, California v. United States, C.A. No. 75-2170	12/30/75	Defendant (5/25/76)
Curry, McKinley and Otero Counties, New Mexico v. United States, C.A. No. 76-0067	1/12/76	Plaintiff (7/30/76)
Choctaw and McCurtain Counties, Oklahoma v. United States, C.A. No. 76-1250	7/6/76	Plaintiff (5/12/78)
El Paso County, Colorado v. United States, C.A. No. 77-0185	2/1/77	Defendant (11/8/77)
City of Rome v. United States, 446 U.S. 156 (1980)	5/9/77	Defendant (4/22/80)
Alaska v. United States, C.A. No. 78-0484	3/21/78	Defendant (5/10/79)

***/ Rescinded the 4/3/72 bailout judgment.

Attachment F

"BAILOUT" SUITS FILED UNDER SECTION 203 OF
THE VOTING RIGHTS ACT OF 1965, AS AMENDED
THROUGH DECEMBER 11, 1981

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
Maine v. United States, C.A. No. 75-2125 (D.D.C.)	11/25/75	Defendant (7/5/77)
Simenson v. Bell (Roosevelt County, Montana), C.A. No. CV-76-59-HG (D. Mont.)	6/22/76	Defendant (3/17/78)
Doi v. Bell (Hawaii), C.A. No. 77-0256 (D. Hawaii)	7/14/77	Split (partial) */
County of Placer (Calif.) v. United States, C.A. No. S-80-123 MLS (E.D. Cal.)	2/20/80	Defendant (6/13/80)

*/ Summary judgment granted for Japanese language minority in Maui County, denied for all others, 449 F. Supp. 267 (3/28/78); remainder of case dismissed (8/21/79).

Attachment C

USE OF EXAMINERS TO LIST VOTERS
JANUARY 1, 1972 THROUGH DECEMBER 11, 1981

MISSISSIPPI

Dates	Counties	No. Listed
September 20-23, 1972	Madison	273
June 8, 10-15, 1974	Pearl River	181
May 2,3,9,10,16,17,23, 24,30,31; June 7, 1975	Madison	404
September 5,6, 11-13, 18-20, 1975	Humphreys	261

Attachment H

NUMBER OF FEDERAL OBSERVERS ASSIGNED

JANUARY 1, 1972

through

DECEMBER 11, 1981

ALABAMA

Elections	Counties	No. of Observers
May 2, 1972 Primary	Choctaw	20
August 8, 1972 Special Election	Dallas	10
November 7, 1972 General	Hale Wilcox	42 68 110
May 7, 1974 Primary Election	Choctaw Hale Lowndes Wilcox	24 30 18 30 112
June 4, 1974 Primary Run-Off	Sumter	22
November 5, 1974 General	Greene Lowndes Talladega Wilcox	18 24 54 14 110
May 4, 1976 Primary	Dallas Wilcox	42 44 86
May 25, 1976 Primary Run-Off	Choctaw Wilcox	14 20 34
August 10, 1976 Municipal	Sumter (Gainesville)	3
November 2, 1976 General	Perry Sumter Wilcox	25 21 12 58

ALABAMA

Elections	Counties	No. of Observers
September 5, 1978 Primary	Hale	47
	Marengo	101
	Pickens	27
	Sumter	48
	Wilcox	16
		3 (Reserves)
		242
September 26, 1978 Primary Run-Off	Hale	35
	Marengo	94
	Russell	65
	Sumter	7
	Wilcox	21
		222
November 7, 1978 General	Bullock	32
	Wilcox	105
		137
July 8, 1980 Municipal	Pickens (Aliceville)	15
	Sumter (Epes & Geiger)	6
		21
September 2, 1980 Primary	Conecuh	68
	Hale	49
	Pickens	16
	Wilcox	30
		163
September 23, 1980 Primary Run-Off	Conecuh	25
November 4, 1980 General	Sumter	63

CALIFORNIA

Elections	Counties	No. of Observers
November 7, 1978 General	San Francisco	146
December 11, 1979 Run-Off	San Francisco	140

GEORGIA

Elections	Counties	No. of Observers
August 8, 1972 Primary	Baker	6
	Taliaferro	6
		12
August 29, 1972 Primary Run-off	Taliaferro	12
November 7, 1972 General	Peach	20
August 13, 1974 Primary	Hancock	30
November 5, 1974 General	Hancock	34
December 10, 1975 Municipal	Terrell (Dawson)	11
August 10, 1976 Primary	Meriwether	15
	Stewart	13
	Terrell	27
		55
August 31, 1976 Primary Run-Off	Stewart	12
April 10, 1978 General	Hancock (Sparta)	4
August 5, 1980 Primary	Bulloch	9
	Calhoun	18
	Early	19
	Johnson	33
	Mitchell	19
	Sumter	26
	Telfair	16
	Tift	14
		156

LOUISIANA

Elections	Parishes	No. of Observers
August 19, 1972 Primary	De Soto St. Helena	16 24 40
September 20, 1972 Primary Run-off	St. Helena	6
November 7, 1972 General	De Soto	14
March 23, 1974 Municipal Primary	East Carroll (Lake Providence) Madison (Tallulah)	12 20 32
May 4, 1974 Primary Run-Off	East Carroll (Lake Providence)	12
September 28, 1974 School Board Run-Off	Sabine	12
November 1, 1975 Primary	East Carroll Madison DeSoto	38 56 5 99
December 13, 1975 Primary Run-Off	East Feliciana St. Helena	13 4 17
August 14, 1976 Primary	East Carroll East Feliciana	30 3 33
October 27, 1979 Primary	Plaquemines East Carroll St. Helena	27 11 44 82
December 8, 1979 Primary Run-Off	East Carroll St. Helena	34 14 48

Elections	Parishes	No. of Observers	
April 5, 1980 Special School Board	St. Landry	12	

MISSISSIPPI

Elections	Counties	No. of Observers	
August 24, 1972 Special Run-off	Humphreys	6	
November 7, 1972 General	Claiborne Issaquena Madison Wilkinson	38 14 47 36 135	
November 21, 1972 Special Run-off	Issaquena	5	
April 1, 1974 Municipal	Yazoo (Yazoo City)	8	
May 28, 1974 Local Special	Marshall	20	
November 5, 1974 General	Kemper	48	
December 17, 1974 Special	Kemper	24	
August 5, 1975 Primary	Benton Claiborne Hinds Leflore Madison Marshall Noxubee Sunflower Warren Yazoo	11 38 14 81 63 65 57 71 42 46 4 492	(Reserves)

MISSISSIPPI

Elections	Counties	No. of Observers	
August 26, 1975 Primary Run-Off	Benton	6	
	Clay	16	
	Hinds	12	
	Holmes	14	
	Humphreys	8	
	Madison	67	
	Marshall	42	
	Noxubee	12	
	Oktibbeha	16	
		8	(Reserves)
		201	
November 4, 1975 General	Benton	12	
	Bolivar	55	
	Claiborne	38	
	Holmes	20	
	Humphreys	59	
	Issaquena	2	
	Jefferson	26	
	Leflore	81	
	Madison	57	
	Marshall	110	
	Noxubee	57	
	Sharkey	20	
	Tallahatchie	6	
	Tunica	8	
	Wilkinson	20	
		24	(Reserves)
		595	
September 7, 1976 Special Election	Grenada (City of Grenada)	9	
September 14, 1976 Run-Off	Grenada (City of Grenada)	10	
November 2, 1976 General	Clay	16	
	DeSoto	51	
	Issaquena	4	
	Noxubee	26	
	Tunica	16	
		113	

Elections	Counties	No. of Observers
May 10, 1977 Primary	Noxubee (Macon)	7
	Sunflower (Sunflower & Moorhead)	6
	Bolivar (Shaw)	4
	Hinds (Edwards)	3
	Leflore (Itta Bena)	4
	Tallahatchie (Tutwiler)	2
	DeSoto (Hernando)	2 28
May 16, 1977 Primary Re-run	Bolivar (Shaw)	5
May 17, 1977 Primary Run-Off	Marshall (Holly Springs)	5
June 7, 1977 General	Bolivar (Shaw) Holmes (Tchula)	5 5 10
June 28, 1977 Special	Tunica	24
August 16, 1977 Special	Marshall	14
September 13, 1977 General	Leflore (Sidon)	3
April 3, 1978 General	Yazoo (Yazoo City)	16
November 14, 1978 Special	Tunica	5
November 28, 1978 Run-Off	Tunica	5

Elections	Counties	No. of Observers
December 11, 1978 Municipal	Bolivar (Rosedale)	5
August 7, 1979 Primary	Bolivar	13
	Covington	21
	Greene	15
	Humphreys	30
	Jasper	18
	Kemper	44
	Marshall	105
	Tallahatchie	52
	Wilkinson	26
	Yazoo	19
		343
August 28, 1979 Primary Run-Off	Covington	8
	Greene	8
	Humphreys	38
	Kemper	11
	Marshall	136
	Tallahatchie	33
	Yazoo	34
		268
October 2, 1979 Special	Yazoo	7
November 6, 1979 General	Bolivar	32
	Covington	12
	Claiborne	73
	Greene	10
	Holmes	33
	Humphreys	38
	Marshall	136
	Noxubee	65
	Tunica	28
	Yazoo	34
		461
November 27, 1979 Special Election	Warren	89
December 11, 1979 Special Run-Off	Warren	44
May 13, 1980 Special Election (Supt. of Education)	Humphreys	21

Elections	Counties	No. of Observers
November 4, 1980 General	Claiborne	54
	Clay	36
	Humphreys	27
	Noxubee	71
	Quitman	20
	Yazoo	23
		231
November 18, 1980 Run-Off	Noxubee	15
	Yazoo	7
		22
May 12, 1981 Municipal Primary	Marshall (Holly Springs)	11
	Quitman (Marks)	5
	Tallahatchie (Tutwiler)	4
		20
May 19, 1981 Municipal Primary Run-Off	Picayune (Pearl River)	26
June 2, 1981 Municipal General	Holmes (Tchula)	4
November 10, 1981 Primary	Sunflower (Indianola)	10
December 8, 1981 General	Sunflower (Indianola)	12

NEVADA

Elections	Counties	No. of Observers
September 12, 1978 Primary	Humboldt	3

SOUTH CAROLINA

Elections	Counties	No. of Observers
November 7, 1972 General	Clarendon	50
	Dorchester	55
		105

Elections	Counties	No. of Observers
June 27, 1978 Primary Run-Off	Marion	12
November 7, 1978 General	Darlington	55

TEXAS

Elections	Counties	No. of Observers
May 1, 1976 Primary	Wilson Uvalde Medina Fort Bend	18 [illegible] 57 18 117
November 2, 1976 General	Bee Frio LaSalle	24 26 26 76
May 6, 1978 Primary	Reeves	59
June 3, 1978 Primary Run-Off	Reeves	15
August 12, 1978 Special Run-Off	Crockett	8
November 7, 1978 General	El Paso	8
November 4, 1980 General	Atascosa	19

WISCONSIN

Elections	Counties	No. of Observers
February 21, 1978 Primary	Shawano (Bartelme)	3
April 4, 1978 General	Shawano (Bartelme)	3

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

25 FEB 1982

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in further response to your letter of December 2, 1981, concerning enforcement of the Voting Rights Act and analysis of H.R. 3112, the House-passed bill to amend the Act. My January 8, 1982 letter replied to some of your questions. This letter completes our response.

> 5. Describe in detail the Department's policy on annexations: What percentage reduction of minority voting strength is deemed to constitute a denial or abridgement of their right to vote? Under what circumstances will the Department require a municipality to change its form of government as a condition of approval? What provisions of the Act or passages in its legislative history justify these policies? What decisions of the Supreme Court justify these policies? What positions did the Department advocate in those cases?

a. The Department's policies concerning annexations are based on Section 5, which applies to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on the date used to determine coverage under Section 4(b), e.g., November 1, 1964. To obtain preclearance, either from the U.S. District Court for the District of Columbia or from the Attorney General, a jurisdiction must show that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or * * * [membership in a language minority group]."

In Allen v. State Board of Elections, 393 U.S. 544, 565-569 (1969), the Supreme Court held that Section 5 applied to a change from district to at-large voting. 1/ The Court's reasoning was as follows:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See Reynolds v. Sims, 377 U.S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

393 U.S. at 569.

In 1970, Congress enacted a five-year extension of the Act's special provisions, including Section 5. The House report and the joint statement of ten members of the Senate Judiciary Committee expressed approval of the Supreme Court's decision in Allen. 2/

In a 1971 decision, Perkins v. Matthews, the Supreme Court held that annexations are within the scope of Section 5. 400 U.S. 379, 387, 390. The United States did not participate in Perkins, but, in holding that annexations are covered, the Court relied in part upon testimony to that effect given by this Department during the 1969-1970 Senate hearings on extending the Act. See 400 U.S. at 391-394. 3/

In 1975, the Act's special provisions were extended for seven years. The legislative history indicates Congress' approval of Perkins and continued approval of Allen. 4/ Also, the com-

1/ This Department filed a memorandum for the United States as amicus curiae, taking the position that the change to at-large elections (as well as the other changes at issue in Allen) was covered by Section 5.

2/ H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969); Joint Views of Ten Members of the Senate Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5521 (1970).

3/ In 1971, this Department issued its first set of guidelines for implementing Section 5. Annexations were included in the list of covered changes. See 28 C.F.R. § 51.4(c)(3).

4/ See, e.g., H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975).

mittee reports listed, as an example of practices showing the need to continue Section 5, "annexations of predominantly white areas." 5/

In 1973, in City of Petersburg v. United States, the Supreme Court affirmed the denial of preclearance with regard to an annexation that would have changed the city's population from majority black to majority white. 354 F. Supp. 1021 (D.D.C. 1972), aff'd per curiam, 410 U.S. 962. 6/

In City of Richmond v. United States, 422 U.S. 358, 371-372 (1975), the Supreme Court held that, in the context of a fairly drawn system of single-member districts for electing the city council (which system would replace the pre-annexation at-large system), the annexation in question would not have the racial effect proscribed by Section 5. 7/ The case was remanded

5/ H.R. Rep. No. 94-196 at 10; S. Rep. No. 94-295 at 16.

6/ This Department had previously objected to the annexation.

The district court did not find that the annexation had a racial purpose, but found that the city had failed to meet its burden of proving the absence of racial effect. 354 F. Supp. at 1027-1028. The district court stated the following:

> The Court concludes then, that this annexation, insofar as it is a mere boundary change and not an expansion of an at-large system, is not the kind of discriminatory change which Congress sought to prevent; but it also concludes, in accordance with the Attorney General's findings, that this annexation can be approved only on the condition that modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, i.e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen.

354 F. Supp. at 1031.

7/ In Richmond, 422 U.S. at 370, the Supreme Court stated the following:

> Petersburg was correctly decided. On the facts there presented, the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from partici-

to the district court, however, for further proceedings with regard to the issue of racial purpose. 8/ 422 U.S. at 375.

In City of Rome v. United States, 446 U.S. 156, 187 (1980), the Supreme Court upheld the denial of preclearance to a group of annexations. 9/

7/ (continued)

> pation in the governing of the city through membership on the city council. We agreed, however, that that consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen. It is our view that a fairly designed ward plan in such circumstances would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community.

8/ The result reached by the Supreme Court in Richmond--remand for further proceedings on the issue of purpose--is the course that this Department had proposed.

9/ In City of Rome, this Department's position was that the annexations should not receive preclearance.

The Supreme Court's reasoning was as follows:

> The District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See Perkins v. Matthews, 400 U.S., at 388-390. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system "fairly reflects the strength of the Negro community as it exists after the annexation[s]." City of Richmond v. United States, 422 U.S., at 371. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.

466 U.S. at 187.

Another pertinent decision is Beer v. United States, which is discussed below.

b. In evaluating annexations submitted for review under Section 5, the policy of the Department is to apply the standards developed by the federal courts. This is done on a case-by-case basis in consideration of all the relevant facts.

Among the factors considered are the effects of the proposed annexation upon the racial make-up of the total population, voting-age population, and registered voters. However, the Department does not use any rigid mathematical cut-off. Each submission is evaluated individually. The existing method of government, including whether the electoral system provides for majority or plurality voting, for full-slate or "single-shot" voting, and for election by district or at-large voting, is considered, along with such matters as the extent of racial bloc voting. We also consider the history of annexations by the jurisdiction.

When an objection is interposed to changes caused by an annexation, our practice is to indicate the kinds of action the municipality might take that would render the change unobjectionable. The Department is always willing to discuss matters of this kind with the municipalities.

> 6. Describe in detail the Department's policy on reapportionment: What sort of mathematical standards are used to determine when a reapportionment constitutes a denial or abridgement of the right to vote? What other objective criteria are taken into account? How does the Department determine what sort of changes to require as a condition for approval? What provisions of the Act or passages in its legislative history justify these policies? What decisions of the Supreme Court justify these policies? What positions did the Department advocate in those cases?

a. The statutory basis for applying Section 5 to reapportionment plans is the language that was interpreted in Allen.

In Georgia v. United States, 411 U.S. 526 (1973), the Court held that a reapportionment statute was subject to Section 5. 10/

10/ This was an action by the United States to enforce Section 5, i.e., to enjoin implementation of a state reapportionment law that had not been precleared. The district court held in favor of the United States, and the Supreme Court affirmed.

The Supreme Court pointed out that the reasoning of Allen "all but conclusively established" that Section 5 covers redistricting laws. 411 U.S. at 532. The Court noted Congress' awareness of and acceptance of Allen and the practice of this Department and covered jurisdictions. 411 U.S. at 533-534.

Another pertinent decision is White v. Regester, 412 U.S. 755, 765-769 (1973), in which the Supreme Court sustained the lower court's decision that use, in a statute establishing districts for the Texas legislature, of multi-member districts in Dallas and Bexar Counties was unconstitutional, because they were "being used invidiously to cancel out or minimize the voting strength of" blacks and Mexican-Americans respectively (412 U.S. at 765). 11/

The legislative history of the 1975 amendments to the Voting Rights Act emphasized the need for continuing the application of Section 5 to the redistricting process in covered states. 12/ The committee reports noted with approval the decision in White v. Regester. 13/

In Beer v. United States, 425 U.S. 130 (1976), 14/ the Court enunciated a standard concerning "retrogression," which it explained as follows:

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . . ." H. R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to

11/ The United States did not participate in White v. Regester.

12/ See, e.g., H.R. Rep. No. 94-196 at 10-11; S. Rep. No. 94-295 at 17-18.

13/ H.R. Rep. No. 94-196 at 19; S.Rep. No. 94-295 at 27.

14/ Beer was an action by the City of New Orleans to obtain preclearance of the reapportionment of its councilmanic districts. This Department opposed the granting of preclearance. The district court denied the declaratory judgment sought by the city, but the Supreme Court held that the lower court had erred in concluding that the plan would have racially discriminatory effect.

> insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.
>
> It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.

425 U.S. at 141 (footnote omitted).

Also relevant is United Jewish Organizations v. Carey, 430 U.S. 144 (1977). 15/ The Court held that New York's use of racial criteria in redistricting Kings County was not unconstitutional. 16/ 430 U.S. at 161 (White, J., with Stevens, Brennan and Blackmun, Js.), 179-180 (Stewart, J., with Powell, J., concurring in the judgment).

b. In evaluating reapportionment or redistricting plans submitted under Section 5, as in evaluating annexations, the Department applies the legal standards that have been developed by the courts. In doing so, we proceed on a case-by-case basis, in the light of all of the facts, without imposing any rigid mathematical standards.

15/ This action, brought by Hasidic Jews who resided in Kings County, New York, challenged the constitutionality of a state redistricting statute (adopted after a prior statute had been objected to by the Attorney General, pursuant to Section 5). The lower courts upheld the state statute.

This Department filed a brief in the Supreme Court, asserting that the lower courts had properly dismissed the Attorney General as a party and that the redistricting plan did not violate the plaintiffs' Fourteenth or Fifteenth Amendment rights. The Supreme Court affirmed the judgment of the court of appeals.

16/ After the Attorney General objected to its initial redistricting plan, the state adopted a new plan creating, in Kings County, 65-percent nonwhite majorities in two additional senate and two additional assembly districts.

Most often, the question presented is whether new district boundary lines lead to retrogression in the ability of members of racial groups to participate in the electoral process. Relevant considerations include the racial make-up of the total population, voting-age population, and registered voters in the districts before and after the boundary lines of the districts were redrawn. Other factors that are considered include the method of election and the compactness and contiguity of the districts. 17/

The Department does not require any particular change as a condition for preclearance. However, we do discuss with the submitting jurisdiction possible methods of bringing the apportionment plan into compliance with Section 5. If the jurisdiction wishes, our Section 5 guidelines allow informal discussion of possible revisions. For example, we might discuss particular revisions of boundary lines or electoral practices.

8. Describe in detail the Department's policy regarding institution of suits to protect voting rights: How many different sorts of suits are authorized by statute? What criteria does the Department employ in determining when to bring each type of suit? What different sorts of relief are authorized by statute? What criteria does the Department employ in determining which sorts of relief to request in a particular case?

a. A number of statutory provisions authorize the Attorney General to bring civil actions to protect voting rights. This authority relates not only to discrimination on the basis of race or membership in a language minority group, but also to provisions concerning durational residency requirements, 18/ voting age, 19/

17/ Regarding submissions such as reapportionments of legislative bodies, including state legislatures, we also consider the racial impact of deviations from one-person, one-vote requirements.

18/ Section 204(b) of the Voting Rights Act as amended, 42 U.S.C. 1973aa-2(b).

19/ Section 301(a)(1) of the Voting Rights Act, as amended, 42 U.S.C. 1973bb(a)(1).

and the rights of overseas citizens. 20/ In addition, there are criminal laws prohibiting interference with voting rights. 21/

Under Section 12(d) of the Voting Rights Act, 42 U.S.C. 1973j(d), the Attorney General is authorized to sue to enforce the Act's special provisions, including Section 5, and also such permanent provisions as Sections 2 and 3. Another statute granting authority to sue to prevent racial discrimination regarding voting is Section 131 of the Civil Rights Act of 1957, 42 U.S.C. 1971(c). See also Title IX of the 1964 Civil Rights Act, 42 U.S.C. 2000h-2.

Under Section 204 of the Voting Rights Act, as amended, 42 U.S.C. 1973aa-2. the Attorney General is empowered to sue to enforce Section 201, the permanent prohibition against use of literacy tests, and Section 203, which imposes bilingual election requirements on certain counties.

b. For more than ten years, the main priority of the Civil Rights Division in the area of voting has been enforcement of Section 5, the preclearance requirement. Our administrative implementation, i.e., processing changes submitted to the Department, is supplemented by litigation. We defend suits brought by a jurisdiction to obtain judicial preclearance of a change. In addition, we initiate suits to enforce Section 5--suits in the local federal district court to enjoin operation of changes that have not been precleared.

In recent years, the category accounting for the second largest number of the Civil Rights Division's voting rights suits is litigation to remedy dilution of the voting rights of blacks or a language minority group.

In deciding whether to initiate a suit, we use the following criteria: the strength of the evidence of a violation, whether the violation is egregious, the jurisdiction's response to our

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20/ Section 7(a) of the Overseas Citizens Voting Rights Act, 42 U.S.C. 1973dd-3(a).

21/ E.g., 18 U.S.C. 241-242; 18 U.S.C. 245(b)(1)(A), added by Section 101(a) of the Civil Rights Act of 1968; Sections 11(c)-(e) and 12(a)-(c) of the Voting Rights Act, as amended, 42 U.S.C. 1973i(c)-(e); 1973j(a)-(c). If an alleged violation of one of the criminal statutes involves discrimination based on race or membership in a language minority group, the matter is handled by the Criminal Section of the Civil Rights Division. If such discrimination is not involved, the matter is handled by the Criminal Division.

efforts to obtain voluntary compliance, the number of persons affected, the existence of legal issues between the United States and the jurisdiction, and the availability of our resources.

c. As noted above, provisions of the Voting Rights Act and other statutes dealing with the right to vote authorize both civil and criminal relief, but, since 1975, the Civil Rights Division has brought only one criminal prosecution in the area of voting rights.

The statute that we use most frequently is Section 12(d) of the Voting Rights Act, 42 U.S.C. 1973j(d), which provides that in the event of violation of specified provisions of the Act, such as Section 2 or Section 5, "the Attorney General may institute for the United States * * * an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order * * *." Also, declaratory judgments are authorized (see 28 U.S.C. 2201).

In determining what remedies to seek in litigation, the Department is basically guided by the nature of the violation: the defendants should take the action needed to bring them into compliance with federal law and remedy the effects of the violation. As a rule, declaratory and injunctive relief are the forms of relief most often sought. Such relief is generally sufficient to insure the federally protected rights of the victims of voting discrimination. Sometimes, the Department also finds it necessary to seek other relief. 22/

In an action to enforce Section 5, the basic relief is an injunction against implementation of the non-precleared change in voting laws. At times, such a suit may involve an effort to postpone or set aside an election.

In a dilution suit under Section 2, e.g., a suit challenging the at-large method of election, we seek adoption of a nondiscriminatory system.

9. List all suits to protect voting rights initiated by the Department since 1975. Describe in detail in each case how the criteria described above were applied.

a. My letter of January 8 included a list of the voting rights suits we have initiated since January 1, 1975. See Attachment D to that letter.

22/ For example, in one case, the United States initiated civil contempt proceedings after we determined that the defendants in a pending case had failed to comply with a federal court order.

b. To indicate application of the criteria outlined in our reply to question 8, we are attaching a summary of each of the cases listed in Attachment D. These summaries are Attachment I to the present letter.

10. List all suits for bailout filed under the Act since 1965. Describe the criteria used by the Department in determining whether to consent to bailout. Describe how the Department's actions in each case complied with those criteria.

a. Our January 8, 1982 response included lists of the bailout suits under Section 4(a) and Section 203(d). See Attachments E and F to that letter.

b. The criteria regarding consent to a bailout judgment depend upon the applicable statutory provisions.

(1) Section 4(a)

(A) In a bailout suit by a 1965- or 1970-covered jurisdiction, the issue is whether, during the applicable period (now, the 17 years preceding the filing of the suit), there was any use of a "test or device" with the purpose or effect of denying or abriding the right to vote on account of race. 23/ The definition of "test or device" applicable to these jurisdictions is set forth in Section 4(c) and includes requirements concerning literacy, educational achievement, good character, and the voucher of other persons.

The next-to-last paragraph of Section 4(a) states that the Attorney General "shall consent" to the entry of a bailout judgment if he "determines that he has no reason to believe" that any such discriminatory use of a test or device occurred during the applicable period. 24/

23/ Section 4(a) provides that a bailout judgment may not be issued to a jurisdiction for a period of 17 years after entry by a federal court of a final judgment determining that such discriminatory use of a test or device occurred within the territory of the jurisdiction.

24/ Section 4(d) sets forth a de minimis exception for cases in which the incidents of discriminatory use of a test were few in number and promptly corrected by state or local officials, and recurrence of such discrimination is unlikely.

(B) The coverage formula added to Section 4(b) in 1975 uses a new definition of "test or device." That definition, Section 4(f)(3), refers to conducting registration or elections solely in English in a jurisdiction with substantial "language minority group" population. 25/ This additional definition of "test or device" is the primary issue with regard to bailout by a 1975-covered jurisdiction, but does not apply to bailout from 1965 or 1970 coverage.

To obtain a bailout judgment, a 1975-covered jurisdiction must show that, during the preceding ten years, it did not use English-only elections for the purpose or with the effect of denying or abridging voting rights on the ground of membership in a language minority group.

(C) When a bailout suit is filed, our practice is to conduct an investigation in order to determine whether a test or device was used during the pertinent period and, if so, whether such use had the proscribed discriminatory purpose or effect.

If our investigation shows that there was no discriminatory use of a test or device, we consent to entry of a bailout judgment. Otherwise, we defend the suit and oppose entry of such a judgment.

(2) Section 203(d)

The issue in a bailout suit under Section 203(d) is whether "the illiteracy rate of the applicable language minority group within the [plaintiff] State or political subdivision is equal to or less than the national illiteracy rate." 26/ If the pertinent data on illiteracy showed that the jurisdiction satisfies the standard of Section 203(d), we would consent to the bailout judgment.

c. To indicate application of our criteria, we are attaching a summary of each of the bailout suits. See Attachment J. As noted in my January 8 letter, nine of the suits under Section 4(a) resulted in a bailout judgment, and each such judgment was based on the Attorney General's consent.

25/ The term "language minority group" refers to Hispanics, American Indians, Asian Americans and Alaskan Natives.

26/ The meaning of "illiteracy" for purposes of Section 203 is set forth in Section 203(b).

12. List all States and political subdivisions to which the Department has assigned federal examiners during the last ten years. Describe in detail the criteria, including written regulations and guidelines, used by the Department in determining whether to assign such examiners.

a. Our January 8 letter included lists of the counties to which examiners have been assigned during the past ten years. See Attachments G and H to that letter.

b. The statutory criteria employed by the Attorney General in certifying counties for the use of federal examiners are set forth in Section 6 of the Act, 42 U.S.C. 1973d. Examiners have two functions--listing persons whom the examiner found to be qualified to vote (see Sections 6 and 7 of the Act) and being present at an election to which federal observers are assigned (see Sections 8 and 12(e) of the Act).

The Department of Justice has not issued any regulations or guidelines regarding the criteria for using examiners. We will describe (1) our general practice concerning use of examiners to list qualified voters, (2) the specific circumstances that resulted in such use of examiners in two Mississippi counties in 1975, and (3) our practice with regard to use of federal observers (and therefore examiners) at an election.

(1) Section 6 of the Act, as amended, provides for the appointment of examiners (a) when authorized by a court pursuant to Section 3(a) of the Act or (b), in a county subject to the special provisions, when the Attorney General certifies (i) that he has received, from at least 20 of the county's residents, meritorious written complaints that their voting rights have been denied, under color of law, on account of race or membership in a language minority group or (ii) that, in his judgment, "the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment."

In making the latter determination, the Attorney General is required to take into account whether the ratio of nonwhite to white persons registered to vote appears reasonably attributable to violations of the Fourteenth or Fifteenth Amendment or whether bona fide efforts are being made to comply with those amendments. More specifically, the Department considers such factors as how long and how consistently the voter registration office is open, its location in relation to areas where minority registration is low and whether offices are set up in outlying areas; whether there has been intimidation of registrants ranging from discourtesy to violence; and whether standards are applied differently to white and minority applicants.

(2) The most recent use of examiners to list qualified voters occurred, in 1975, in Madison County and Humphreys County, Mississippi. Examiners were assigned to Madison County after the county registrar allowed whites, but refused to grant blacks, the opportunity for voter registration in outlying areas of the county, and the registrar closed his office to avoid registering blacks, refused to allow black applicants to be assisted by other blacks, and displayed a pistol while ordering a black registration worker and two black prospective applicants out of his office.

Federal examiners were assigned to Humphreys County after the county registrar caused lengthy delays in the registration of illiterate black voters, closed his office during the usual hours for voter registration, and refused to allow voter registration in the evening or on weekends, the only time available to many black field workers for registration.

(3) When a county is subject to an examiner certification, the Attorney General may direct the Office of Personnel Management to assign federal observers, persons who monitor the conduct of the election and the counting of votes. As noted above, whenever observers are assigned to an election, an examiner is also present.

In determining whether federal observers are needed at a particular election, we consider three basic factors: (a) the extent to which those who will run an election are prepared, e.g., whether there are sufficient voting hours and facilities, whether procedural rules for voting have been adequately publicized, and whether polling officials have been selected in a nondiscriminatory manner and are instructed in election procedures; (b) the confidence of the minority community in the electoral process and in the individuals conducting the election, including the extent to which minorities are allowed to be poll officials, and (c) the possibility that forces outside the official election machinery, such as racial violence or threats of violence or a history of discrimination in areas other than voting, may interfere with the election. Such factors are particularly important in an election where a minority candidate or a non-minority candidate who has the support of minority voters has a good chance of winning the election. Federal observers can provide a calming, objective presence and the observers can serve to prevent intimidation of minority voters at the polls and to assure that illiterate voters are provided with noncoercive assistance in voting.

For most of the states covered by the special provisions of the Act, we determine the need for federal observers through standard pre-election surveys. 27/

> 13. How many political subdivisions are covered by the preclearance provisions of the Act? List each State or political subdivision which, on the basis of all information available to the Department, would be unable to meet the bailout standard set by H.R. 3112, and in each case describe the reason for such inability.

a. Nine states are fully covered by the special provisions of the Voting Rights Act. This means that Section 5's preclearance requirement applies to each of those state governments, as well as to the 830 counties and independent cities within those states and to all of their subunits. In addition, the special provisions apply to a total of 82 political subdivisions in 13 other states. Please note that a list of the covered jurisdictions is set forth in the appendix to our Section 5 guidelines, Attachment A to my January 8, 1982 letter.

b. On October 1, 1981, I sent Congressman Railsback a letter discussing operation of the bailout standard of H.R. 3112. Included, as attachments, were detailed lists of the jurisdictions affected by certain criteria. A copy of this letter (which was included in the Congressional Record) is attached. See Attachment K. We are in the process of updating the lists, and I plan to provide them to the Subcommittee in connection with my testimony.

Please note that, because of lack of information on the nature of the criteria, we are not able to estimate the effect of the standards concerning (1) compliance with the procedural requirements of Section 5, (2) constructive efforts regarding registration and voting, (3) elimination of dilutive voting procedures and methods of election, or (4) the general provision on violation of federal or state prohibitions against voting discrimination.

27/ Our surveys begin with telephone inquiries to election officials in counties with significant minority populations. These inquiries are followed by telephone discussions with minority contacts in counties where minority and white or Anglo candidates are contesting a local office, and in counties where we have received complaints of discrimination in election procedures. Our surveys conclude with field investigations in counties where our telephone inquiries show that the assignment of federal observers may prove to be necessary. The final decision regarding the assignment of federal observers is made by the Assistant Attorney General on the basis of written recommendations that set out the facts obtained in the pre-election surveys.

14. Describe the criteria used by the Department in determining whether to enter into a consent decree, settlement, or agreement resolving voting rights litigation. What effect would the enactment of the provision of H.R. 3112 governing the consequences of such agreements have on the Department's policies?

a. In determining whether to enter into a consent decree, settlement or agreement resolving voting rights litigation, the Department's primary consideration is whether the actions to be taken by the parties to the consent decree will effectively achieve compliance with federal law.

The Department attempts to resolve lawsuits by consent of the parties whenever possible, because such resolution achieves compliance with federal law and, at the same time, allows for more efficient use of our limited resources.

b. Under the standard set forth in H.R. 3112, no bailout judgment would issue if the court were to determine, inter alia, that, during the applicable period, a consent decree had been entered into which resulted in the abandonment of a voting practice which was challenged on racial grounds. Although the enactment of this provision would not materially affect the Department's policies concerning consent decrees, the provision could well affect the willingness of defendant jurisdictions to enter into such decrees.

15. Describe the Department's interpretation of the term "voting procedures and methods of election which inhibit or dilute equal access to the electoral process" as used in H.R. 3112.

Section 1(b) of H.R. 3112 sets forth amendments to the bailout provisions of Section 4(a) of the Voting Rights Act, 42 U.S.C. 1973b(a). These amendments, which would take effect on August 5, 1984, would add a new set of standards for award of a bailout judgment. The required showing must be made with regard to the ten years preceding the filing of a bailout suit and the period during which the suit is pending.

The provision referred to in your question, proposed Section 4(a)(1)(F)(i), would require a state or political subdivision seeking a bailout judgment to prove, for the applicable period, that it and "all governmental units within its territory" have "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process." This provision was included in the bill as reported by the House Judiciary Committee, and no amendment regarding it was considered

during the House floor debate. Accordingly, the main evidence of its intended meaning is the report of the House committee, H.R. Rep. No. 97-227, 97th Cong., 1st Sess. (1981).

One issue relates to the coverage of Section 4(a)(1)(F)(i), that is, the meaning of "voting procedures" and "methods of election." Neither of the terms is defined in the bill. 28/ The House report states (p. 43) that "[v]oting procedures encompass requirements for voter registration and the registration process" and that "methods of election include the electoral process and the means by which public officials are elected." Some specific guidance is provided by the following explanation:

> The basis for this standard is the extensive committee record which shows clearly that discriminatory voting procedures and methods of election continue to prevail throughout the covered jurisdictions. This evidence indicates that the types of voting procedures and methods of election which have continuously been used in a discriminatory manner include: unduly restrictive voter registration procedures, multi-member legislative districts, at-large county-wide and citywide voting which denies a substantial minority population an equal opportunity to participate, majority vote-runoff requirements, prohibitions on single-shot voting, and others.

House report at 42-43.

To the extent that proposed Section 4(a)(1)(F)(i) would apply to the voter registration process, it is related to proposed Section 4(a)(1)(F)(iii). The latter provision would require, as a condition for bailout, proof that the jurisdictions in question

> have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

The basis for and meaning of subparagraph (iii) are explained as follows in the House report (pp. 43-44):

28/ The term "voting procedures" is similar to language appearing in Section 2 of the Act, 42 U.S.C. 1973, ("standard, practice, or procedure"), and Section 5, 42 U.S.C. 1973c, ("standard, practice, or procedure with respect to voting").

> The Committee hearing record is replete with examples of restrictive registration practices and procedures, such as restricted hours and locations for registration, dual registration practices, and discriminatory reregistration requirements, which continue to exist throughout the covered jurisdictions. A jurisdiction could meet the requirements of the subsection by offering expanded opportunities for registration through the appointment of deputy registrars who are accessible to minority citizens, offering evening and weekend registration hours, or providing postcard registration. Other examples of constructive efforts include appointment of minority citizens as deputy registrars, pollworkers, and to other positions which indicate to minority group members that they are encouraged to participate in the political process.

Thus, it appears that subparagraphs (i) and (iii) would require at a minimum that any covered jurisdiction seeking bailout not only eliminate any registration requirements or practices that might be said to disadvantage blacks or members of language minority groups, but also alternatively adopt such measures as necessary to enhance the opportunities for convenient registration and voting of minorities. 29/

The next set of issues relates to subparagraph (i)'s phrase "inhibit or dilute equal access to the electoral process." The House report states (p. 43) the following:

> The Committee's greatest concern is that a jurisdiction seeking bail-out be required to show that it, and governmental units within its territory, have eliminated voting procedures and methods of election which discriminate against or submerge minority voters. The requirement to eliminate means the elimination of all such structural and procedural barriers.

The report indicates that the requirement of proposed Section 4(a)(1)(F)(i) is aimed particularly at at-large election systems and is not limited to procedures or election methods that

29/ The House report states (p. 43) that proposed Section 4(a)(1)(F)(iii) "places an affirmative duty on covered jurisdictions to expand the opportunities for minority citizens to register and vote."

are unconstitutional. 30/ The applicable standard would be "purpose or effect"; the report states (p. 43) that the jurisdiction seeking a bailout judgment must provide "empirical evidence that its methods of election and voting procedures have neither the purpose nor the effect of discriminating." One obvious conclusion to be drawn is that virtually no covered jurisdiction with an at-large election system and substantial minority population will be permitted to obtain release from the special provisions unless that at-large system is eliminated--even if all the other criteria of the bailout provision can be fully satisfied.

> 16. Does the Department have sufficient resources at this time to respond to such bailout suits as may be brought under the existing Act? Does the Department have sufficient resources at this time to respond to such bailout suits as may be brought under H.R. 3112 were it to be enacted? If not, what other resources are needed?

a. As noted above, under the present bailout provision of Section 4(a), our response to a bailout suit includes an investigation in the jurisdiction. The extent of our litigative efforts depends on whether the case proceeds to discovery and trial. 31/

30/ After listing the examples of covered procedures and methods of election, the House report (p. 43) adds:

> Although they are not necessarily unconstitutional under existing standards, these voting procedures and methods of election cited by the Supreme Court and lower Federal courts as having a "built-in-bias" against minorities do not permit minorities "to enter into the political process in a reliable and meaningful manner." White v. Regester, 412 U.S. 755, 766-67 (1973); Zimmer v. McKeithen 485 F.2d 1297 (5th Cir. 1973) (en banc).
>
> For example, while in some areas with few minority citizens, at-large election may be a reform measure, the Committee heard extensive evidence about discriminatory at-large election systems n the covered jurisdiction [sic].

31/ Of the seven bailout suits filed after the 1975 Amendments to the Voting Rights Act, three were concluded by the entry of judgments in which we consented to bailout in the early stages of litigation, three were concluded by the jurisdiction's voluntary dismissal of the action in the early stages of litigation after we had determined that we could not consent to bailout, and one case, involving the City of Rome, Georgia, proceeded through all stages of litigation including appeal to the Supreme Court.

To date, the number of bailout suits has been limited, and our resources have been adequate to respond to those suits. 32/

In the event that Congress does not extend the Act before August 6 of this year, it is likely that, soon after that date, all or most of the 1965-covered jurisdictions would bring bailout suits. This could mean a total of six statewide suits and one or more suits by 39 North Carolina counties. 33/

Responding to a statewide bailout suit would be a substantial undertaking. The demands on our resources would depend in part upon the timing of the bailout suits, i.e., whether their filing is staggered over a period of months or whether several are filed at essentially the same time. If the resources of our Voting Section and the FBI proved to be inadequate, we would have to divert temporarily other resources available within the Department and might need to seek additional funds from Congress.

b. H.R. 3112, the House-passed bill, would substantially change the bailout process. First, a bailout suit could be brought by an individual county in a fully covered state. There are more than 800 such counties.

Second, new bailout standards would be applicable after August 1984, which would be the earliest possible date for bailout.

It is difficult, at this time, to estimate what the demands on our resources would be after August 1984, because that requires speculation as to the number and timing of bailout suits that would be filed and the issues that would be in dispute. It is possible that, in 1984 and the next several years, a large number of bailout suits would be filed. Still, the standards are such that it would be exceedingly difficult for a plaintiff jurisdiction to meet them. For example, a bailout effort by a state or a county could be defeated simply by showing that one of the towns within it had failed, during the preceding ten years, to obtain preclearance of one or more changes in voting laws. Accordingly, even if the number of suits were large, there might be few trials and few full investigations. Litigation of some legal issues, including appeals, might be necessary.

32/ The Civil Rights Division's litigation of voting suits in the district courts is handled by 17 attorneys in the Voting Section, including three supervisors.

33/ In August 1965, the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia became subject to Section 4(a). Of the North Carolina counties covered on the basis of the 1965 formula, 26 became subject to Section 4(a) in August 1965; the other 13 became subject in January or March 1966.

At some point, probably after 1992, the situation would change. That is, adjudication of the various issues presented by the bailout standards would be necessary. Such suits would be extremely difficult and complicated. They would, for example, entail litigating the purpose and effect of all electoral systems of the plaintiff jurisdiction and all the cities, towns and school districts within it. The demands on this Department with regard to investigating and litigating even a single suit of this type would be extremely great. Nonetheless, because it appears that such demands would not arise until many years in the future, we cannot be specific regarding the additional resources that would be needed.

17. In the Department's view are there any purposes served by the confinement of bailout litigation to the District of Columbia that could not equally well be served by litigation in other districts?

Under Sections 4(a) and 14(b) of the Voting Rights Act, exclusive jurisdiction over actions to terminate Section 4(a) coverage is vested in the United States District Court for the District of Columbia. Such actions are heard by a three-judge court, and there is a right of direct appeal to the Supreme Court.

In 1965, the reasons for confining bailout suits to the District Court for the District of Columbia were (1) a desire for uniformity of decisions at the trial-court level, (2) the belief that use of the District of Columbia court would mean prompt and impartial adjudication of the cases, thus avoiding problems that had been experienced in some of the federal courts in covered states, and (3) the convenience to this Department. 34/

During its consideration of H.R. 3112 on October 5, 1981, the House of Representatives debated and rejected an amendment, offered by Congressman Caldwell Butler, that would have permitted Section 4(a) bailout actions to be brought in the local federal district courts. 35/ Opponents of the amendment stated that, over the last 16 years, use of the District of Columbia court had worked well, and they maintained that the original reasons for

34/ See, e.g., H.R. Rep. No. 439, 89th Cong., 1st Sess. 19 (1965); 111 Cong. Rec. 10354-10355 (1965) (Senator Hart), id. at 10362-10363 (Senator Javits), id. at 16225 (Congressman Ryan).

35/ Under the amendment, the suits would be heard by a three-judge court, the members of which would be selected by the chief judge of the circuit and could not include "any of the judges normally assigned to * * * [the] judicial district." See 127 Cong. Rec. H 6948 (daily ed., Oct. 5, 1981).

limiting the suits to that court were still valid. 36/ The disadvantages of barring use of the local federal courts were discussed by Congressman Butler and other supporters of his amendment. 37/

Our view concerning this issue depends upon the nature of the bailout standards. The present provisions have been workable and, if the existing bailout standard is retained, we would favor continuing the exclusive jurisdiction of the District Court for the District of Columbia. If bailout standards similar to those of the House-passed bill are adopted, the arguments made in favor of permitting bailout suits to be brought in the local federal district courts are, in our opinion, more persuasive.

I hope that this letter will be of assistance.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Attachments

36/ See, e.g., 127 Cong. Rec. H 6951 (daily ed., Oct. 5, 1981) (Congressman Edwards); id. at H 6956 (Congressman Washington). See also H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 36 (1981).

37/ See, e.g., 127 Cong. Rec. H 6948-6950 (daily ed., Oct. 5, 1981) (Congressman Butler). See also H.R. Rep. 97-227 at 66-67 (dissenting views of Congressman Butler).

Senator HATCH. Thank you, Senator Grassley, for calling upon Senator Mathias, who will be our next witness.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. In view of the fact that we have spent a lot of time and I have had already an opportunity to get in a few words, I am going to ask permission to submit my statement for the record and then just make one point very briefly.

Senator HATCH. That will be fine. Your full statement will be made a part of the record as though fully delivered.

Senator MATHIAS. Since this question of intent is obviously the focal point of this discussion and I suspect will be throughout the month of February, I would like to say that I think that the amendment that we propose to section 2 is needed. I want to answer the chairman specifically. It is needed to clarify the burden of proof in voting discrimination cases and to remove the uncertainty caused by the failure of the Supreme Court to articulate a clear standing in the *City of Mobile* v. *Bolden*. In that case it was four members of the Court who interpreted section 2 to require that violations of the section be based on specific evidence of discriminatory purpose.

In this connection, I would say, Mr. Chairman, that the language that has been used this morning—we want to overrule the Court—is really not accurate. We are not trying to overrule the Court. The Court seems to be in some error about what the legislative intent was. We are simply trying to make it clear what I recall the legislative intent to have been, what the Attorney General recalls it to have been—Attorney General Katzenbach.

Prior to *Bolden*, a violation in voting discrimination cases can be shown by reference to a variety of factors that, when taken together, added up to a finding of illegal discrimination. But in *Bolden* the plurality appears to have abandoned this totality of circumstance test and to have replaced it with a requirement of specific evidence. By requiring the specific evidence of intent to discriminate, the plurality in *Bolden*—note, I say plurality, not majority——

Senator HATCH. There were six Justices, were there not, who endorsed an intent standard?

Senator MATHIAS. Places a virtually impossible burden on the plaintiffs.

The reason we need it is that plaintiffs must now reach back into time and produce direct evidence of discriminatory purpose. With all deference to the chairman, I think this is a requirement of a smoking gun, and I think it becomes a crippling blow to the overall effectiveness of the act.

Congress has the constitutional authority to refresh the memory of that plurality of the Court and to restore the original meaning to section 2, and that is merely what we are trying to do.

I will submit the balance of my statement so that the other witnesses can be heard.

Senator HATCH. Thank you, Senator Mathias.

I have one question for you, but let me first say this: It was more than a plurality. There were six Justices arguably who agreed that the intent standard was the standard under the 15th amendment. Six Justices reaffirmed that under the 15th amendment you have to have intent to have a violation. I think this opinion is shared by the majority of people who have read the case. I might even add that Justice White, in his dissent in *Mobile,* said that purpose was necessary. I think this is an important point to recognize.

Let me ask you this question.

Senator MATHIAS. Just so the record is clear, you said six members. There were four, and two concurred, but on other grounds.

Senator HATCH. The four concurring judges, Justice White, and perhaps one or two of the concurring justices.

Senator MATHIAS. Justice Blackmun concludes that the relief afforded appellees by the district court was not commensurate with the sound exercise of judicial discretion.

Senator HATCH. That is true about Blackmun; but it is hardly dispositive that he opposed the intent requirement.

Senator MATHIAS. I will stick with four.

Senator HATCH. Fine, but let us read the whole case.

I noted with great interest in the Washington Post recently a statement by Mr. John W. Douglas, chairman of the Maryland General Assembly's Black Caucus redistricting panel. He was quite concerned that the city of Baltimore which, as you know, is 55 percent black, would only have four out of nine house districts, only 44 percent of these districts, with a majority black population. Mr. Douglas said, as I recall, that he was dissatisfied with the plan for that reason and that the Black Caucus was considering legal action. Do you know if any suit has been initiated yet?

Senator MATHIAS. I do not know that.

Senator HATCH. Do you have any thoughts on such a suit's legal merits? Do you think that any of the changes in the proposed Voting Rights Act amendments may have an impact on his suit if it is ever brought?

Senator MATHIAS. I am sure it could well have some impact.

Senator HATCH. I am sure, too.

Senator MATHIAS. Depending on when the suit is brought, we get around to enacting this bill, and all that kind of thing.

Senator HATCH. Let us assume the bill is enacted and the suit is brought. What kind of an impact do you expect this law, assuming that the Supreme Court would uphold it, would have on Mr. Douglas' and his associate's suit to have proportional representation in the city of Baltimore with a 55 percent representation?

Senator MATHIAS. The impact of the law—and by that I assume you mean the bill——

Senator HATCH. That is right, should it be enacted in its present form, and not vetoed.

Senator MATHIAS. That is the first time that nasty word has been used—"veto."

Senator HATCH. No; it has been used repeatedly throughout these hearings this morning, not by anybody on the administration's part but by those questioning.

Senator MATHIAS. The purpose of the bill is to provide for fair and just access to the electoral process.

Senator HATCH. Is that the most fair and just means to achieve access—if 55 percent of Baltimore is black then 55 percent ought to be black majority districts?

Senator MATHIAS. A fair and just operation of the electoral process is to give all citizens equal access to vote, run, or otherwise participate in the process.

Senator HATCH. What does "equal access" mean, Senator Mathias?

Senator MATHIAS. You are well aware of what it means.

Senator HATCH. I want to know what you think it means, because I know what it means under the effects test in section 5. I think it means, as does the Attorney General of the United States, proportional representation.

Senator MATHIAS. You look at the totality of circumstances; that is what we have been doing.

Senator HATCH. That is what we do under the intents standard.

Senator MATHIAS. I do not think——

Senator HATCH. Of course we do.

Senator MATHIAS. You require some proof of intent. The Attorney General says that is not the same proof of intent that would be required under a criminal statute, or at least that is what I heard him say. Is that what you heard him say? He said it is not that kind of intent. I am not sure just what kind of intent he does mean.

Senator HATCH. I am quite confused as to the relevance of the circumstances that you are considering in their totality. For instance, the intent test would also allow all of these considerations to be evaluated by the court in question.

Senator MATHIAS. Is what you are really asking me, would this bill require proportional representation? If that is really your question, I can give you a quick answer—no.

Senator HATCH. I will give you an equally quick response: it most certainly would.

Senator MATHIAS. That is where we disagree.

Senator HATCH. You and the Attorney General and I disagree, I suppose.

Let me just say this: You talk about "equal access," and "totality of circumstances." In the *Lodge* case, for example, the totality of circumstances have been considered to arrive at a finding that there was an intent to discriminate.

The circumstances added up to an inference of intent, enough to go to the jury, as they do in criminal cases, but without that high of a standard of proof.

I do not understand what the question is that the Court asks itself in evaluating the totality of the circumstances under the results test. What precisely does the Court ask itself after it has looked at the totality of the circumstances? What is the standard for evaluation under the results test?

Senator MATHIAS. Look at the results.

Senator HATCH. That is all? You are saying that if there was absolutely no intent to discriminate, as the Court found in the *Mobile* case, yet the results were the election of disproportionately few minority candidates, that a case would be established? How would this effect a case such as that raised in Baltimore?

Senator MATHIAS. I do not think looking like discrimination—the Court has to find that there is discrimination. If the results are that people are being excluded, that is a condition that we want to remedy. It is not a punitive act, it is a remedial act. We want to remedy that condition.

Senator HATCH. How are you going to do that without looking predominantly at the numbers in a case such as the one I cited from Baltimore?

Senator MATHIAS. Of course you look at the numbers; you look at a variety of factors.

Senator HATCH. If there is no showing of intent, there is in fact no intent. If the numbers show what Mr. Douglas said, how does a community respond? What evidence does it offer? Would we be able to impose a voting system on Baltimore?

Senator MATHIAS. I can only repeat what I have said, Mr. Chairman. The Court would look at a variety of factors. I think they have to look beyond a lack of proportionality. They have to look at a lot of things. That is what we believe the law has required before the *Mobile* case. That is what we would simply restore; that is all.

Senator HATCH. Again, I am still confused as to the relevance of what you are talking about, with regard to these circumstances that you are considering in their totality. What precisely does the Court ask itself after it has looked at the totality of circumstances? Does it not really come down to a statistical numbers game and proportional representation?

Senator MATHIAS. You look at what goes on; you look at where people are, what they do; you look at a great variety of things.

Senator HATCH. Under present law—which the *Mobile* case articulates—I think the question asked is this: Do these circumstances—the totality of the circumstances—add up to an inference of intent? That is what the present law is.

Senator MATHIAS. Let me just suggest this to you. The record will either bear me out or will not, as the days unfold. I think we will hear about the impact of the *Bolden* case. You have just implied it is all so easy.

Senator HATCH. No, I have not.

Senator MATHIAS. You just look at this, that, and the other thing, and it all adds up, and there is no problem to it.

Senator HATCH. It should not be easy. I am not implying that it should be easy.

Senator MATHIAS. The impact of the *Bolden* case may well have been to chill the atmosphere here. We often hear of chilling effect—this may be another case of chilling effect—that very few cases have been filed, and people do not file because they are concerned about what they need to prove. They find the law in a vague and uncertain state. So their recourse, as a matter of fact, if not of law, has been narrowed and diminished. It is that situation that we want to correct.

Senator HATCH. Let me just suggest to you, Senator, that every one of these cases—the *Arlington Heights* case, the *Washington* v. *Davis* case, the *Mobile* v. *Bolden* case, the *Lodge* v. *Buxton* case, the *Escambia County* case, the *Feeney* v. *Mass* case, all recent cases—has held that under the doctrine of intent you can look at the totality of the circumstances.

What I am saying is that we have a test now, a test that has worked, that has proven to be correct, that fits within the Constitution, that has been articulated by the Supreme Court of the United States of America, and that is not inordinately difficult to prove. I do not believe that you have actually articulated what the Court asks itself under the effects tests.

It seems to me that the totality test, as you have expressed it, is irrelevant within the context of the effects test, because there is no standard by which they would evaluate the evidence, where with the intent test, at least, we have a standard which can be proven, and a standard which does work.

Senator MATHIAS. Mr. Chairman, I think you have perhaps summed up the difference between us very neatly in your last statement. You think it works; I do not think it works. You are going to sit here and hear a lot of testimony between now and February 25, and we hope that that testimony will persuade you. The present state of the law is not working. It provides an unreasonable burden of proof, and it is narrowing the remedy of grievances in the country.

Senator HATCH. Remember that the goal of American jurisprudence is not to facilitate convictions but to create justice. Frankly, I agree with you; if you adopt the effects test, complaints will be facilitated against almost every municipality in this country, but, in the vast majority of cases, on completely erroneous grounds. If you proved these cases under the present standard, which does work, I think the American public will understand and support the final decisions more readily than by having some nebulous, unproven, unstandardized approach to solving this complex issue that conceivably could allow anybody to bring a suit for any flimsy reason. Even in the absence of any intent to discriminate on the part of the municipality, the proposed changes in section 2 would result in people being branded as discriminators without any showing of intent.

Senator MATHIAS. Mr. Chairman, I think we are going back and forth here like a tennis game. Rather than continue this indefinitely, let me just offer you the universal response that the late great H. L. Mencken gave to all letters that he received, "You may be right."

Senator HATCH. Could I ask one other question, Senator? Do you know of any instances in your own personal experience—and you are a great civil rights advocate, for which I admire you—where the intent test as presently interpreted has proved inefficacious, invalid, or unbeneficial in any way?

Senator MATHIAS. There will be testimony presented on that very point——

Senator HATCH. Can you think of any?

Senator MATHIAS. I think rather than be repetitious, you have witnesses coming in who are going to discuss that point.

Senator HATCH. OK. We thank you, Senator Mathias.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

MR. CHAIRMAN, THE FUTURE OF THE MOST EFFECTIVE CIVIL RIGHTS ACT OF ALL TIME WILL BE DECIDED DURING THE SECOND SESSION OF THE 97TH CONGRESS. FOR THE NEXT SEVERAL WEEKS THIS SUBCOMMITTEE WILL HEAR TESTIMONY ON PROPOSALS TO EXTEND THE VOTING RIGHTS ACT OF 1965. TODAY, THE FATE OF THE 1965 ACT IS IN YOUR HANDS. FOR THAT REASON, I WELCOME THIS OPPORTUNITY TO TESTIFY BEFORE THE SUBCOMMITTEE ON THE IMPORTANCE I ATTACH TO EXTENDING THE VOTING RIGHTS ACT. I WILL ALSO EXPLAIN WHY I BELIEVE THAT S. 1992, WHICH I INTRODUCED ON DECEMBER 16, 1981 FOR MYSELF AND 60 OF MY COLLEAGUES, IS THE MOST APPROPRIATE VEHICLE FOR THE EXTENSION OF THE ACT.

IN 1870, THE 15TH AMENDMENT WAS ADDED TO THE CONSTITUTION. SECTION 1 SET OUT THIS SIMPLE, UNEQUIVOCAL COMMAND:

> THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE SHALL NOT BE DENIED OR ABRIDGED BY THE UNITED STATES OR BY ANY STATE ON ACCOUNT OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE.

BY PROVIDING A SPECIFIC CONSTITUTIONAL PROVISION PROTECTING THE RIGHT TO VOTE, THE RECONSTRUCTION CONGRESS ESTABLISHED ACCESS TO THE BALLOT AS A RIGHT JUST AS FUNDAMENTAL AND PRECIOUS AS THOSE INSCRIBED IN THE BILL OF RIGHTS BY OUR FOUNDING FATHERS. INCORPORATING THIS PRINCIPLE INTO OUR ORGANIC LAW CONSTITUTED A SOLEMN PROMISE THAT OUR SOCIETY WOULD NOT TOLERATE RACIAL BARRIERS PLACED IN THE WAY OF AMERICANS SEEKING ACCESS TO THE VOTING BOOTH.

UNFORTUNATELY, DESPITE THE UNAMBIGUOUS LANGUAGE OF SECTION 1, OF THE 15TH AMENDMENT, ITS PROMISE HAS NEVER BEEN FULLY REDEEMED. IN FACT, IT HAS OFTEN BEEN REPUDIATED AND IGNORED. FOR NEARLY A CENTURY, THAT PROMISE LAY DORMANT, BURIED IN LARGE PART BY AN AVALANCHE OF DISCRIMINATORY DEVICES SUCH AS LITERACY TESTS, POLL TAXES, GRANDFATHER CLAUSES, AND WHITE-ONLY PRIMARIES.

IT WAS NOT UNTIL THE LATE 1950'S THAT THINGS REALLY BEGAN TO CHANGE. THREE TIMES, FIRST IN 1957 AND AGAIN IN

1960 AND 1964, CONGRESS ENACTED LEGISLATION TO ENHANCE THE FEDERAL GOVERNMENT'S ABILITY TO FIGHT DISCRIMINATORY VOTING PRACTICES ON A CASE-BY-CASE BASIS. BUT, DESPITE THESE NEW LAWS, THE EVILS CONTINUED. WHY? THE ANSWER WAS QUITE SIMPLE. AS THE SUPREME COURT OBSERVED, TAKING THIS TEDIOUS, TIME-CONSUMING CASE-BY-CASE APPROACH MEANT THAT:

> EVEN WHEN FAVORABLE DECISIONS (WERE) ... FINALLY OBTAINED, SOME OF THE STATES AFFECTED ... MERELY SWITCHED TO DISCRIMINATORY DEVICES NOT COVERED BY THE FEDERAL DECREES OR...ENACTED DIFFICULT NEW TESTS DESIGNED TO PROLONG THE EXISTING DISPARITY BETWEEN WHITE AND NEGRO REGISTRATION.

THOSE BENT ON FRUSTRATING BLACK ACCESS TO THE VOTING BOOTH STAYED ONE STEP AHEAD OF THE FEDERAL COURTS. TO CATCH THEM UP, SOMETHING NEW WAS NEEDED. THAT NEW APPROACH WAS THE VOTING RIGHTS ACT OF 1965. BASICALLY, IT SUBSTITUTED A STREAMLINED, EVEN-HANDED ADMINISTRATIVE PROCEDURE FOR THE PIECE-MEAL LITIGATION THAT HAD PROVED SO INEFFECTIVE.

By passing the Voting Rights Act of 1965, Congress took a giant step toward turning the promise of the 15th Amendment into a reality. It signaled to the nation and to the entire world that systematic violations of the 15th Amendment would no longer be tolerated. With the enactment of the 1965 Act, Black Americans finally began to collect on what Dr. Martin Luther King called the "promissory note of the Constitution."

More than 16 years have passed since President Johnson signed the Voting Rights Act into law. Much has been accomplished under the Act. Since 1965, minority registration and voting have increased dramatically. The number of blacks registered to vote in South Carolina, Alabama, Mississippi, Louisiana, Georgia, Virginia, and parts of North Carolina has doubled since 1965. And, in the period between the 1976 and 1980 Presidential elections, Hispanic registration increased by 30 percent nationwide and 44 percent

IN THE SOUTHWEST. MEMBERS OF MINORITY GROUPS HAVE BEEN ELECTED TO PUBLIC OFFICE IN INCREASING NUMBERS. REAL PARTICIPATION HAS BECOME A FACT OF LIFE IN AREAS OF OUR COUNTRY WHERE POLITICS USED TO BE A GAME OF CHARADES ENJOYED BY A SELECT FEW.

CLEARLY MUCH HAS BEEN ACHIEVED UNDER THE VOTING RIGHTS ACT, BUT MUCH REMAINS TO BE DONE. WE STILL NEED THE VOTING RIGHTS ACT. UNLESS IT IS EXTENDED, THE HARD-WON PROGRESS OVER THE PAST 16 YEARS WILL BE PUT IN JEOPARDY. THIS POINT WAS MADE OVER AND OVER AGAIN LAST YEAR BY WITNESSES BEFORE THE HOUSE JUDICIARY SUB-COMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS ON PROPOSALS TO EXTEND THE VOTING RIGHTS ACT OF 1965.

THE HOUSE SUBCOMMITTEE HEARD TESTIMONY ABOUT THE CONTINUING NEED FOR THE VOTING RIGHTS ACT. FAR FROM MERELY REHASHING TALES OF ABUSES DATING BACK TO THE 1960S, THE HEARING RECORD CONTAINS NUMEROUS CONTEMPORARY EXAMPLES

OF VOTING DISCRIMINATION. SOME ARE REMINISCENT OF THE 1960s -- INTIMIDATION OR HARASSMENT OF MINORITY MEMBERS SEEKING TO VOTE OR REGISTER. BUT OTHERS REFLECT MORE SOPHISTICATED DODGES -- AT-LARGE ELECTIONS, ANNEXATIONS, MAJORITY VOTE REQUIREMENTS, PURGING OF VOTERS, AND EVEN CHANGES IN ESTABLISHED POLLING PLACES. SUCH TACTICS HAVE BEEN EFFECTIVELY EMPLOYED TO DILUTE THE IMPACT OF MINORITY VOTERS.

THE HOUSE HEARINGS ALSO DOCUMENTED WHAT WE HAD ALREADY SUSPECTED: THAT THE FEDERAL GOVERNMENT'S MOST EFFECTIVE TOOL AGAINST SUCH DEVICES IS SECTION 5 OF THE ACT, WHICH REQUIRES FEDERAL REVIEW OF CHANGES IN STATE AND LOCAL ELECTION LAWS AND PROCEDURES PROPOSED BY JURISDICTIONS WITH A HISTORY OF DISCRIMINATION. AND, THE HEARINGS MADE CLEAR THAT THE CONTINUED EFFECTIVENESS OF SECTION 2, THE ACT'S GENERAL PROHIBITION AGAINST VOTING DISCRIMINATION, HAD BEEN THROWN INTO QUESTION BY THE SUPREME COURT'S DECISION IN CITY OF MOBILE V. BOLDEN.

THE HEARING RECORD COMPILED BY THE HOUSE JUDICIARY SBUCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS CONVINCED THE HOUSE OF REPRESENTATIVES THAT AN EFFECTIVE VOTING RIGHTS ACT MUST BE PASSED. NOT ONLY MUST IT BE PASSED, BUT IT MUST BE PASSED PROMPTLY. UNLESS CONGRESS ACTS BY AUGUST 6, 1982, SECTION 5, IN EFFECT, WILL NO LONGER APPLY TO SEVERAL JURISDICTIONS OF SPECIAL CONCERN. ON TWO PREVIOUS OCCASIONS CONGRESS HAS FACED SIMILAR DEADLINES AND HAS ACTED IN THE NICK OF TIME TO EXTEND THE ACT.

MR. CHAIRMAN, I AM CONFIDENT THAT THE HEARING RECORD COMPILED IN THE COMING WEEKS BY THIS SUBCOMMITTEE WILL CONVINCE YOU AND YOUR COLLEAGUES THAT AN EFFECTIVE, PROMPT, EXTENSION OF THE ACT IS NOT ONLY JUSTIFIED, BUT THAT CIRCUMSTANCES COMPEL IT. THE REMAINING QUESTION THEN WILL BE WHAT FORM THE EXTENSION SHOULD TAKE. I HAVE HAD SOME THOUGHTS ON THIS SUBJECT, AND, SO HAS THE HOUSE OF REPRESENTATIVES.

TWICE IN THE 97TH CONGRESS I HAVE INTRODUCED BILLS TO EXTEND THE VOTING RIGHTS ACT. ON APRIL 7, 1981, SENATORS KENNEDY, METZENBAUM, WEICKER, BIDEN, CHAFEE, MOYNIHAN, CRANSTON AND I INTRODUCED S. 895, THE VOTING RIGHTS ACT AMENDMENTS OF 1981. THAT BILL WAS IDENTICAL TO H.R. 3112, WHICH WAS OFFERED ON THE SAME DAY BY PETER RODINO, CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE. BASICALLY, BOTH S. 895, AND H.R. 3112, WOULD HAVE EXTENDED UNTIL 1992 BOTH THE TEMPORARY PROVISIONS OF THE ACT, INCLUDING SECTION 5, AND THE LANGUAGE MINORITY PROTECTIONS ADDED IN 1975. IN ADDITION, THE BILLS WOULD HAVE CLARIFIED THE BURDEN OF PROOF IN VOTING DISCRIMINATION CASES BROUGHT UNDER SECTION 2 OF THE ACT.

THE ORIGINAL VERSION OF H.R. 3112, WAS REVIEWED EXTENSIVELY DURING THE HEARINGS BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS TO WHICH I HAVE PREVIOUSLY ALLUDED. AND, ON OCTOBER 5, 1981, THE HOUSE APPROVED A REVISED VERSION OF THE BILL BY AN OVERWHELMING VOTE OF 389-24.

On December 16, 1981, three fifths of my colleagues in the Senate and I introduced S. 1992, which is identical to the House-passed version of H.R. 3112. I urge the Subcommittee's favorable consideration of S. 1992. I do so for a number of reasons.

S. 1992 has broad bipartisan support. This was demonstrated by the House's decisive action in approving H.R. 3112, as amended, and by the large numbers of Democrats and Republicans who have joined together to sponsor its Senate counterpart. But, equally important, it is a fair proposal which we believe will be effective.

Make no mistake about it. S. 1992 is a compromise measure. It is by no means identical to the original versions of H.R. 3112 and S. 895. Some changes have been made and one of these represents an important compromise.

Specifically, S. 1992 contains a liberalized bailout provision which was adopted at the time of the mark-up by

THE HOUSE JUDICIARY COMMITTEE. UNDER THIS NEW PROCEDURE, JURISDICTIONS COVERED UNDER THE ACT'S SPECIAL PROVISIONS, INCLUDING SECTION 5 PRECLEARANCE, CAN BAILOUT MORE EASILY THAN IF PRESENT LAW WERE EXTENDED. S. 895 AND H.R. 3112, AS INTRODUCED, WOULD HAVE CONTINUED THE EXISTING AND MORE STRINGENT "BAILOUT PROCEDURES". IN MY VIEW, THIS CHANGE REPRESENTS A MAJOR ACCOMMODATION AND I SHARE THE BELIEF OF THE HOUSE JUDICIARY COMMITTEE THAT IT "WILL PROVIDE THE NECESSARY INCENTIVES TO THE COVERED JURISDICTIONS TO COMPLY WITH LAWS PROTECTING THE VOTING RIGHTS OF MINORITIES," AND THUS ALLOW THEM TO ACHIEVE EXEMPTION FROM THE ACT'S SPECIAL REQUIREMENTS.

MR. CHAIRMAN, I AM WELL AWARE THAT THIS REVISED "BAIL-OUT" PROCEDURE WILL BE THE SUBJECT OF MUCH DISCUSSION AT YOUR HEARINGS. ALSO CERTAIN TO BE DISCUSSED EXTENSIVELY IS THE AMENDMENT TO SECTION 2 OF THE VOTING RIGHTS ACT PROPOSED IN S. 1992.

THE AMENDMENT TO SECTION 2 IS NEEDED TO CLARIFY THE BURDEN OF PROOF IN VOTING DISCRIMINATION CASES AND THUS REMOVE THE UNCERTAINTY CAUSED BY THE FAILURE OF THE SUPREME COURT TO ARTICULATE A CLEAR STANDARD IN CITY OF MOBILE V. BOLDEN. IN BOLDEN, FOUR MEMBERS OF THE COURT INTERPRETED SECTION 2 TO REQUIRE THAT VIOLATIONS OF THE SECTION BE BASED ON SPECIFIC EVIDENCE OF DISCRIMINATORY PURPOSE. PRIOR TO BOLDEN, A VIOLATION IN VOTING DISCRIMINATION CASES COULD BE SHOWN BY REFERENCE TO A VARIETY OF FACTORS THAT WHEN TAKEN TOGETHER ADDED UP TO A FINDING OF ILLEGAL DISCRIMINATION. IN BOLDEN, THE PLURALITY APPEARS TO HAVE ABANDONED THIS "TOTALITY OF CIRCUMSTANCES" TEST AND TO HAVE REPLACED IT WITH A REQUIREMENT OF SPECIFIC EVIDENCE OF DISCRIMINATORY PURPOSE.

BY REQUIRING SPECIFIC EVIDENCE OF "INTENT" TO DISCRIMINATE, THE PLURALITY IN BOLDEN PLACES A VIRTUALLY IMPOSSIBLE BURDEN ON PLAINTIFFS. NOW, PLAINTIFFS MUST

REACH BACK INTO TIME AND PRODUCE DIRECT EVIDENCE OF DISCRIMINATORY PURPOSE. THIS "SMOKING GUN" REQUIREMENT IS A CRIPPLING BLOW TO THE OVERALL EFFECTIVENESS OF THE ACT. CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO CORRECT THE PLURALITY'S MISINTERPRETATION OF CONGRESSIONAL INTENT IN BOLDEN AND RESTORE THE ORIGINAL MEANING OF SECTION 2. OUR AMENDMENT TO SECTION 2 WOULD DO JUST THAT. SPECIFICALLY, S. 1992 WOULD AMEND SECTION 2 BY MAKING CLEAR THAT A VIOLATION EXISTS IN THOSE SITUATIONS WHERE THE CHALLENGED CONDUCT RESULTS IN A DENIAL OR ABRIDGMENT OF THE RIGHT TO VOTE.

I UNDERSTAND THAT SOME HAVE EXPRESSED CONCERN ABOUT THE PROPOSED AMENDMENT TO SECTION 2 IN S. 1992. IT HAS BEEN SAID THAT THIS NEW LANGUAGE MAY LEAD TO A STATUTORY REQUIREMENT OF PROPORTIONAL REPRESENTATION FOR MINORITY VOTERS. I THINK THESE CONCERNS ARE UNFOUNDED. AS THE ORIGINAL SPONSOR OF S. 895, I CAN SAY UNEQUIVOCALLY THAT LANGUAGE IN S. 895 AND H.R. 3112, AS INTRODUCED, DID NOT

HAVE ANY SUCH MEANING. HOWEVER, TO MAKE SURE THAT THERE WOULD BE NO DOUBT ABOUT THE IMPACT OF THE PROPOSED AMENDMENT TO SECTION 2, THE HOUSE JUDICIARY COMMITTEE ADDED SPECIFIC LANGUAGE ON THIS VERY POINT:

> THE FACT THAT MEMBERS OF A MINORITY GROUP HAVE NOT BEEN ELECTED IN NUMBERS EQUAL TO THE GROUP'S PROPORTION OF THE POPULATION, SHALL NOT, IN AND OF ITSELF, CONSTITUTE A VIOLATION OF THIS SECTION.

MR. CHAIRMAN, I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO APPEAR HERE TODAY. I LOOK FORWARD TO OUR WORKING TOGETHER IN THE WEEKS AHEAD AND TO WRITING WHAT I HOPE WILL BE THE FINAL CHAPTER IN THE VERY LONG AND DIFFICULT SAGA THAT HAS OCCUPIED THIS NATION FOR WELL OVER A CENTURY: THE STRUGGLE TO GUARANTEE THE RIGHT TO VOTE FOR ALL AMERICANS.

Senator HATCH. Senator Kennedy, we will take your testimony at this point.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Mr. Chairman, I appreciate that.

I would like to have my statement printed in its entirety in the record. We have a number of witnesses—many have come from out of town—whom I think we ought to hear from. I intend to be around during the course of these hearings, and I would like to hear from Mr. Hooks, Vilma Martinez, and Ms. Hinerfeld from the League of Women Voters, if we could.

Senator HATCH. I hope you want to hear from Dr. Berns also, Senator.

Let me just say this: We will put your full statement in the record. I have read it. I would like to just ask you one question and maybe discuss a few other points for a minute.

The specific application of the proposed new "results" standard in section 2 confuses me, for instance. Suppose, for example, that we are considering a hypothetical new mayor of Boston. Suppose that Boston has a minority population of approximately 22.4 percent. And suppose that Boston has a city council of approximately 11 percent minorities. This is slightly less than one-half of the minorities' representation in the population. Suppose further that the city of Boston elected its representatives on an at-large basis, a system of government that, as you know, many civil rights advocates consider unconstitutional. Suppose further that there was at least some credible evidence that the voting patterns in the minority and non-minority communities in Boston varied in some significant respects. Suppose too that there had been a history of segregated schools in Boston. Suppose that my exemplary mayor had a predecessor who had acknowledged in the newspapers a certain history of racial discrimination in Boston. Assume finally that the U.S. Civil Rights Commission had indicated that there was "a great deal of unfinished business of civil rights" in Boston. Let us assume all this.

Can you offer this mayor any assurances and, if so, specifically what assurances that he will not have the Justice Department, or the Lawyers Committee for Civil Rights, or the NAACP Legal Defense Fund suing the city of Boston upon passage of this act under the new "results" test? And what assurances could you offer to this mayor that his constituents in Boston are not going to have these organizations coming into his community and suing him and the community to dismantle its entire system of government?

This is a purely hypothetical situation of course, but I would like to have your response.

Senator KENNEDY. Supposing you write it out for me, and I will give you a written answer.

Senator HATCH. I have written it out, and I think the point is there.

Senator KENNEDY. I know you have written it out. Why do you not make a copy?

Senator HATCH. Sure.

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Senator KENNEDY. I thought these hearings were to hear witnesses this morning, and—

Senator HATCH. You were one of them.

Senator KENNEDY. We have heard a lot from some of the Senators. Let me just say that what basically we are attempting to do with our proposal is restore the rule of law as it was in the *White* decision.

There is no requirement for strict proportional representation at large elections, and to try and state that as part of our particular legislation is—I think the words were used earlier in the course of the hearing—a smokescreen. It basically fails to understand what the courts were dealing with in the *White* decision and what we are attempting to do with this legislation.

Senator Mathias' response was right on point. No matter how many times the question is asked, I think the answer is very much the same—that there is no requirement about a strict proportional representation at large elections. What will be considered is a variety of different factors, some of which have been outlined in the course of the hearings and in the committee report that was put out in the House, and I imagine there are going to be other factors to be considered by a court, not to be all inclusive. I think that is what we are getting at. That is what Senator Mathias has responded to. That is why I think this would be an important provision. No matter how many times the question is asked, that at least represents an answer.

Senator HATCH. Thank you, Senator.

I would hasten to point out about the *White* v. *Regester* decision that Mr. Justice Potter Stewart said in his Mobile decision that *White* v. *Regester* is, thus, consistent with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."

I would still be interested in the application of the new "results" test to my "hypothetical" New England community.

Senator KENNEDY. The fact is, Mr. Chairman, that as I understand a case similar to the condition which you described was brought regarding the Boston School Board. I will put that into the record, and I will point out that the plaintiffs lost under the standard of *White* v. *Regester*.

Senator HATCH. We will be happy to put it in the record although I am unsure of its relevance with respect to the new proposal.

Senator KENNEDY. Thank you.

[The prepared statements of Senator Kennedy and Senator Metzenbaum follow:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Today, the Senate Judiciary Committee begins consideration of the most important civil rights law of modern times -- the Voting Rights Act of 1965.

The Act is so crucial because the right it protects is so fundamental. The right to vote and to have that vote counted fully and fairly is essential to representative democracy. All other rights in a democracy flow from that right. Without full enjoyment of the right to vote a citizen cannot be sure he will have a fair opportunity to protect his other rights or to make the government responsive to his needs.

That is why we are here today. That is why the American people have expressed such a strong concern about the fate of the Voting Rights Act. And that is why Senator Mathias and I have introduced S. 1992 to preserve the precious protection of this Act.

There are a number of battles which this society went through in the 1960's and which we thought we had put behind us. Now, there are those who would open old wounds. On a number of fronts, they ask us to refight these old battles once again. It is a sad spectacle. But I am still hopeful that the Administration will not make that necessary -- at least in the case of voting rights.

One national commitment which the American people made in 1965 was that we would finally fulfill the proud promise of the 15th Amendment. For 100 years, the simple promise of the amendment remained largely unfulfilled. In many places blacks and other minorities could not vote.

The Voting Rights Act has ended that shameful blight for black and brown Americans. It has enabled all Americans to escape the prison of our past and to cleanse the stain of that past from our national conscience. The Voting Rights Act more than any other law symbolizes the fundamental decisions which America made two decades ago.

Twice before, in 1970 and 1975, the crucial provisions of the Act have been extended. Each time the Act has come under attack. But each time, the Congress on a bipartisan basis has come to its rescue. In 1975, the Act's protections was also extended to Hispanic Americans and other language minorities who have been the victim of similar discrimination in the right to vote.

Today, once more, the question before us is whether a strong, effective Voting Rights Act will continue to protect millions of our citizens. Or, will the Act be crippled under the guise of "streamlining" it, and making it more "reasonable?" We have heard those offers to revise the Act before. All too often they are code words for sophisticated efforts to gut the most successful civil rights law of our time. The choice is clear. We must not let that happen.

In the weeks ahead, we will hear a lot of technical discussion about "bail-out" and"intent test", about bilingual elections and Section 5 preclearance. But make no mistake about it. The issue to which those terms refer are not mere technicalities. They go to the core of our commitment to protect the right of every American to participate in the political process.

What is more, the American people understand that these are not minor technicalities. Civil Rights Groups, Bar Associations, religious and public interest organizations and individuals from all parts of the country who want a strong Act all understand that these are crucial questions. They know what this fight is all about. And they too are determined that this great law shall not be crippled.

As we hear the witnesses and review the record, it is important that we keep the central issues in focus. Today I want to emphasize five main points.

First, the Voting Rights Act is still needed,particularly the preclearance requirement of Section 5.

Second, the bill which Senator Mathias and I introduced with 59 of our colleagues and which the House passed by a 389-24 vote, is a reasonable compromise. It does not represent insistence on our druthers without any effort to accommodate the concerns of others. It is a significant revision of the bill which we introduced last Spring. The inclusion in this second bill, S. 1992, of a new liberalized bail-out procedure for those jurisdictions covered by Section 5 is a substantial modification of the law. It represents a major concession by those of us who favored the strongest possible legislation.

Third, if the bail-out is amended further, there is a serious danger that the extension of Section 5 will prove a hollow victory. A flimsey bail-out provision would become a seive. It would serve as a backdoor exit for many jurisdictions where the preclearance provision of Section 5 is still needed. It would be an indirect repeal of Section 5.

Fourth, we must be wary of the scare tactics and mis-information that will be used against the proposed amendment to Section 2 of the Voting Rights Act. We have already heard extremely misleading statements of what the law has been and of what our amendment would do. In fact, the Mathias-Kennedy bill would restore the law in voting discrimination cases to what it has been for most of the past 15 years.

The courts have made clear that under the standard in our bill there is no right to a quota or to proportional representation, even in the context of at large elections. Some have alleged that our bill would strike down at large elections unless minorities elected a proprotional share of the candidates. That allegation is false and misleading. The witnesses who will come before you will meet it head on. It is precisely the kind fo scare tactic which we do not need in dissussing something as scared and fundamental as the right to vote.

The last major point which I hope this Committe and the public will keep in mind concerns the bilingual election provisons of the Act. These provisions have proven successcul in bringing thousands of Americans into the political process who were previously unable or hesitant to participate because of their inabflity to speak and read English. We should keep faith with these Hispanic American, Asian American, and Native Americans. We should assure them that despite effort to undermine these provisions, they will be retained.

THE NEED FOR SECTION 5

To understand the continued need for the Voting Rights Act, it is necessary to remember its orgins. The Civil Rights Act of 1957 and 1960 had authorized the Attorney General to seek injunctions against discrimination. Many time consuming private and government lawsuits were brought.

The key to the Voting Rights Act was the preclearance requirement which put the burden of time and inertia on those proposing a new scheme. A new law has to be approved before it could be implemented.

The initial effort to implement the Voting Rights Act focused on black registration. More than a million black citizens were added to the voting rolls from 1965 to 1972. But registration is only the threshold hurdle to full, effective participation in the political process. As the Supreme Court has said:

> "The right to vote can be affected by dilution of voting power, as well as by absolute prohibition on casting a ballot."

Opponents of the dramatic rise in registration sought to cancel the impact of the new black vote. A broad array of dilution schemes have been tried. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for single-member election districts, or combined with other sohphisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose has been to neutralize the gains made at the ballot box under the Act.

Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts. Upholding the constitutionality of Section 5, the Supreme Court noted:

> "Congress knew that some of the states covered by Section 4(b) of the Act had resorted to the extraordinary strategem of contriving new rules of various kinds for the sole purpose perpetuating voting discrimination in the face of adverse federal court decreees. Congress had reason to suppose that these states might try similar maneuvers in the future in order to evade the remedies for discrimination contained in the Act itself."

Once the Supreme Court made clear that the Act required review of any new laws in covered areas which could directly or indirectly impair the right to vote, Section 5 became both the centerpiece of the Voting Rights Act and the main target of efforts to undermine it.

Some opponents of the Act may still claim at this late date that the scope and administraion of Seciton 5 has run beyond the intent of Congress. That is simply incorrect. Not only has the Supreme Court repeatedly reaffirmed that Congress sought a broad safeguard against anticipated ingenious counter-schemes; Congress itself has ratified that broad reading in the course of the 1970 and 1975 extensions of the Act.

At the beginning of this Congress there were many who questioned the continued need for the stringent safeguards of Section 5. Now those voices are far fewer. The hearings in the House Judiciary Committee vividly demonstrated continuing efforts to deny minorities fair and equal access to the political process. Witness after witness warned that without the continued protection of Seciton 5 in their area, the advances of a decade could be wiped out in the short time it would take to impose new discriminatory schemes.

I am concerned about the need for further progress. But I am even more concerned about the risk of losing what has already been won. Those who fought the battles know how fragile the victories really are.

In recent years there has been a steady number of objections under Section 5. In fact, while more than 800 proposed changes have been objected to since 1965, well over half of those objections have been entered since the last time the Act was extended in 1975.

All too often, the background of those changes -- the absence of an innocent explanation, or the departure from past practice as minority voting strength approaches a new level -- demonstrates a continuing intent to dilute the minority vote, and a continuing need for the Act.

Many of the practices are complex and subtle. Sophisticated rules regarding redistricting may seem part of the everyday rough-and-tumble of American politics -- tactics used traditionally by the "ins" against the "outs." However, we must view such schemes in the context of repeated efforts to perpetuate past voting discrimination, and to undermine the results of the Voting Rights Act. The repetition of the same pattern over and over, as these rules were adopted in the late 1960's and early 1970's as black voting strength emerged, was hardly a coincidence.

Perhaps the best testimonial to the continued need for Section 5 was the conversion of representative Henry Hyde, after he had attended the House hearings. Admitting his initial hostility to extension of the administrative preclearance mechanism and his preference for litigation in court, Representative Hyde wrote this in the House Committee Report:

> Reluctantly I came to embrace the conclusion that administrative enforcement is indeed a practical necessity; the risks of continued voting rights abuse are too great to fall victim to philosophical purity.

Nor is the issue any longer whether Section 5 should be dissipated by applying it nationwide. The recent objection to redistricting in New York City was a vivid reminder that the preclearance provisions apply to parts of 22 states. The President has abandoned his earlier support for that position. And Representative Hyde has candidly admitted that making Section 5 nationwide "would strengthen the Act to death."

Thus, a frontal assault on Section 5 is no longer very credible. Instead the focus has shifted to revising the bail-out provisions of the Act by which jurisdictions may remove themselves from Section 5 coverage.

THE BAIL-OUT COMPROMISE

There is a bail-out provision in the current law. It is linked to the last discriminatory use of literacy tests. Therefore, in most jurisdictions it has not been available during the period of their preclearance coverage.

Our original legislation did not include any new bail-out because Senator Mathias and I did not believe that an additional one was clearly justified.

I am still not convinced that the case for an additional bail-out has been made. The preclearance provisions have worked fairly and effectively without undue burden on the covered jurisdictions.

However, a compromise was forged during the House deliberations which was designed to give jurisdictions an incentive to improve their records and to demonstrate full acceptance of minority participation. The provision reported by the Committee and passed overwhelmingly and adopted by the House is a fair and effective provision. This compromise was opposed on the House floor by some who argued that it was an impossible bail-out and offered only false hope to covered jurisdictions. I believe the bail-out is a tough,but fair and reasonable. It is tough , as it should be, for it is not designed to remove the protection of preclearance without very clear proof that it is no longer needed. Jurisdictions could bail out if they have fully complied with the provision of the Voting Rights Act for the past ten years; have eliminated discriminatory procedures; and have demonstrated that they accept participation of minorities through constructive efforts such as reasonabley accessible registration, effortsto combat voter intimidation, and similar reforms. Informed estimates are that some 200 of the 800 covered counties in the wholely covered states would be eligible to apply for bail-out when the provisions go into effect in 1982.

This addition of a new bail-out provison was a major concession and should expedite renewal of the Act. It is appropriate for the Senate to focus our efforts on swift passage of the House bill which had such overwhelming bipartisan support.

This provision contains a second major concession. Under current law, if an entire state is covered by Section 5, a county within that state may not bail-out on its own, no matter how good its record. Our bill allows individual counties to bail-out without have to wait for the rest of their state, as long as they can meet the new criteria. Efforts to weaken this new bail-out further in the House of Representatives were rejected decisively. They shoud be rejected by this Committee as well.

Nonetheless, some Senators have served notice that they will try to weaken the bail-out procedure. Alternative bail-out provisions which will be offered have loopholes that would permit a majority of those jurisdictions where Section 5 is still needed to end their coverage. If they do, the bail-out will turn out to be an escape hatch which leaves the vaunted protections of Section 5 an empty shell. We will have several days of detailed testimony on the bail-out issue. I urge my colleagues to listen to the testimony with this warning in mind. The burden is on those who would loosen the compromise bail-out provisionsin the House bill to show specifically why they are unworkable or unfair. I do not believe they will be able to do so.

AMENDMENT OF SECITON 2 OF THE VOTING RIGHRS ACT

Section 2 of the Voting Rights Act is the general prohibition of practices which deny or abridge the right to vote. S. 1992, like the House passed bill, would add clarifying language to Section 2 so that it would explicitly state that any practice which "results" in such denial or abridgement is prohibited.

If the Attorney General or private plaintiffs challenge a practice in a jurisdiction not covered by the preclearance obligation of Section 5, they must sue under Section 2. In addition, Section 2 is the only recourse even in areas covered by Section 5 for laws or practices adopted prior to 1965.

An effective, usable Section 2 is an essential part of the Act. However, the recent Supreme Court decision of Mobile v. Bolden cast a heavy cloud over Section 2's availability to challenge discrimination. A statutory amendment is needed to clarify the section and return the law to the original understanding of Congress that Section 2 would reach discriminatory results, whether or not plaintiffs proves a discriminatory purpose.

Opponents of the amendment assert that it would introduce a new and unprecedented standard; that it departs from the original intent of Congress and that it is unconstitutional. Most of all, in the face of repeated statements of the amendment's scope, they persist in the inaccurate assertion that the proposed "results" test would constitute a "quota requirement" of proportional representation.

These hearings will subject these assertions to close scrutiny. Detailed legal memoranda will be supplied on these claims. I am confident that the record ultimately will make clear they are incorrect. In fact, the amendment of Section 2 in S. 1992:

--reflects the original understanding of Congress in 1965;
--restores the legal standard that applied for most of the past 15 years;
--is constitutional; and
--would not require quotas.

Section 2, as amended would not make mere failure of minorities to win proportional representation a violation, even if that came as the result of at large elections. Plaintiffs would have to prove additional factors establishing that, in the total circumstances minority voters not only failed "to win" but were effectively shut out of a fair opportunity participate in the election.

BILINGUAL ELECTION ASSISTANCE

The fifth fundamental issue of extension of the bilingual election assistance provisions of present law. These provisions do not expire until 1985. But we should make clear our commitment to provide a sufficient opportunity for these provisions to achieve their purpose. It is particularly important that we so do in view of the fact that bills have been introduced to repeal these provisions during the current extension of the Act.

Similar efforts were overwhelmingly rejected in the House. Those votes reflect the compelling record compiled in the House committee on the Judiciary.

Two kinds of arguments were made against these provisions in the House; their alleged burden and their alleged impact on the American Melting Pot tradition. Each was properly rejected.

After the initial start-up and targeting efforts, the administrative burden and cost is not excessive. Congressman Paul McCloskey of California, who questioned these provisions, acknowledged this when he testified in the House:

"It can no longer be argued that the cost is excessive for the bilingual ballot."

New York State Attorney General Robert Abrams agreed with that verdict.

The theoretical argument has been that such bilingual assistance might make language minority Americans more separate and insulate them from the mainstream of American society. I think that argument stands logic on its head. History teaches us that the best way to avoid insularity is to bring people into the political process; not to make them feel shut out. An editorial last September in the San Diego Union put it well:

> As for bilingual separtism, we do not see that as a real danger in America ...bilingual voting, at best is a temporary measure, a make-shift measure to give older Spanish-speaking citizens the sense of full participation in our democracy. The younger members of the community are moving rapidly away from linguistic isolation.

We should not turn our backs now on the thousands of older Americans who, through no fault of their own, simply have not had the opportunity to learn English well enough to vote without painful embarrassement and dangerous confusion.

I expect this Subcommittee to hold fair and expeditious hearings. I expect the full Committee on the Judiciary to meet on this measure and report it promptly to the full Senate. And I am confident that, working together, members of Congress and concerned Americans from all parts of this country will ensure that the Voting Rights Act emerges from this process strong and intact.

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Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977).

Challenge to at-large election of members of the Boston, Massachusetts school committee.

Holding in favor of defendants.

Results test applied:

> The Court of Appeals expressed some concern that, after Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), intent may be required in a dilution case. 565 F.2d at 4, n. 6. However, the Court proceeded with a results analysis, and the found the plaintiffs lacking. Therefore, there was no need to resolve the intent issue. What is important is that, under the results analysis, the First Circuit said at-large systems are not unconstitutional per se, proportional representation is not required, and more than a scintilla of evidence is necessary to prove a violation.
>
> Multi-member schemes "will be struck down only when the challenger carries a burden of proving that the system was instituted to further racially discriminatory purposes or that the effect of the method is to 'minimize or cancel out the voting strength of racial or political elements of the voting population.'" 565 F.2d at 4, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

Proportional representation not required.

At-large elections not unconstitutional per se:

> "Any analysis of the at-large system under attack must begin with an acknowledgement that multi-member districts are not per se invalid." 565 F.2d at 4.

More than a scintilla of evidence is required in addition the absence of black elected officials:

> Plaintiffs proved a number of factors, including history of discrimination, large district, no residency requirement, recent racial campaign tactics, no blacks elected, black voter alienation, intimidation of black candidates in the community, and unresponsiveness. Yet this evidence was not enough.

PREPARED STATEMENT OF SENATOR HOWARD M. METZENBAUM

Mr. Chairman, I appreciate the opportunity to testify before the Subcommittee on the Constitution on what I regard as perhaps the most significant piece of legislation we will address in the 97th Congress—the amendment of the Voting Rights Act of 1965.

As Senators, we are keenly aware of the importance of the right of each and every citizen to participate in the political process by voting. The legitimacy of our place in the Senate is derived from the legitimacy of each election and the fairness of the American electoral system. As elected officials, we have a responsibility to preserve and to protect the right of every citizen to vote freely and privately without regard to race, language or handicap. As Senators, our voice in the Congress and throughout the Nation is the voice of the people who elect us. It is this right to vote which makes ours a nation truly of, for and by the people.

This is why we must give top priority to the passage of this legislation. This is why, frankly Mr. Chairman, I was disapointed at the administration's request for a sudden postponement of the initial day of hearings one week ago. We have no time to waste. The core of the current voting Rights Act expires in just over six months. We cannot afford to let this expiration date pass. I hope that the 62 Senators who have cosponsored S. 1992, a bill identical to the one passed overwhelmingly by the House by a vote of 389—24, will prevail. Justice demands that this bipartisan group succeed in its efforts to protect all cittizens' right to vote. Those of us concerned about a meaningful extension of this act will not relax our efforts until that end is achieved.

I might add that I'm pleased the administration has finally given us at least part of its position on extension of the Voting Rights Act. But I'm disappointed that by refusing to adopt a section 2 "reesults test" the administration still has not put itself squarely in favor of meaningful extension of the act.

The Voting Rights Act of 1965 is often called the most effective piece of civil rights legislation this country has ever had. It was enacted to "assure that the right of citizens of the United States to vote is not denied or abridged on account of race of color . . . in any Federal State or local election."

In two years the number of Blacks registered to vote in the six States fully covered under the special provisions of the act increased from 29.3 percent to 52 percent. By 1971, the figure had increased to 71 percent.

The number of black officials elected in the South jumped from less than 100 in 1964 to 1,100 in 1974. Now that figure is estimated at closer to 2,000.

More recent attempts to bring other disenfranchised citizens into the voting booth have had similar positive results. In the past five years, the number of Hispanics registered to vote in New York has risen 20 percent. In Texas in five years the number of Hispanic elected officials has jumped 30 percent.

Since enactment, the act has been gradually strengthened and continually reaffirmed. New provisions have been added to deal with new problems. The bilingual ballot provision is an example of this. And despite the constant attempts to weaken or to destroy it, the original act and all strengthening amendments have always passed the Congress with solid bi-partisan majorities in both Chambers.

Once again, the Congress is addressing this piece of legislation as its provisions are due to expire. And once again we are faced with attempts to weaken this legislation which has been so necessary and so effective.

Ironically much of the case for weakening the act is based on its past success. The act, we are told, has served its purpose. It has brought about the desired improvement. It is therefore no longer needed, we are told.

The reasoning behind this argument is not only faulty, but it is more than a bit disturbing. It resupposes that there is an acceptable level of voting rights violations. Obviously, there is no such thing. If even one person is denied the right to cast a ballot, there is a need for the Voting Rights Act.

The purpose of the Voting Rights Act is not to reward progress against discrimination. Nor is it to punish past discriminatory acts. It is plainly and simply to end all discrimination at the polls and ensure everyone the right to a free vote.

Moreover, contrary to claims of those that want to weaken voting rights guarantees, the continuing need for voting rights legislation is obvious. The days of poll taxes and literacy tests may be mostly behind us, thanks to enactment of the original Voting Rights Act. But though the methods have changed, dicrimination still exists. As the chairman of the House Committee on the Judiciary, Peter Rodino, said during House consideration of voting rights legislation last October:

Time and again we were told by witnesses (at subcommittee hearings) of ingenious schemes designed to deny citizens their rights to vote or to dilute the strength

of their ballot. The list of ploys—dual registration, reregistration, gerrymandering, at-large elections, annexations, intimidation, inconvenience to name a few—is limited only by the imagination.

And as the Civil Rights Commission found in a report issued last year:

"In a study of voting problems in 70 jurisdictions covered by the pre-clearance provisions, some minorities found registration officials discourteous, or openly hostile and intimidating when they attempted to register. Requests for unnecessary personal information by officials also were found to intimidate minorities . . . the present attitudes of registrars deter minorities from registering.

". . . registration in the jurisdictions studied often took place in locations or at times that were particularly inconvenient for minorities.

". . . minorities continued to be harassed or intimidated by election officials when they attempted to vote."

The protections of the Voting Rights Act are still clearly needed.

Mr. Chairman, you have before your subcommittee several bills which amend the Voting Rights Act in different respects.

Frankly, three of those bills are grossly unfair and inadequate. S. 53, which repeals the Voting Rights Act's bilingual protections, is totally unacceptable. These provisions are essential to protecting the voting rights of millions of foreign language minority voters.

S. 1761 extends the pre-clearance provisions nationwide. That may sound good on its face, but, in fact, extending the act's coverage nationwide would create such enforcement burdens that the act's effectiveness would be totally destroyed.

S. 1975 is also grossly inadequate. It simply will not protect against the disenfranchisement of voting minorities. The bill is deficient in several respects:

1. It will cripple enforcement of the act by requiring those challenging specific discriminatory practices to demonstrate intent to discriminate. By requiring in essence a "smoking gun" before any practice can be outlawed, the bill would jeopardize the voting rights of millions of Americans.

2. It would not extend the act's current protection for bilingual voters for a sufficiently long period of time. According to House testimony, as I mentioned earlier, these bilingual provisions currently avoid the effective disenfranchisement of countless language minority Americans.

3. And finally, the bill creates a virtual bail-out sieve. It essentially guarantees to jurisdictions whose past discriminatory acts have been challenged, an escape from the act's automatic preclearance provisions. S. 1975's bail-out provisions are the exceptions that swallow the rule.

With all due modesty, Mr. Chairman, the bill that Senator Kennedy and Mathias and I have introduced along with 59 other Senators—S. 1992—is the only way to extend the Voting Rights Act and still provide adequate protection to voting minorities. The bill, which, as I mentioned, passed the House by an overwhelming 389-24 vote, does the following essential things:

1. It extends until 1984 the Act's current section 5 pre-clearance provisions. It then provides for a reasonable and achievable bail-out for political jurisdictions which have complied with the act in the past; have made no use of discriminatory election laws or devices; and have taken positive steps toward including more minority citizens in the electoral process. It is estimated that 20–25 precent of the counties now subject to pre-clearance obligations will be eligible to bail out as soon as the bail-out provisions become applicable.

2. It clarifies the language in section 2 to prohibit practices that have a discriminatory result, without requiring specific proof of a direct purpose to discriminate. This change is made necessary by the Supreme Court's plurality decision in *Mobile* v. *Bolden*. It will conform the test for discrimination to that which was in the minds of the framers of the original Voting Rights Act of 1965.

3. It continues until August 6, 1992, the requirement of bilingual election materials and voting assistance.

For many years, millions of nonwhite citizens in this country were forced to earn the right to vote by passing literacy tests—or to pay for this right through poll taxes. Or worse still, they were coerced not to use the right at all rather than have to undergo the intimidation that accompanied attempts to register or cast a ballot.

Ultimately, they were compelled to fight for the right to the ballot box. They marched. They went to jail. They aroused the conscience of this country and forced those in power to guarantee them their civil rights.

The right to vote, guaranteed by the original act of 1965, was a hard won right. We cannot sit by and let its guarantees wither. We have a responsibility to enact the strongest possible voting protection to all citizens of this country. For without the vote, it is meaningless to be called a citizen.

Mr. Chairman, I urge your subcommittee to pass S. 1992 at the earliest possible date and give the rest of us on the committee and in the Senate as a whole an opportunity to do justice.

Thank you.

Senator HATCH. Our next witness will be Prof. Walter Berns, who is resident fellow at the American Enterprise Institute in Washington. We will have three final witnesses after that.

Dr. Berns?

STATEMENT OF PROF. WALTER BERNS, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. BERNS. Thank you, Mr. Chairman.

Along with everybody else who has testified on this bill and everybody else who has expressed an opinion on it publicly at least, I believe the Voting Rights Act of 1965 is the most successful civil rights act ever enacted by the Congress.

The 15th amendment declares that the right to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude, and it gives Congress the power to enforce this right by appropriate legislation. And the Voting Rights Act, without question, was and is appropriate legislation.

I will not read my whole statement and therefore will skip some parts as they appear in the statement. In that opening statement, I do of course refer to the tremendous success that has been achieved by means of the Voting Rights Act, and I also point out that voting is, in my opinion, the principal security for civil rights. I also point out that I was persuaded by the hearings in the House that there are some jurisdictions, perhaps still more or less remote jurisdictions, where the right to vote is being denied, and I conclude from this fact that Federal supervision continues to be needed.

So I am in favor of extending, as it were, the various provisions of the act that permit this Federal supervision.

Nevertheless—and here I get to the substance of my statement—I am opposed to the bill which has been introduced here, because I gather that bill is identical to the bill that passed the House. My opposition is confined to the amended section 2 of the bill, and in stating my opposition I will do my best to avoid use of the word "intent" and so forth.

In its original form, section 2 was a mere declaration or statutory restatement, as you said, Mr. Chairman, of the 15th amendment. In its amended form, the words "to deny or abridge the right to vote" have been deleted. In their place have been put the words "in a manner which results in a denial or abridgement of the right to vote."

This new language will make section 2 the key section of the act, one that will affect the electoral laws, practices, and arrangements of every political subdivision in the country—Baltimore, Boston, Utah, as well as Rome, Ga.

It will authorize—indeed, it will foster, in my opinion—suits against these jurisdiction, suits alleging that the way they apportion seats, the way they organize their governing units, the way they count their votes, even the way they define themselves, have the effect of abridging not the right to vote but, rather, of abridg-

ing the electoral power of a group of voters, and it of course will make the Federal courts the supreme electoral lawgivers.

I find it difficult to believe that this is actually what the Congress wants, and I am rather certain that it is not what the States, the counties, and the cities want. If this legislation is adopted, they will be deprived of the authority to decide for themselves how to organize themselves.

When in 1965 this authority was taken from southern States—mostly southern States—and handed over to the Justice Department and Federal courts, it was understood to be "a draconian measure," necessitated only by the egregious behavior of those States. It was understood to be a temporary measure.

The offending States and local jurisdictions could bail out if they behaved. Now, it will in effect be applied everywhere to every State and with no opportunity of their ever bailing out.

In a very real sense this amended section 2 will make the bailout section, section 4 of the act, superfluous, and it will make the preclearance section of the act superfluous. It will do this by authorizing the Federal judiciary—whose members I do not have to remind this committee are subject to no man's suffrage—to rewrite every law affecting the results of elections.

The House report on this bill makes no attempt to conceal this. This new section 2 language is intended to express the difference between, on the one hand, the right to vote and, on the other hand, what the Justice Department and the Federal courts have made of the right to vote.

And what have they made of the right to vote? Quite simply, for some groups it is the right to be represented in proportion to their numbers in the community. I say this because the amended section 2 is intended avowedly to reverse the Supreme Court's decision in *City of Mobile* and bring it into line with the Court's decision in *City of Rome* v. *United States.*

The latter was a Voting Rights Act case, the former, a 15th amendment case. A Voting Rights Act case applies only to designated jurisdictions; a 15th amendment case applies everywhere. According to *Mobile,* a plaintiff must show discriminatory intent. According to *Rome,* a State, county, or city bears the burden of showing that its electoral laws, its practices, and its arrangements do not have a discriminatory effect. And what, according to *City of Rome*—and to mention one other important case that thus far this morning has not been mentioned in this committee room, at least while I have been in it, and I have been here since 9:30; I am talking now about *United Jewish Organizations* v. *Carey*—what, according to *City of Rome* and *UJO* v. *Carey,* is a discriminatory effect?

It is one where the votes of blacks and of language minorities—American Indians, Asian Americans, Alaskan Natives, and persons of Spanish origins—the votes of these groups of persons are not diluted.

When is a vote diluted? When the group is deprived of the opportunity to elect one of the group; for example, to quote from *UJO* v. *Carey,* when the number of blacks in a district is not sufficient "to insure the opportunity for the election of a black representative."

As the law now stands, the law that will be part of section 2 of the Voting Rights Act if the amended section is adopted, this au-

thorizes the Federal courts to require States to change their laws so as to insure that minorities will be elected in proportion to their numbers.

For example, New York in *UJO* v. *Carey* was required to create districts 65 percent nonwhite. To do this, New York had to engage in blatant racial gerrymandering. In redrawing its district lines, race was the only criterion employed, just as it was some 25 years ago when Alabama redrew the boundaries of the city of Tuskegee and, without removing a single white voter, managed to exclude all but a tiny fraction of Tuskegee's black voters from the city, all but 4 of a total of 400. The Supreme Court, in *Gomilion* v. *Lightfoot,* a 1960 case, a 15th amendment case, said that this was a blatant violation of the 15th amendment.

Incidentally, there is a perfect illustration of what one can do with the intent test. The Court employed it there, employed it properly, and found unanimously that Alabama had violated the 15th amendment. What Alabama in 1960 was forbidden to do, New York was required to do, and if the amended section 2 is adopted, every State in the Union—all 50—will be required to do.

One of Chief Justice Warren's legacies to American politics was the aphorism: "Legislators represent people, not trees or acres." That being so, the States were forbidden to apportion seats in either house of their legislatures on any basis other than population.

Now, according to these Voting Rights Act cases, legislators must represent not undifferentiated people, people defined only as individuals living in districts of approximately equal size, but defined as groups of people, defined by their race or language preference, and they can be said to represent them only if they are of that race or if they, if you will, prefer that language.

I am not unmindful of the fact that the amended section 2 contains this disclaimer that: "Disproportionality of results shall not in and of itself constitute a violation of this section." All that means, and all it is intended to mean, is that some factor, in addition to disproportionality, will have to be present before it can be said that a group's vote has been abridged by being diluted.

What factors? Well, they can be found in the cases already litigated, and I will not bother to go over them, especially, Mr. Chairman, since you already have had them in this room today.

Besides, whatever Congress intends, the courts are likely to treat it the same way the Supreme Court treated a somewhat similar disclaimer in the Civil Rights Act of 1964. There, Congress said specifically that nothing in title 7 of that act should be interpreted to require employers "to grant preferential treatment to any person or group because of race, color, sex, or national origin, not even to correct an imbalance which may exist with respect to the total number or percentage of persons of any race," et cetera, "employed by any employer." That was that disclaimer in title 7 of the 1964 act.

That, I would think, is clear enough, but I remind this subcommittee that the Supreme Court paid it no heed. To read this as written—that is to say, "To read this as Congress wrote it," said Justice Brennan, "would bring about an end completely at variance with the purpose of the statute," by which he meant, of

course, at variance with the Court's purpose for the statute. Congress says one thing, the Supreme Court says another thing, and then Congress does nothing.

So section 2, as amended, will require proportional representation, and this, as I argue in my prepared statement, will promote racial bloc voting on the part of nonwhites and whites alike, and such voting will have unfortunate consequences.

Without going into detail here, I question whether a black can be fairly represented only by a black and not, for example, by a Peter Rodino, or that a white can be fairly represented only by a white and not, for example, by an Edward Brooke.

And I wonder, if a group's interest is defined by its race, why we bother to hold elections and what we mean by representative government. Here I will read from the concluding section of my prepared statement:

"Representative government does not imply proportional representation or any version of it that is likely to enhance bloc voting by discrete groups. The Framers of the Constitution referred to such groups as 'factions,' and they did their best to minimize their influence. The idea that a legislative assembly should be a 'mirror' or a 'reflection' of the people was advanced and advanced assiduously by the opponents of the Constitution," the group of people we call Anti-Federalists.

As one of them—Melancton Smith by name—Alexander Hamilton's powerful opponent in the New York ratifying convention—as Melancton Smith said there, "The idea that naturally suggests itself to our minds, when we speak of representatives, is that they should resemble those they represent." That is the end of the quote.

"Such an idea may naturally have suggested itself in 1787-8, as it did earlier, but the Framers of the Constitution emphatically rejected it. Representation, as they understood it, was one of the discoveries made by the new and improved 'science of politics'"--I am quoting now from "Federalist 9"—"discoveries that would, for the first time in history, make free government possible. To them, representation was a means of refining and enlarging the public views"—quoting "Federalist 10" now—"by passing them through the medium of a chosen body of citizens," this body and the House of Representatives.

"Under a proper system of representation"—still quoting—"the public voice, pronounced by representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

To conclude, "Whereas the Anti-Federalists called for small districts and, therefore, many Representatives, the Framers called for (and got) larger districts and fewer Representatives. They did so as a means of encompassing within each district 'a greater variety of parties and interests,' thus freeing the elected Representatives from an excessive dependence on the unrefined and narrow views that are likely to be expressed by particular groups of their constituents."

I have taken the trouble, Mr. Chairman, to go into some detail but not, I am sure, sufficient on this question of representative government, because, in my view, the amended section 2 of this Voting

Rights Act is destructive of the principle of representation as it is embodied in the Constitution.

I repeat, you were quite right to press Senator Mathias on this point, and I wish that he were here to ask me, as a resident of Montgomery County——

Senator HATCH. Maybe I will ask you.

Mr. BERNS [continuing]. As to what the effect would be in the city of Baltimore. In my opinion, without question, the passage of the amended section 2 will foster such suits and will make it much easier to win such suits, with the result that the city of Baltimore's government will have to be restructured, just as the city of Rome's government was restructured. I think that is the express purpose of this legislation.

You were well advised indeed, it seems to me, to press this question of what are these egregious conditions in Massachusetts, in Utah, in Maryland, in Pennsylvania, in Iowa. What are they that justify the nationalization, in effect, of the Voting Rights Act all over the country?

Thank you.

Senator HATCH. I appreciate your testimony. It has been very articulate testimony. We will put your complete written statement in the record as though fully delivered.

Mr. BERNS. Mr. Chairman, I do not ask you to put that written statement in the record. It was compiled hastily out of a longer piece yesterday, and I read it again this morning.

Senator HATCH. If you would like to finish it up, we would be happy to put it in the record.

Mr. BERNS. I think it would be unjustified to spend the taxpayers' money to put that particular inelegant thing in the record.

Senator HATCH. All right. Your oral statement has been very eloquent; there is no question about that.

To clarify what I was asking Senator Mathias, as I recall, only 22 percent in Baltimore's city council are minorities, despite a 55-percent black population in the city. So when you say they would have to restructure the whole city government if this change in section 2 becomes law, what do you mean by that?

Mr. BERNS. I mean by it, Mr. Chairman, what the district court judge whose name I cannot recall—Pitman?—in *Mobile*—the order he handed down, which was confirmed on the circuit and then reversed by the Supreme Court, disestablished the city commission form of government and replaced it with a mayor/council system, the council members being elected in single-member districts. That was, as the Attorney General said, dramatic.

I would say it is a rather astonishing exercise of judicial power, assumed in this case to be a power coming out of the 15th amendment, simply to restructure a system of government that—you will have the facts on this, and perhaps members of your staff can inform you right now of the percentage of municipalities in this country that are governed under this particular form of government.

Senator HATCH. Two-thirds of municipalities in this country are at-large municipalities, totally acceptable under the Constitution.

Mr. BERNS. That, I assume, is what a Federal court in Baltimore will do, just as the Supreme Court did, in effect, by upholding the

Justice Department in the Williamsburg district of Brooklyn in that *UJO* v. *Carey* case.

Here the question was the authority of a Federal court, really, to redraw district lines, to gerrymander. I would have assumed that if the case, *Reynolds* v. *Sims,* meant anything, it meant districts of approximately equal size of undifferentiated people and with the implicit assumption that there would be no gerrymandering. To achieve the result in *UJO* v. *Carey,* as I say, you had racial gerrymandering of a blatant sort.

Justice Frankfurter referred to the Tuskegee situation, as those lines were redrawn by the Alabama Legislature, as resulting in "an uncouth 28-sided figure." It is entirely possible that the Federal courts will be upholding gerrymandering that will make the city of Tuskegee look, by comparison, to be a perfect ellipse, if we are to achieve the results of some of these Justice Department decisions.

Senator HATCH. I would like to turn to Senator Thurmond, at this time; but just to button this down, how was the Hasidic Jewish community treated in *UJO* v. *Carey*?

Mr. BERNS. There was in fact, of course, the Hasidic community, as you say. They were a consolidated community, and they happened to live in a single assembly district, but in order to achieve the 65 percent black proportion of a district, it was necessary to redraw district lines and to split that Hasidic community in two.

In a sense, they would have a Voting Rights Act grievance if the Hasidic community were one of the designated groups under the Voting Rights Act, but of course it is not, and so they had no comparable power.

Senator HATCH. Do you anticipate that many instances like that may arise?

Mr. BERNS. If we are going to ghettoize, which in a sense is what we are doing, with respect to some groups, why not do it for all groups? Why not do it for Republicans in Cook County, Ill., or Democrats in Orange County, Calif., or for that matter Republicans in Montgomery County, Md.?

Senator HATCH. That would be an interesting thing.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Professor Berns, I want to commend you for your analysis of this bill. I may have some questions to submit for the record. I have another hearing coming up on judicial nominations, and I will have to leave at this time, but I want to thank you for your presence here and for your testimony.

Mr. BERNS. Thank you, sir.

Senator HATCH. Dr. Berns, can you elaborate a bit on the notion of "dilution" that is developed within the content of the Voting Rights Act? What is "dilution"? What, in your view, would constitute an undiluted vote, as opposed to a diluted vote? What do they look like, and how do we make this distinction?

Mr. BERNS. Quite simply, a vote is understood to be diluted—and here of course we are talking about not the vote of an individual but the vote of a group, and a group's vote is said to be diluted when its legislative representation is less than its proportion in the community. In order to overcome that, to provide the remedy for that, you redraw district lines, as the Justice Department did in

UJO v. *Carey,* and, as I say, you gerrymander. You find people sufficient in number to insure successful representation on the part of that group.

That 65-percent figure is interesting. If a group votes as a bloc, one would suppose that a district 50 + 1 would be large enough to achieve the result desired, but the Justice Department did not settle on 50 percent plus 1; it required the State of New York, which was under pressure of course to hold the 1974 primary and general elections—and I presume that is why they went along with it without too much arguing—it required the State of New York to build districts with 65 percent blacks.

Why a 65-percent ratio if the purpose is not to insure a sufficient number of blacks to insure the election of a black?

As it turned out of course, in four of the five districts involved in that case, in the subsequent election four of them elected whites, because the Justice Department had underestimated the amount of voter nonturnout.

One therefore wonders whether in subsequent cases the Justice Department, with the approval of the courts, will really look at voter turnout, which in those sections of Brooklyn may have been as low as 10 percent and was almost surely as low as 20 percent for certain groups, and will insist that districts be designed that are 80 or 90 percent of a nonwhite group.

Incidentally, if you were, Mr. Chairman, a partisan Republican, a very narrowly partisan Republican, you ought to support this legislation.

Senator HATCH. That is right.

Mr. BERNS. You are not, but if you were——

Senator HATCH. I agree.

Mr. BERNS. You would want to support this legislation because its tendency will be to build black districts, and the more black districts you can build, or—to put it this way—the more blacks you can pack into one electoral district, the more Democratic that district will become, and the more Republican will become the surrounding districts. It is a plain case of gerrymandering.

Senator HATCH. And that is certainly the way it is going to be used if section 2 is passed in its present form.

So the very people that this law is supposed to help are ultimately going to wind up being hurt as far as electoral influence in this country is concerned, if the proposed changes are made. Am I correct in saying that?

Mr. BERNS. Yes indeed, sir.

Senator HATCH. Could you elaborate upon your assertion that the results test is somewhat predicated upon the assumption that only blacks can represent blacks and only whites can represent whites? How is that premise implicit in this test?

Mr. BERNS. I think it is implicit in the Justice Department's order to the State of New York, which is part of the law. I want to make that point clear. This will be part of the law that is embodied in the amended section 2. Those instructions were to build the election districts sufficiently black—nonwhite in this case actually; it was not simply black, it was nonwhite.

And that raises another argument of course, sir, because the Puerto Ricans there objected to the fact that they did not have

their district. What do they mean by "their district"? They mean a district where they can elect a Puerto Rican.

The 65 business, which is part of the law or will be part of the law, is intended to achieve the result of electing a member of the group that is packed into an electoral district. That is the only way it can be interpreted. Otherwise, why do it?

Senator HATCH. Proponents of the results test argue that their objective is not the implementation of a system of proportional representation but simply an equal opportunity to participate in the electoral process.

One of our later witnesses, Mr. Hooks, who is head of the NAACP, refers to this criticism as a "scare tactic". How do you account for such fundamental disagreement on whether or not the results test has anything to do with proportional representation?

Mr. BERNS. I acknowledge, as we all did earlier this morning, that I can be wrong, and Mr. Hooks may be right. I would, if I were in your position, ask him how he interprets *UJO* v. *Carey*.

Senator HATCH. And the Hasidic Jew problem?

Mr. BERNS. Sure; of course they have a grievance. If it is assumed that a white can only be represented by a white and the Spanish-speaking person only by a Spanish-speaking representative, and so forth and so on, why not a pious Jew represented by a pious Jew or a Republican in Cook County, Ill., represented by a Republican? That would require an upheaval.

Senator HATCH. That would be shocking, I can tell you.

Can you elaborate on what seems to be a rather summary rejection in your statement of the disclaimer provision in section 2 that states expressly that "proportional representation in and of itself is not the object of the results test"?

Mr. BERNS. The question is what did the House mean and what did the 62 Senators who have supported this bill mean when they said, "in and of itself"? That means that disproportionality, in and of itself, is not sufficient to constitute a violation of this section, but disproportionality in addition to one other factor.

Senator HATCH. One other factor?

Mr. BERNS. One other factor, and then the question is, can you find that other factor? The courts have found that other factor. You have made a list of them this morning; I have a list somewhere here culled from cases decided by the Supreme Court of the United States.

Senator HATCH. And in almost every jurisdiction of this country of any consequence or size with minorities you could find at least one other factor, could you not?

Mr. BERNS. I think so.

Incidentally, nothing has been said of this. We have talked constantly as if we were talking about city councils and perhaps State legislatures. I see no reason why congressional districts will not be affected by the amended section 2, not so much in Utah and not at all in Wyoming. Representative Cheney, I think, is safe, since his district comprises the whole of the State. But any State with more than a couple of seats in the Congress will be affected by this legislation, because the voting power of these groups is certainly being diluted as the House is now constituted.

Of course I will not get to the question of the U.S. Senate, where vote dilution amounts to distillation, I think, right now.

Senator HATCH. This would take *Reynolds* v. *Syms* to the *n*th degree, would it not? Where now you have to look at population, this section 2 change would add the fact that you must now look at color as well as population.

Mr. BERNS. Of course the only way you can satisfy those two criteria is gross gerrymandering and lines, as I say, that will make Tuskegee look like a perfect ellipse.

Senator HATCH. Let me ask you this: What is wrong with the notion that the Voting Rights Act ought to be directed toward insuring, not merely that citizens can register and vote, but that they are entitled to an "effective vote" as well?

Mr. BERNS. Senator, I suppose you are in a much better position than I am to answer that question, because I think the answer turns on the experience that one gains here through active work in the Senate.

I ask you to imagine a legislative body where every one of the members—every one of you, if you will—represents a discrete group which is understood to have interests that are idiosyncratic and have nothing, in effect, in common with the interests of other groups.

To what extent then would it be possible to find the kind of accommodation that is required to pass laws that have the effect of securing the rights of all? To what extent will it be possible for you to work with your colleagues in that body when, to put it in its grossest form, x percent of a legislative body is made up of blacks in proportion to their number in the population and x percent made up of whites? That is the issue—black/white.

The founders—and I touched on this when I talked about representative government—wanted larger districts precisely to prevent a member from being beholden to one narrow interest within the community, because a representative who represented a diversity of opinion and of interest in his own section would find it easier to accommodate his interests and to achieve accommodation with the representatives of other districts. That is what the founders thought; that is what Madison thought, and I think he was profoundly right in that respect.

Senator, in a way one can find the answer to this question in those Western European assemblies and parliaments that, over the course of years, have been chosen by means of proportional representation. To what extent does a French assembly, for example, under the Third Republic, made up of members chosen in this particular way—to what extent was it possible for that group to function, as we hope the Congress of the United States will function? To what extent was it possible for those people to accommodate themselves to each other and to make the necessary compromises that have to be made in a legislative body? That is really what we are talking about here.

Senator HATCH. One final question: Do at-large systems and municipal government, an apparent target of the results proponents, necessarily discriminate against minority groups?

Mr. BERNS. They discriminate if the definition of "discrimination" is voting results, and so forth.

Senator HATCH. As in section 2 of the House bill and the Kennedy-Mathias bill?

Mr. BERNS. The city of Mobile had a 35-percent black population and had never succeeded in electing a black assemblyman. That on its face might trigger even an intent, and it did, I think, for Justice White in the *Mobile* case.

Senator HATCH. Right.

Mr. BERNS. On the other hand, if one looks at the situation and if the black voting age population really does vote, it may turn out that the blacks of Mobile have as much influence on the people who represent them. Those who represent them must take into account the interests of those blacks, as for example, the Democratic city council of Chicago does Republicans in the city of Chicago.

Does a resident of the city of Chicago have a legitimate grievance that the city of Chicago is not made up on a proportional representation basis—the city council? Can it be said that he is seriously deprived of a constitutional or Federal statutory right? The important thing here is to insist on the right to vote, and if that is achieved--if minority groups have the right to vote—then it seems to me that their interests can be protected.

Members of this body and Members of the House of Representatives since the Voting Rights Act of 1965—and I think this can be demonstrated—pay more attention to the interests of blacks—for example, southern Representatives and southern Senators—than they did heretofore, and they do so because they depend on their votes.

Senator HATCH. Thank you, Dr. Berns.

[Magazine article written by Dr. Berns and submitted for the record follows:]

Voting Rights and Wrongs

Walter Berns

THE Voting Rights Act of 1965 is surely the most successful civil-rights measure ever enacted by the national government. Everybody—or, at least, everybody who has publicly offered an opinion on the subject—agrees with this judgment, and there is good reason why they should. Among civil rights, that of voting is fundamental because the enjoyment of other rights is likely to depend on it; prior to 1965, however, and despite the Civil Rights Acts of 1957, 1960, and 1964, it was a right denied to most Southern blacks. In Mississippi, for an egregious example, only 6.8 percent of voting-age blacks were then registered to vote; thanks to the Act, that proportion is now almost 70 percent, and in 1980 almost 60 percent of them actually voted. What is more, not only do white candidates for public office throughout the South now actively and publicly solicit black support at the polls, and Southern Senators and Congressmen legislate with a view to the interests of their black constituents, but major Southern cities have black mayors (Atlanta being the most conspicuous of these). Indeed, there are now almost 2,000 black elected public officials in the six states of the Deep South.

So successful has the Act been in achieving its objective (which, as then Attorney General Katzenbach put it, was the removal of barriers to black voter registration), that even some of its devoted supporters began to question whether its "Draconian" pre-clearance provision in Section 5 was needed any longer. Under this provision, some nine states (mostly Southern) and political subdivisions of thirteen others are required to submit all proposed changes in their voting laws and procedures to the U.S. Attorney General for his approval. For states accustomed to referring to themselves as sovereign commonwealths, this is an ignominious position to be in, especially since, in practice, their appeals are made not to exalted political officials, such as Griffin Bell or William French Smith, but to anonymous persons—who knows their names? and who can bring them to account?—in the Civil Rights Division of the Department of Justice. That great civil libertarian, Justice Hugo L. Black, protested that Section 5 treated the states as "conquered provinces" and was unconstitutional. (More recently, the usually soft-spoken Thad Cochran, Republican Senator from Mississippi, put it this way: "Local officials have to go to Washington, get on their knees, kiss the ring and tug their forelocks to all these third-rate bureaucrats.") What, these states ask, are they *now* doing to deserve this treatment? And why single them out? Is there no voting fraud up north, in Chicago, for example? It may have been in response to this question that Henry Hyde of Illinois, the ranking Republican on the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, asked, "Shall we extend the mandatory pre-clearance for these 'selected areas' another ten years . . . or is seventeen years in the political penalty box enough?"

Hyde's question was asked last summer when the House was debating proposals to renew or extend the Voting Rights Act. Unless Congress acts before August 6, 1982, some of these states and political subdivisions will be eligible to petition the U.S. District Court for the District of Columbia to be removed from this Section 5 pre-clearance coverage; in the words of the phrase coined to describe this procedure, they will be able to "bail out." Rather than permit this, some members of the House proposed that the pre-clearance provision be extended to cover all 50 states and all their political subdivisions; this, at least, would meet the complaint of unequal treatment. At this, Henry Hyde, for one, balked. What is significant, however, is that he ended up voting for the extension. He did so, he explained, because of what he learned during committee hearings on the proposals: "Witness after witness testified to continuing and pervasive denials of ready access to the electoral process for blacks."

Any fair-minded person would have to agree with this assessment. Despite the progress made since 1965, there are still more or less remote areas where state and local officials continue to resist according voting rights to minorities. Without federal supervision, there is no assurance that these practices would not continue or be resumed

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in other voting districts in some of the states. The price of liberty, as Tom Paine said, is eternal vigilance, and it is unfortunate, but the time has not yet come when we can rely on every local official to provide it.

The House agreed. It passed a bill extending the Act by the overwhelming margin of 365 votes (389-24); and when, on December 16, an identical bill was introduced in the Senate, 61 members of that body, including 8 Republican committee chairmen and several Southern Democrats, immediately indicated their intention to support it. Its easy passage would seem to be assured when it reaches the floor of the Senate, probably in April; as its sponsors, Senators Kennedy and Mathias, were quick to point out, a majority of this size is sufficient to defeat any attempt to filibuster on the bill. It is almost sufficient to overturn a presidential veto, not that there is much likelihood that the President would dare to cast one. Opposition to this bill, even White House opposition, has been conspicuous by its absence, so much so that some Senate staff members have complained of difficulties in finding witnesses willing to testify against it.

This is unfortunate because the bill in its present form is much more than an extension of the current law. Unless it is amended it deserves to be defeated.

II

WHAT is new in this bill is not to be found in Section 5's pre-clearance provision, on which most of the debate has been focused; that section is unchanged. What is mostly objectionable in this bill is not to be found in the new bail-out section, even though its effect will be to make it almost impossible for any jurisdiction to take advantage of the bail-out privilege. What is new and profoundly objectionable is the seemingly innocuous amendment to the text of Section 2 which, by general agreement, was not one of the Act's "key sections." (In one compendium of significant civil-rights laws, this section was omitted from the text of the 1965 Act precisely because, in the editor's view, it was not one of the "key sections.")

In its original form, Section 2 was a mere declaration, or a restatement in statutory form, of the Fifteenth Amendment to the Constitution. Where the Amendment says the "right of citizens of the United States to vote shall not be denied or abridged" on account of race or color, Section 2 says, more explicitly, that no "voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied [so as to] deny or abridge" the right to vote. Not surprisingly, unlike other sections of the Act, this one has given rise to very little litigation, and in the current debate over extending the Act very little attention has been paid to it. Yet its language was altered in a significant way. The words "to deny or abridge" the right to vote were deleted; in their place were put the words "in a manner which *results* in a denial or abridgment" (emphasis added) of the right to vote. This new language will make Section 2 the key section of the Act, one that will affect the electoral laws and practices of every state and political subdivision in the nation. There is reason to doubt that this was understood by all the Congressmen and Senators who lined up quickly in support of the bill.

The new language is intended to express the difference between the right to vote and what the federal courts, in voting-rights cases, have made of the right to vote. (It was placed in Section 2 of the bill because that section, unlike Section 5, applies to the entire country, and applies to existing voting laws and practices as opposed to voting changes.) Voting, Chief Justice Warren pronounced in a 1969 case, includes "all activities necessary to make a vote effective," and the effectiveness of a vote is now measured by its results. Thus, a vote can be "diluted"—that is, made less effective—if a city annexes its surrounding territory with the consequence that the proportion of black voters declines from 56 percent to 47 percent of the population; or if, as a result of reapportioning its voting population, a state reduces the percentage of black voters in a district below 65 percent, the proportion calculated by the Justice Department and certain federal District Courts to make it relatively certain that a black will be elected; or if, when changing from a system of plurality to one of majority voting, a city cannot prove that the change will not "dilute the effectiveness of the Negro vote." This last reference is to a 1980 case, *City of Rome* v. *United States*, and a consideration of it and *City of Mobile* v. *Bolden*, decided the same day, will help to explain what Congress is up to.

Rome, Georgia, had a commission form of government, the commissioners being elected on an at-large basis and by a plurality of the vote. (As the Supreme Court noted, "literally thousands of municipalities and other local government units throughout the nation" have such a system.) In 1966, the state of Georgia enacted new laws affecting municipal governance, among them one providing for election of commissioners by majority vote. Since Georgia was covered by Section 5 of the Voting Rights Act, it had to "pre-clear" this electoral change with the Attorney General. He refused his approval and Rome went to court. The trial court found no discriminatory purpose in the new law, but it ruled against the city because the law was discriminatory in effect. As the Supreme Court repeated in its affirmance of the lower court's decision, the law would deprive "Negro voters of the opportunity to elect a candidate of their choice," by which it meant, a candi-

date of their own race. More precisely, the city had *not* proved that the new law would *not* have the effect of depriving Negro voters of the opportunity to elect a Negro candidate.

On the same day, the Supreme Court reached the opposite conclusion in a case presenting starkly similar facts. Mobile, Alabama also had a commission form of government, the three commissions being elected every four years by majority vote in at-large elections. *City of Mobile* v. *Bolden* began when black citizens of the city challenged the legality and constitutionality of the at-large election procedure, alleging that their vote had been "diluted" because, while blacks comprised more than 35 percent of the population, no black had ever been elected a city commissioner. Although the trial court found that Mobile blacks registered and were able to vote without hindrance, it nevertheless held this "dilution" of voting power to be an abridgment of the right to vote in violation of the Fifteenth Amendment, and ordered the replacement of the commission system by a mayor-council system, with council members to be elected from nine single-member districts. A sharply divided Supreme Court reversed, holding that an election law that is facially neutral on its face can be said to violate the Fifteenth Amendment only if it can be shown to have been motivated by a discriminatory purpose and that there was no such showing in this case. A plurality of the *Mobile* Court held that Section 2 of the Act is coextensive with the Fifteenth Amendment, and, therefore, does require proof of discriminatory purpose.

What accounts for the discrepancy in these judgments? The Mobile case was tried not under the Voting Rights Act but, rather, under the Fifteenth—and, to some extent, the Fourteenth—Amendment. Alabama, like Georgia, was covered by Section 5 of the Act, but Mobile, Alabama, unlike Rome, Georgia, had not changed its election law—it had been in effect since 1911—and, therefore, was not required to "pre-clear" it with the Attorney General under Section 5.

Thus, as the situation stands after these two 1980 cases, anyone challenging old election laws, or new laws in jurisdictions not covered by Section 5 of the Voting Rights Act, must sue under Section 2 of the current Act or under the Fifteenth (or Fourteenth) Amendment, and to prevail he must show discriminatory purpose; to prevail under Section 5, it is the city or state that bears the burden of proof and it must show no discriminatory effect.

The amended Section 2 is intended to reverse the Supreme Court's decision in *City of Mobile*. By making it clear that, in its judgment at least, proof of discriminatory purpose or intent is not required in cases brought under the Fifteenth Amendment (by way of Section 2), the House Judiciary Committee, as it frankly admitted in its report on the bill, intended to do away with the discrepancy between the law of *Mobile* and the law of *Rome*.

If enacted, it would permit voting-rights suits to be filed by the Attorney General or any private litigant against every state, city, county, or other electoral jurisdiction in the country. It would put every jurisdiction on notice that it might have to appear in a federal court to defend its election laws—any law affecting elections—against the charge that they "dilute" the votes of blacks and a few other minority groups. And it would, of course, make these federal courts the country's electoral lawgiver.

III

At the end of his dissenting opinion in *City of Mobile*, Justice Thurgood Marshall said that if the Court "refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination' . . . it cannot expect the victims of discrimination to respect political channels of seeking redress." Such minatory statements are singularly out of place in judicial reports—after all, judges are not supposed to provoke or even to excuse lawlessness—but, except in the context in which it appears, Marshall's point concerning sophisticated modes of discrimination has considerable merit. There are ways of abridging the right to vote without apparently denying it.

The paradigm case of this occurred some twenty years ago when Alabama, without removing a single white voter, managed to exclude all but a fraction of Tuskegee's black voters from the city (all but 4 of a total of 400) by redrawing the city's boundaries, transforming its shape from that of a simple square to "an uncouth twenty-eight sided figure," as Justice Felix Frankfurter put it. The Supreme Court was unanimous in its judgment that this was a violation of the Constitution, with all but one member agreeing that it was an abridgment, if not a denial, of the Fifteenth Amendment's right to vote.

But in *City of Mobile* the Court was not retreating from its position in the Tuskegee case; it was refusing to join Marshall in his insistence that the Constitution requires that "the votes of citizens of all races shall be of substantially equal weight." To the Court—or, actually, to the plurality of Justices who joined in Justice Potter Stewart's opinion—this was a call for proportional representation. "The theory of this dissenting opinion . . . appears to be that every 'political group,' or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers." This, said Justice Stewart, is not the law of the Constitution.

Marshall angrily denied that he was calling for proportional representation; this charge was, he said, a "mischaracterization" of his position. There is, he went on, a clear distinction between a requirement of proportional representation and the discriminatory effect or vote-dilution test. "The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them." In like manner, the amended Section 2 of the Voting Rights Act contains this disclaimer: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

Despite these assurances, however, one from Marshall and the other from Congress, the distinction between the vote-dilution test and the proportional representation of at least some minority groups is likely to be no clearer than that between racial goals and racial quotas.

Those words in the amended Section 2—"in a manner which results in a denial or abridgment"—will derive their meaning in part from the Supreme Court's decision in *United Jewish Organizations* v. *Carey*, and according to Justice William Brennan, "the one starkly clear fact of this case is that an overt racial number was employed to effect petitioners' assignment to voting districts." In equally stark fact, race was the *only* criterion employed in the redrawing of district lines. Yet the Court, with Brennan concurring, approved it by a vote of 7 to 1.

At issue in this case was the New York reapportionment statute enacted after the 1970 census, and more precisely, the district lines drawn in three metropolitan counties, Kings, New York (Manhattan), and Bronx. In one of the newly-drawn districts, the nonwhite majority was *only* 61 percent, and the Justice Department, from whom Section 5 pre-clearance was required,* concluded from this and other facts that the state had *not* shown that the district lines had *not* been drawn with the purpose or effect of diluting the voting strength of nonwhites (blacks and Puerto Ricans). Faced with the necessity to have its reapportionment plan in place in time for the 1974 primary and general elections, the state revised the plan as it affected the districts in these counties, increasing the size of the nonwhite majority from 61 percent to 65 percent. This satisfied the Justice Department in Washington but not everyone in the local district, for, in order to find the number of nonwhites needed to achieve the required 65-percent proportion, the state had to reassign to other districts some members of what had been a consolidated Hasidic community. The Hasidim went to court and, as one might expect, lost. They lost because, as Brennan put it in his separate opinion, they had "not been deprived of their right to vote" (which, of course, could also have been said of the nonwhites in the county), and because while their vote may have been diluted as a result of their being divided into separate districts, they do not constitute a group explicitly protected under the Voting Rights Act. Congress at its pleasure has reserved this status for blacks and so-called language minorities: American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage. The Hasidim were expected to take their chances along with the rest of the whites, and in this case at least there was no evidence of "cognizable discrimination against whites." Whites could elect their representatives—that is, they could elect whites—in those districts where they were in the majority. *UJO* v. *Carey*, like some cases before it, stands for proportional representation, not, admittedly, for every group—the Court did not join Marshall by saying that "the votes of citizens of all races shall be of substantially equal weight"—but proportional for some groups.

ONE of Chief Justice Earl Warren's legacies to American politics was the aphorism, "Legislators represent people, not trees or acres," and, that being so, states were forbidden by the Constitution to apportion seats in either house of their legislatures on any basis other than population. Now it turns out that legislators represent not undifferentiated people—people defined only as individuals living in districts of approximately equal size—but groups of people defined by their race, and they can be said to represent them only if they are of that race. As the Court said, the votes of blacks will be diluted when the number of blacks in a district is not sufficient "to insure the opportunity for the election of a black representative." How many black representatives? That depends on the number of blacks in the county. How many are required in a district to insure the election of a black representative? If one takes it for granted that blacks vote as a bloc, at least 50 percent, and beyond that the number would seem to depend on voter turnout. In Kings County, turnout tends to be low, so 61 percent was deemed insufficient. Why 65 percent? "A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he 'got the feeling . . . that 65 percent would be probably an approved figure' for the nonwhite population in the assembly district in which the Hasidic community was located. . . ."

* These counties were subject to the pre-clearance provision of the Voting Rights Act because New York then had a literacy test for voting and, given a choice between Richard Nixon and the candidate of a badly discredited Democratic party, fewer than 50 percent of the state's voting age population had gone to the polls in the 1968 presidential election. In combination, these factors were presumed to be evidence of disfranchisement of some sort.

Of course, as any well-informed student of voting behavior could have told these anonymous Justice Department Solons (and told them over the phone), 65 percent may not be sufficient to insure the election of nonwhite representatives. In the first place, voters can (and sometimes do) look to factors other than race when casting their ballots, and it is an insult to assume this to be untrue or even uncharacteristic of "nonwhite" voters. In the second place, in some areas (and Kings County is one of them) nonwhite voter turnout is so low that, even if nonwhites voted as a solid bloc, districts on the order of 80 or even 90 percent would be required to insure the election of their candidate. Voter turnout is related to education—the more education, the higher the turnout—and not at all to race, a fact that ought to be pondered by the ideologues in the Justice Department and federal judiciary. Since the nonwhites in these Kings County (which is to say, Brooklyn) districts tend to be very poorly educated, it is not surprising that, judging from the returns in the 1980 congressional elections, their turnout may be as low as 10 percent and surely is as low as 20 percent. Whatever the reason, four of the five districts the Justice Department presumed to be safely nonwhite after the 1974 reapportionment proceeded to elect white representatives in the ensuing local elections.

WHAT, then, can we make of Congress's assurance that Section 2 does not require a group's representation to be equal to its proportion of the population—or that disproportionality does not "in and of itself" constitute a violation of the section? If we assume, surely correctly, that this language is not intended to be a repudiation of *UJO* v. *Carey* and the other vote-dilution cases, Congress means that some factor in addition to disproportionality must be present before it can be said that a group's vote has been abridged by being diluted. What factors? Well, for example, the fact that a group's "discreteness and insularity [has allowed the] dominant political factions to ignore [it]"; or the fact that, after a city annexed additional territory, the number of black seats on the council declined; or the fact that there is evidence of racial bloc voting. Where there is "underrepresentation," the presence of any one of these additional factors, or any one of what Justice Stewart in the *City of Mobile* case referred to as "gauzy sociological considerations," will continue to trigger a violation. So much for the "not-in-and-of-itself" disclaimer.

Besides, whatever Congress's intention in making this disclaimer, the courts are likely to treat it the way they treated a similar disclaimer in the Civil Rights Act of 1964. There Congress said specifically that nothing in Title VII of that Act should be interpreted to require employers "to grant preferential treatment" to any person or group because of race, color, sex, or national origin, nor even to correct "an imbalance which may exist with respect to the total number or percentage of persons of any race [etc.] employed by any employer."

Clear enough, one would think, but the Supreme Court paid it no heed. To read this as written, said Justice Brennan in the *Weber* case, would bring about an end completely at variance with the purpose of the statute, by which he meant, the purpose of the Court.* Congress's disclaimer should be taken with a grain of salt. If the amended Section 2 is adopted, minorities whose voting power has been "diluted" will be able to file suits against jurisdictions throughout the country, and the remedy for vote dilution will prove to be minority representation in proportion to the size of the minority group.

In trying to achieve this, however, the federal courts will encounter a few problems. Where nonwhite voter turnout is as low as it is in Kings County, New York, will the amended Voting Rights Act require districts with populations 80 or 90 percent nonwhite? Some Republicans hope so; they know that the more blacks they can pack into a district, the more Democratic the vote of that district, and, consequently, the better will be their chances to win in surrounding districts. From their partisan point of view, as many districts as possible should be 100-percent nonwhite.

Then, is it not a violation of the Voting Rights Act to combine Puerto Ricans and blacks in the single category, nonwhite? Both are explicitly protected groups and, according to the principle of *UJO* v. *Carey*, each is entitled to representation in proportion to its numbers. (Interestingly enough, the Puerto Ricans of Kings County objected to the 1974 redistricting plan precisely because it did not establish a Puerto Rican district.) Perhaps in future cases the nonwhite group will have to be split into its component parts and each part given a district it can call its own. If so, the redefined Tuskegee (that "uncouth twenty-eight sided figure") will, by comparison, look like a perfect ellipse. And, for one more example, it will be interesting to witness the situation where a city is ordered by the U.S. District Court for the District of Columbia to concentrate blacks in voting districts in order to "undilute" their voting power at a time when the local U.S. District Court has ordered the city to annex surrounding territory in order to integrate the schools.

IV

A GENUINE system of proportional representation, of the sort sometimes employed in Western Europe, is one where each

* See my article, "Let Me Call You Quota, Sweetheart," COMMENTARY, May 1981.

political group—*Union socialiste et républicaine, Gauche indépendante, Jeune République, Rassemblement du peuple français*, etc.—is guaranteed a share of seats in the legislature equal to its share of the popular vote. Since these groups are defined by their interests or the opinions they hold, and the popularity of these opinions cannot be known until they are elicited, there have to be elections. But one can learn how many blacks there are in the country simply by consulting the census reports. Why, then, bother to hold elections? Why construct these elaborate election districts to insure that black voters will elect, say, a Charles Diggs rather than, say, a Peter Rodino (chairman of the House Judiciary Committee)?

And indeed, one of the unintended consequences of this enactment of the amended Section 2 would be that the other sections of the Voting Rights Act would, in effect, be made superfluous. Who needs statutes providing Attorney General pre-clearance, or bail-outs, or federal election examiners and observers, when, with a few seemingly innocuous words, the judiciary can be authorized to do everywhere what the Justice Department has been doing only in the few "covered" jurisdictions, such as Houston, where it called off a general election, or New York City, where, merely because it thought it had not been given sufficient information, it prevented the holding of a primary election, or Kern County, California, where it ordered the printing of Spanish-language ballots—67,430 of them, of which number only 174 were actually used—in a 1978 primary election? Government by judiciary can be more efficient—think of school busing, abortion, prison reform—than government by administrative agency, to say nothing of government by local election officials.

Senator HATCH. Senator Grassley?

Senator GRASSLEY. I have no questions, Mr. Chairman.

Senator HATCH. Thank you for appearing. We appreciate the effort you have put forth to present your testimony. It has been very enlightening.

Our next witness will be Benjamin Hooks, the executive director of the NAACP.

Mr. Hooks, we are happy to have you with us today.

I wonder if we could just take a 10-minute break, unless you would rather not. I could use a 10-minute break myself, if no one has any objection.

Mr. HOOKS. Fine.

Senator HATCH. OK. We will recess for just 10 minutes, and then come back, and Mr. Hooks will be our first witness. Our last two witnesses will be Vilma Martinez and Ruth Hinerfeld.

[Recess taken.]

Senator HATCH. We are happy to resume our hearings today, and we are very pleased to have Mr. Ben Hooks with us, as one of the leading civil rights advocates in America. We will be very interested in what he has to say here today.

Mr. Hooks?

STATEMENT OF BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ACCOMPANIED BY ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU; AND RALPH NEAS, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HOOKS. Senator Hatch and members of the committee, my name is Benjamin L. Hooks, and I am the executive director of the National Association for the Advancement of Colored People.

In my appearance here today I am also speaking as chairman of both the Leadership Conference on Civil Rights and the Black Leadership Forum, two other organizations vitally interested in this issue, the extension of the Voting Rights Act.

The National Association for the Advancement of Colored People is a 73-year-old civil rights organization with more than 1,800 branches and 600 youth and college chapters. We operate in all 50 States and the District of Columbia.

The Leadership Conference on Civil Rights was founded in 1949, and it is a coalition of 157 national organizations. The Black Leadership Forum is comprised of the chief executive officers of 15 national black organizations.

Today I am accompanied by Ms. Althea T. L. Simmons, on my right, who is director of the NAACP's Washington Bureau—and who may have to leave shortly.

Senator HATCH. We are happy to have you here, Ms. Simmons.

Mr. HOOKS. And Mr. Ralph Neas, on my right, the executive director of the Leadership Conference on Civil Rights.

The organizations that I represent appreciate the invitation to appear before the subcommittee today. We are here, Mr. Chairman, to announce once again our strong and unswerving support of the extension of the Voting Rights Act and specifically to support S. 1992.

I must confess, Mr. Chairman, I was somewhat surprised to hear the Attorney General say, in answer to questions put by Senator Kennedy, that the civil rights community had given the administration word that they would support a simple extension. That statement simply is not factual, and perhaps in all justice the Attorney General has so many things on his mind that he has forgotten it.

But I would like to point out for the record that on April 7, 1981, the Kennedy-Mathias bill was introduced in the Senate, known as the Rodino bill in the House—S. 895 and H.R. 3112. Both of these bills clarified section 2, and immediately upon their introduction the entire civil rights community endorsed those bills in public, in press conferences, in news conferences all over the country.

More specifically, in May I testified before the House committee; Vernon Jordan testified on that same date, other civil rights leaders testified on succeeding dates, and each of us unequivocally supported publicly and on the record the extension of the voting rights measure as contained in the Kennedy-Mathias-Rodino bills.

In May of that same year or June, the staff of LCCR met with the staff of Attorney General Smith, and later on in July I personally led a delegation to meet with Attorney General Smith, and we made it very clear that we supported the Mathias-Kennedy-Rodino bills and those bills did contain the clarification or amplification of section 2 of the Civil Rights Act.

So I know of no time that we have ever given any indication privately or publicly that all we wanted was a simple extension.

Let me also add that, as it relates to the bail-out provision, that was not a provision which the civil rights community wanted. It was a provision which we accepted because we wanted the strongest—not only the strongest possible extension measure, but also the strongest possible bipartisan coalition.

Representative Hyde of Illinois indicated that he wanted that bailout provision, and we reluctantly acquiesced in it. It was not something which the civil rights community proposed.

On October 5, as you know, the House passed that bill, and we again gave the world knowledge that that is a bill which we approved. So we have not changed our position from April 7 to this good date. We have consistently and publicly supported the Kennedy-Mathias-Rodino bills.

Let me say one other thing. It is our position, without any equivocation or hesitation—and I say this from the background of 30 years experience as a practicing attorney, as a former trial court judge called on to make many snap decisions from the bench, that until the *Mobile* v. *Bolden* case the law was considered by us to include effect or results. And from the date that the *Mobile* case was decided, it was the unanimous view of the civil rights community that even though, in the testimony of Attorney General Katzenbach before this committee in direct answer to Senator Fong's question, the 10 select members of the Judiciary Committee, including Senator Robert Griffin and Senator Hugh Scott, when Attorney General Mitchell wanted to add the language that is being added now, it was necessary because, in their judgment, that that concept was included in section 2. We have had a great deal of discussion about that this morning.

So it is our opinion—and we will submit a memorandum which we think will buttress that—that indeed results or effect had been the prevailing standard.

When we talk about the *Mobile* case, I think we have to take into account the *White* case and the *Whitcomb* case, but we also have to remember the intervening situation of *Arlington Heights* and *Washington* v. *Davis*.

It was in that context that the Supreme Court in other matters started dealing with the idea of intent, in the *Arlington* case, which you have so eloquently cited this morning, and in the *Washington* v. *Davis* case.

So the *Mobile* case came to the Court in a time warp. They had previously decided those earlier cases, and they now had to decide *Mobile* in light of their decisions in the cases of *Washington* v. *Davis* and the *Arlington Heights* case.

Justice Potter Stewart pointed out that undoubtedly the courts had in prior Voting Rights Act cases—and it really does not matter whether the cases came under title 5 or title 2, because the courts have a tendency to deal with the whole situation. He pointed out in his opinion—and it was a plurality opinion of the four Justices—that perhaps the courts made a mistake. It was to correct, not to write new law from our viewpoint, and not to overrule the Supreme Court.

Let me just say one other thing about the 15th amendment. It has never been said that the Congress was restricted to intent. It could pass legislation coextensive with the 15th amendment which went beyond the narrow interpretation of intent.

Mr. Chairman, as I listened to Attorney General Smith today and the statements made by various Senators, and Dr. Berns, I have a peculiar feeling that I have been here before.

I recall in an old jury case that we were trying in Memphis, Tenn., where there were no blacks serving on the jury. The question came up about intent versus effect or results. We knew what the results were. Finally, somebody asked the jury commissioner, "How do you pick your juries?" His words—I can remember them almost verbatim—"I use the city directory, I use the phone book, and I go down the lists, and I pick people out."

Then we asked, "How does it come that you only pick out white people?" He said, "It is not my intention to exclude Negroes; I just

want to make sure that we have got high quality jurors, so I use the streets where I know high quality people live."

He said his intention was not to exclude Negroes, but as a matter of fact the results of his deliberate use of a city directory, where he knew where whites lived and where blacks lived, and his admission that he consciously excluded any streets where black folk lived, but his intent was not to exclude blacks, but make sure that he only got high class people——

Senator HATCH. If I could interrupt you, I think a court could very easily construe that as an intent to exclude blacks.

Mr. HOOKS. I want to move to that point very quickly, but I would just point out that I have been there, Mr. Chairman. I remember when we ran a black for the board of education. You ran at large. As soon as a black came within a 1,000 votes of being elected, the next election they said you had to run by positions.

I can remember when we all were pushing the law that had been in effect for years. In the general election you pulled one lever or made one mark on your vote for the whole Democratic ticket or the whole Republican ticket. But the minute a black was selected in the Democratic primary, they wanted to change the law and said no longer could you push one ticket, you had to individually vote.

I remember when we had all of these questions. I have been there. I have seen my beloved home State and beloved home city deliberately enact run-off laws. If we had to prove intent, they would always say, "That is not our intent."

Now, Mr. Chairman, it seems to me that we have here somewhat of a red herring in this whole business of proportional representation of a so-called mirror image. I know of no civil rights group—and I may state unequivocally for the NAACP and for the Leadership Conference on Civil Rights that we are not seeking proportional representation. We are not seeking a mirror image of the ethnic classifications of neighborhoods or cities. We are simply seeking the unfettered right to vote without having to prove that which sometimes is not susceptible to proof.

We maintain that the reason that the whole argument over title 2 and effect versus intent is a red herring—or perhaps I should say more accurately, as some learned man said recently, a Trojan horse—is the fact that the Attorney General has said, and I have heard the distinguished chairman of this subcommittee say over and over again, that in order to prove intent you have to prove that results becomes a substantive part of intent, that in a court of law—and I certainly can attest to that—the results become very important as you try to measure intent.

It seems to me that what we have said in the civil rights community is true. All the administration is trying to do is make it much harder for those who have been outside of the mainstream to get in, because the administration is saying to us, "It is not enough to prove the effects or the results; we want you to prove intent; we want you to have a higher standard; we are going to superimpose upon a civil case criminal standards."

I remember how often I used to read the charge to the juries—"You must find this defendant guilty beyond a reasonable doubt

and to a moral certainty," whatever that meant. And in civil cases we talked about a preponderance of evidence.

Now, what this administration is doing is imposing the criminal standard of proof on what is allegedly a civil statute. We have to prove beyond a reasonable doubt and to a moral certainty—people who have been wronged.

Let me say finally that I thought I detected in the brilliant and persuasive arguments of Dr. Berns not so much an argument against the newly written words in section 2, as he talked about the *UJO* case and some other cases where we had peculiar results. To say the least, those cases were decided under the Voting Rights Act as now written.

So if you are opposed to what happened, it really means it is a transparent argument, not against the new words of section 2 but against the Voting Rights Act, period. Certainly nobody can say that the results reached in those cases were caused by the language proposed by Senator Mathias and Senator Kennedy which has not been enacted into law.

I think—and Senator Metzenbaum said it so eloquently and so clearly—that this administration, if it is concerned about making it known that it is concerned about the desires and aspirations of all of the citizens, would join in support of S. 1992, which is fair.

I know I cannot ask a question, but I would like to pose a riddle. If indeed the proof of results is a substantive part of the evidentiary necessity to prove intent, and if we are saying that proving results will result in proportional representation, then are you not also saying that if you substitute the word "intent" for "results," if indeed we could ever prove intent we must also have proportional representation? It seems to me that that means it is simply a tactic that is designed as a scare tactic and not reality, because I see absolutely no difference, if you were to put the word "intent" there, and then if indeed we could ever prove it—and it would be difficult to prove—that you would then be saying the courts would have to order proportional representation.

Mr. Chairman and distinguished members of this subcommittee, I want to thank you for this time and for this opportunity. I am prepared to try to answer any questions you may have.

Senator HATCH. Thank you, Mr. Hooks.

In your testimony before the House Judiciary Committee, you expressed strong support for an extension of the present Voting Rights Act without change. I will read your quote from that hearing. This is on page 94 of my transcript. "I have not seen any changes that were anything but changes for change's sake. I do not understand it. It is our position that, since it is working well, those of us who proposed it and were the sufferers and forebearers are not coming in at this time suggesting that there be changes. It would be best to extend it in its present form."

"That is what I have said I want to do. Frankly, I think it should be extended in its present form, because it does work and has been the most effective and important civil rights legislation in history." That was your statement.

Why do you come now before this subcommittee today and tell us that the entire civil rights community now strongly opposes this course of action of a simple extension, and why do you accuse

those of us who wish to preserve the act unchanged, including the intents test, as using what you refer to as code words of discrimination? Have circumstances changed that much in the past 8 months to justify those statements by yourself?

Mr. HOOKS. Mr. Chairman, I may have to reread my testimony, but I am almost positive—and I did not bring it today, and I am sorry that my testimony was headed "Testimony in support of H.R. 3112," which had the change in it.

We had to deal with that, because the *Mobile* v. *Bolden* case was the case that was giving us the most trouble. We were the ones who asked Senator Kennedy and Senator Mathias and Representative Rodino, in the new language, to deal with the *Mobile* thing. We did not consider that.

Let me be very frank. I do not consider that a change. I consider that simply—putting into the language of the bill what we had conceived the language to be from 1965 to 1978. It was clarifying language. I still do not believe that the language is a change.

Senator HATCH. Let me have my aide bring this up. It is my understanding of what the transcript says.

Senator KENNEDY. As I understand, since we only have one copy of your testimony——

Senator HATCH. We would be happy to provide it.

Senator KENNEDY. If you have an extra copy, I would like to see it.

Senator HATCH. I do not have an extra copy. We will make one for you.

Senator KENNEDY. The question Mr. Hooks was asked was dealing primarily with the bailout provision.

Mr. HOOKS. Section 5; that is what I answered.

Senator KENNEDY. I think the response has to be viewed in that particular way. The record is going to stand for itself, but to try to put words in Mr. Hooks' mouth——

Mr. HOOKS. I would like to say that we did call on Senator Kennedy, Senator Mathias, and Representative Rodino before the bill was introduced on April 7, and asked for clarifying language.

We maintain that the clarifying language is not a substantive change but simply expresses directly what we thought was the will of Congress from 1965 to 1978. We wanted, and expressed openly, the *Mobile* situation taken care of and in new legislation.

If I have misstated that, I apologize, but I thought my written testimony talked about that. I will check it again to see. But I do know, on the bailout, we said we did not see any necessity for change.

Senator HATCH. Yes, you did do that. But the question was—I do not want to beat this to death.—"There has been some suggestion that the Voting Rights Act, as presently written, does not take into account the changed circumstances that have occurred in the covered jurisdictions." Then you go on to refer to the bailout section in response to that question.

A subsequent question followed: "I also wonder if you have given consideration as to whether a declaratory judgment that has submitted a voting change which is not discriminatory needs to be brought in the district court in the District of Columbia, or might that be brought in any Federal district court."

Your response was, "The thing that puzzles me, again, is that we have a law that has worked very effectively. It has been hailed as a mighty law. It created a tremendous change in a region of the country where, for 100 years, there was outright illegal activity preventing blacks from voting, and in a few short years it brought a major change in this country, in the parts where it was applied as well as where the law did not apply. All those changes have been for the best at a minimum cost in terms of money, machinery, in terms of anything you want. It baffles my imagination as to why we have to consider a change at all when something is working well. As Vernon Jordan said, 'If it ain't broke, don't fix it.' "

Then you go on to say, "I have not seen any changes that were anything but changes for change's sake. I do not understand it. It is our position that, since it is working well, those of us who proposed it and were the sufferers and forebearers are not coming in at this time to suggest that there be changes. It would be best to extend it in its present form."

We will give you a copy of this, so that you may look it over—OK?

Mr. HOOKS. I simply repeat again that we had on many occasions publicly stated our surprise at the Supreme Court decision in *Mobile* v. *Bolden* and that we felt that had to be clarified, and we supported publicly the bill as introduced by Peter Rodino, and that bill did change section 2. That is what we had reference to.

In our covering memorandum to the Attorney General, we pointed out all of these reasons, and I still maintain—and I recognize I may be haggling; I do not wish to engage the time of the subcommittee in that—I still point out that it is our position—and if it is not true legally, at least we perceived it to be true—that from 1965 to 1978 we were dealing with an effects and not an intent standard. Therefore, the section 2 change proposed by Representative Rodino was not a change but a clarification to make clear what the law was all of the time.

Senator KENNEDY. If we could just yield on this point——

Senator HATCH. May I make one comment before we do?

Senator KENNEDY. Just on the——

Senator HATCH. Let me make a comment first, if you will, and then I will turn to you.

Mr. Hooks, I have not meant to imply that you have not been strongly for the Rodino-Kennedy-Mathias bills. I understand that, and I accept your statement on that.

Please go ahead, Senator Kennedy.

Senator KENNEDY. In the relevant part of the question to Mr. Hooks, he was asked: "Have you given consideration as to whether a declaratory judgment that has submitted change, a voting change, needs to be brought in the District Court of the District of Columbia, might be brought in any Federal district court?" That, it seems to me, is the essence of the question you were asked—whether you thought that they ought to move the preclearance provisions to other sections of the country or they be continued to be retained in the Federal district court.

My understanding of Mr. Hooks' answer in this case is that he believes in his response that this aspect of the law has worked effectively in being brought under the Federal district court. It seems

to me that, in reviewing both the question and the response, that puts it in the correct perspective. I think any suggestion, or any effort to try and indicate otherwise, would not be fair to Mr. Hooks.

If that refreshes your recollection a little bit on the nature of the question——

Mr. HOOKS. I also repeat what Vernon Jordan said; "If it ain't broke, don't fix it." I stand by that. Section 2 was broke, and we had to fix it.

Senator HATCH. Let me just call your attention to the *Mobile* v. *Bolden* case, where Mr. Justice Stewart said, "While other of the Court's 15th amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a 15th amendment violation." He is referring to the Supreme Court's decisions. "The cases of *Smith* v. *Allwright* and *Terry* v. *Adams*," for example, dealt with the question of whether a State was so involved in racially discriminatory voting practices so as to invoke the amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgement of the right to vote by a State."

I do not know of any Supreme Court cases where the effects test was institutionalized in the 14th or 15th amendments or even accepted prior to the *Bolden* case. I might add that the law was no different from 1965 to 1978 than in the 1940's.

Mr. HOOKS. Senator, Justice Stewart in the *Bolden* case cited *Zimmer*. These are the words he used: "was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the equal protection clause, that proof of discriminatory effect is sufficient."

Those are the words of Justice Stewart in the *Bolden* case, in which he admitted—I obviously do not agree with his conclusion, but I have to say this is what he said—that the Supreme Court had in *Zimmer* decided that effect was sufficient. He has said in effect they were wrong.

Senator HATCH. *Zimmer* was not a Supreme Court case.

Mr. HOOKS. My research leads me to understand that this is what he said—that the plurality in *Bolden* was correcting a misunderstanding that, in their judgment, had come into the law about effect versus intent, based on the *Washington* and the *Arlington* cases.

Senator HATCH. I would suggest you read it again, and I will read it again also. But he was correcting a lower court case. If I recall correctly, it was the *Zimmer* case, but let us both look at that again.

Mr. HOOKS. All right, sir, we will look at it again.

I am submitting a memorandum, and I will have the lawyers look at the memorandum again. I confess that the Supreme Court, in its wisdom, is sometimes a little confusing.

Senator HATCH. I have to agree with that.

Mr. HOOKS. I have no hesitance in trying to reread it, but I think that we have amply demonstrated that the *White* case and the *Zimmer* case did not require any proof of intent. That was the controlling law until the *Mobile* v. *Bolden* case, which came to us. I

was one of the lawyers involved. I was shocked out of the blue, because it simply required us to prove what was in the minds of people in 1912, and I do not think we could ever do that. That case has been remanded for the purpose of trying to prove intent.

Senator HATCH. Let me try to shed some light on this. I am reading out of the *Mobile* v. *Bolden* case, "The district court assessed the appellee's claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*. That case, coming before *Washington* v. *Davis*, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the equal protection clause, that the proof of a discriminatory effect is sufficient."

In other words, I think your people have taken that out of context. This is made very clear within the actual context of the case itself.

Mr. HOOKS. We read the same citation, and I will have to go back and check with the lawyers and see where the citation most appropriately applies. I will be happy to do that.

Senator HATCH. I appreciate that.

Mr. HOOKS. But I do not think that changes the basic thrust of what we maintain——

Senator HATCH. No; it does not change that.

Mr. HOOKS [continuing]. That prior to *Mobile* v. *Bolden*, that was the first case under the Voting Rights Act that held that you had to prove intent.

The Attorney General says that was the first case, period, and therefore was the first time the Supreme Court had a chance to speak to it. We do not agree with that. We say there were cases that came under section 5, not under section 2 necessarily, where in a broad way that question was covered.

Senator HATCH. OK.

Mr. HOOKS. At any way, we will re-research that.

Senator HATCH. We will both look it over.

In your House testimony——

Senator KENNEDY. Before we leave that point, does not what Senator Hatch just read really make your point, Mr. Hooks, that prior to the Washington case the proof of discriminatory effect is sufficient? I will get back later into what I think—both the effects test and the intent test were effectively the law prior to this, but prior to the Washington case—the provisions that he just read—the proof of discriminatory effect is sufficient.

It seems to me that this makes the point that you——

Mr. HOOKS. Senator, I read exactly the same passage. I think it makes my point; he thinks it does not, and I do not know why.

Senator HATCH. If your point is that that was the law before the *Mobile* v. *Bolden* case, I fail to see how this particular passage could possibly illustrate your point.

Senator KENNEDY. Before the *Washington* case.

Senator HATCH. Yes, before the 1978 case.

Justice Stewart pointed out only that *Washington* unambiguously clarified a law that some might have misunderstood earlier, not that *Washington* represented a departure in the law. Indeed, he said it did not.

Let me move on to another question. In your House testimony you stated, "I would hope, 10 years from now when I come back, I will only be testifying for 10 more years rather than in perpetuity."

The bill passed by the House, as you know, does not extend preclearance for 10 years; it extends it in perpetuity. Based on your House testimony, am I correct that you would be opposed to that aspect of the bill?

Mr. HOOKS. No, I would not. If I recall, Representative Washington or somebody made a statement about how long this should be in effect. My statement was to the effect that I did not believe that in my lifetime—I do not know how it came out—it would ever happen. My hope was that at some point it would not be, but I tried to express the fact that I did not think that was going to be a reality.

It was really a negative statement put in a positive cast. I was saying then what my hope was, not that I expected it to be at all. And of course "perpetuity" is a word that is susceptible to a lot of meanings. The succeeding Congresses who have no reason for income tax 20 years from now can wipe it out. I do not know whether that time will come or not. I would hope I would come here and testify against income tax at some point, but I do not think that I will have an opportunity.

It was simply that I was saying that would be my hope, not that I expected it, and therefore I am not opposed to that.

Senator HATCH. OK. Mr. Hooks, would you be satisfied with a simple 10-year extension of the Voting Rights Act without change?

Mr. HOOKS. No, sir, I would not.

Senator HATCH. You would not at this point?

Mr. HOOKS. No.

Senator HATCH. You indicate that you know of no one in the civil rights community that has advocated proportional representation. Permit me, if you will, to quote from the Greenville, S.C. "News," of December 13, 1981, the remarks of Dr. Willie Gibson, whom I am sure you know. He is the president, I believe, of the South Carolina NAACP. He indicates his opposition to a redistricting plan in South Carolina by stating, "Unless we see a plan that has the possibility of blacks having the probability of being elected in proportion to this population, we will push hard for a new plan."

Can you explain to the subcommittee what Dr. Gibson is talking about here? It appears to me that he is talking about proportional representation.

Mr. HOOKS. I understand precisely what Dr. Gibson is talking about. Those are not unusual statements to be made. I think there is a big difference between proportional representation and representation in proportion to their population. It simply means that we are not looking for 00 percentage points—if we have 42 percent, we want 42 percent representation. But it does mean there must be some appearance of equity—that we would not be satisfied with a plan, for instance——

Senator HATCH. Is that not a form of proportional representation?

Mr. HOOKS. If you get to the nth degree, any representation is somewhat proportional. It is a part of our Constitution. It is not ad-

hered to generally, but the whole business of redistricting was to adhere to the concept of 250,000 members for a Congressperson, 2 for every State no matter what size for the Senate. It was set up like that.

Gerrymandering is something that has been in our language long before black folk got involved. These are not new concepts.

If you understand what happens in South Carolina—that in the State senate even today there is not a single black serving, unless it happened in the last 3 months. We are involved in a lawsuit there, because we do have blacks in the State house of representatives, but not a single black has been elected to the senate because of the way they do it.

What Dr. Gibson was dealing with was a precise situation where somebody said, "There are 30 members of the senate; would you be happy to settle for 1?" In that kind of rhetorical statement to a people, the answer always is, "Certainly not. We want something that resembles our population." That is a far different cry from a mathematical proportional representation, which is the term that is being used here over and over again.

In the human existence of our lives, if I were to go to any State and was asked to put the NAACP seal of approval on a particular plan, like a Democrat in Utah or a Republican in Cook County, I would probably enter that very suspicious about what was happening. I would want to know, "Does it deal with equity?" And equity does not mean exact mathematical proportions.

I know Dr. Gibson. He is the president of the NAACP Conference for South Carolina. He knows NAACP policy. He would not knowingly violate it. That statement—and I have heard him make it many times—has to do with proportions and not proportionate, mathematical, precise representation based on population.

Senator HATCH. To use your illustration, if not 42 percent, what percentage would you be satisfied with?

Mr. HOOKS. Senator, we have had to wrestle with that over and over again, and new occasions teach new duties. Time makes ancient good uncouth. We have never been able to come up with any precise definition.

Just like the standard of granting broadcast licenses, you must serve the public interest, convenience, and necessity. No writer, not the most learned professors like Willesden, have ever been able to explain it. Like the Supreme Court Justice said about pornography, "I may not be able to define it, but I know it when I see it." Equity to us is something we may not be able to define, but we know it when we see it in a given case.

Senator HATCH. I know proportional representation when I see it too. I think anybody who looks at this knows it.

Let me just ask you this: Let us assume that I am right in my belief that this bill will lead to proportional representation and this bill passes. Of course if it has 62 firmly committed supporters; there is no question it is going to pass. If it passes and it does result in proportional representation, will you accept that?

Mr. HOOKS. I did not quite——

Senator HATCH. Let us say this bill passes in its present form and it results in proportional representation. Would you be satisfied with that?

Mr. HOOKS. I do not know how it would result in proportional representation, unless you had a lawsuit that would declare that it meant that. I am simply saying to you, sir, that we propose in the future, as we have in the past, to monitor and look at the practices.

Remember, when we talk about proportional representation, we seem to have forgotten one thing. We talk about that Baltimore example. It does not matter if Baltimore becomes 90 percent black and they elect a white mayor and 19 white council people out of 19. The law says there must be a practice, a condition, something that happens that causes that, something that you can pinpoint that made that happen.

If the cause is the black folk in Baltimore happen to like that white mayor and those white council people, that is not a cause for justiciable arrangement of a grievance.

All I am saying is that I think we have forgotten what precedes the language, and that is there must be a practice, there must be a condition, and in my written testimony I have outlined about 30 things that happen.

If you could prove that voting from midnight until 8 in the morning kept blacks from voting or putting the precincts in the police department—there are all kinds of things—if you could not prove a practice, a custom, or something that happened, you would not ever get to the results. The results trigger looking at practices, and you have to do both.

I have been in these suits, and let me tell you, sir, they are not easy to win.

Senator HATCH. I understand that.

Mr. HOOKS. When you prove the results, you also have to prove what practice caused that result and that practice is iniquitous or wrong. I think we have forgotten all about that.

Sir, may I ask you one other question? I cannot ask you a question, but may I pose one other situation? If indeed the word "results" would lead to all of this, why not then would the word "intent" lead to the same result, except that the proof would be higher? What magic is there about the word "results" or "effect," if we use either one?

Senator HATCH. Because "intent" focuses discrimination analysis upon processes, rather than results.

Mr. HOOKS. Sir?

Senator HATCH. Because it involves an entirely different method of analysis.

Mr. HOOKS. If you could prove that they intended to deliberately discriminate, segregate, to keep blacks out of office, and never let them serve, then would the result be, if the Court finally adopted that finding that, "In this city we find that they deliberately intended never to let blacks be a part of it, and therefore we mandate that they must now get proportional representation, since they have sinned?"

And if they do not have to do it, suppose the Court says, "We find that the result was that they did not let blacks have office, and we therefore mandate proportional representation?" What is the difference between result and intent that would lead to the concept of proportional representation? I do not understand.

Senator HATCH. The difference is, under intent the Court examines the processes which lead to a given results. Under a result test only results, regardless of whether anybody intended to discriminate, are of significance in making a determination as to whether a violation has occurred or not.

Mr. HOOKS. I thought you said that you prove intent largely by results.

Senator HATCH. No. That may be part of the circumstantial evidence in raising the ultimate inference of intent. It is not dispositive in and of itself, however.

Let me just cite the Greenville News about another statement Mr. Gibson made. "South Carolina's population is approximately 30 percent black, and 30 percent of the senate should be black." There is another illustration of a call for proportional representation.

Mr. HOOKS. Yes, sir, I understand that. I can tell you right now that you might find there are many statements that we make in the heat of battle out on the lines and in the trenches that do not have anything to do with the results we seek.

I wonder also if there were not included in the House bill what I think is the Sensenbrenner amendment, if I remember correctly, which says that any language in this bill can never be construed as to ask for proportional representation.

I think the civil rights community even went along with that language, so that we could not be accused of seeking proportional representation. I think that was an amendment to section 2 which was proposed by a very conservative Republican from the State of Wisconsin, if I remember correctly.

Senator HATCH. That that really is no restriction; all you have got to show is one other factor and you have grounds for a violation, whether truly warranted or not.

Let me quote another remark of a colleague of yours in the civil rights community. Rev. Jesse Jackson was quoted in the Columbia Sun on October 25, 1981, as saying, "Blacks comprise one-third of the State of South Carolina's population and deserve one-third of its representation. We believe that taxation without representation is tyranny."

I think that the point I am making, Mr. Hooks, is that maybe these are simply statements made in the heat of battle. But the fact is this: they are being made. And the fact is this: I do not see how anybody interpreting that language in the House bill can interpret it any other way. It would ultimately lead to proportional representation, assuming that the Supreme Court would not find it unconstitutional.

You have made the point here today that the Supreme Court may very well decide—I think it would be improper for them to decide it this way—but that the Court may decide that Congress has the right to set a legal standard of proof in excess of the constitutional standard. I do not think they will find that in the ultimate result, but personally I feel that the country should not have to undergo the experiment in the process.

Mr. HOOKS. Sir, may I make one other statement? I have on many occasions in some cities made the statement that, "This city ought to have a black mayor." Sometimes I make that statement to

the white power structure; sometimes I make it to black folk encouraging them to vote and register.

Senator HATCH. I find no fault with that.

Mr. HOOKS. I am not at all sure that Jesse Jackson may not have been talking to a black audience about what they had to do in order to get it.

Proportional representation was not a question, as far as I can see it, between 1965 and 1980, when at least we believed that the effects test was the law. We did believe that.

I must tell you that we were shocked when we discovered in the *Mobile* v. *Bolden* case that it required intent. We certainly did not believe that at all in preparing that case and taking it up.

I do not recall proportional representation or the mirror image of the population being a present problem up to that point. I do not think it was; I do not think it will be now.

Senator HATCH. These statements are fine, but the problem we are raising here today is that these statements are being codified into law, in my opinion.

Let me quote from the House report on H.R. 3112. It states there that evidence of lack of proportional representation is "highly relevant."

Mr. HOOKS. I beg your pardon?

Senator HATCH. Evidence of lack of proportional representation is highly relevant in proving a section 2 violation under the results test. Indeed, there is no other factor that they describe in this manner. What does that language mean, in your view?

Mr. HOOKS. It means exactly the same thing to me, Senator, if they had said that proof of proportional representation or lack thereof is very important to prove intent. I just do not think there is any difference at all between intent and results when you talk about proportional representation.

Certainly, if I were trying a lawsuit, or if you were, for some reason, hired by my organization to try a lawsuit—and maybe one day we will be in that happy circumstance—you would not say that even under intent lack of proportional representation deals with the question of results, which deals with the question of intent. I do not think it means any more or less.

I do think certainly, if I were trying a lawsuit, I would deal with the fact that there were five city council people elected and no blacks over a 40-year history, which has to do with representation, whether you put proportional in front of it or not. I would make that same argument whether I was arguing under an intent test or results test. I do not see how I could make any other argument. I would have to use it.

I just fail to see where the word "result" in denying or abridging the rights is any different from intending, except someone tells me that you cannot prove intent, therefore it becomes a nullity.

I think—and I have said before—that the primary difference is that the Administration bill would make it difficult, if not impossible, to ever win a case, because it would demand that you prove intent, and intent is a subjective matter.

I believe, with Senator Mathias, that the Court in *Mobile* v. *Bolden* did more or less take a dim view of indirect and circumstantial evidence and demanded intent in the strictest form. There-

fore, if result tests resulted in proportional representation, the intent test would if you could prove it.

Maybe—certainly not from your viewpoint, because you would not think like that, but maybe from the viewpoint of some—they are saying, "Let's get intent in there, and since it can never be proven, we won't have to worry about it." But I maintain the results would be absolutely no different, except the standard of proof.

I kept hearing the Attorney General say that the reason he wanted intent was that the standard of proof would be much higher. Yet he kept saying that results would be a part of that standard of proof. You have to look at results, and it may be, in some cases, the only proof you do have.

Senator HATCH. Let me just say this: I appreciate your courtesy to me and your kind remarks, but the issue is greater than that. This is a critical constitutional issue. As a practicing trial lawyer before I came to the Senate, I had very few cases where I did not have to prove some kind of intent. In fact, in every criminal case, I had to demonstrate intent, and beyond a reasonable doubt. And in many of the civil cases I had to prove intent by a preponderance of the evidence. It is done every day in every court of law in this country. If the proposed changes in section 2 would make no difference, then why are you fighting so vehemently for the change?

Let me just add this: You have also indicated that the entire civil rights community strongly opposes a simple extension of the Voting Rights Act. I have not taken a survey, but I believe most of my own mail is running strongly in favor of extending the present law.

Let me also ask you what Mr. A. C. Sutton, president of the Texas chapter of the NAACP, means when he announced in a press conference on January 22 of this year that his organization supports extension of the act "as it is presently constituted," except that there should be a reasonable bailout?

I do not want to be the bearer of bad tidings, but I do not think that there is total unanimity, as you have suggested. I think that most people who have looked at the issue in the civil rights community would be very happy to have the simple extension of this law. After all, every civil rights leader, who has ever talked to me about it has stated that it is the most effective civil rights law in history. This is something I wish to bring to your attention.

Mr. HOOKS. I was simply speaking—I asked Ralph Neas specifically when I came here this morning. We have 157 organizations in our group. They have endorsed the Mathias-Kennedy bill. The 15 civil rights organizations in the black leadership forum have endorsed the Mathias-Kennedy bill.

Obviously, those 157 organizations and those 15 organizations do not represent the totality of the civil rights community, but they do represent the most prominent part of the civil rights community.

When you talked about intent, I kept trying to remember my casebook law—*Malum in Se* and *Malum Prohibitum*. I am sure you recognize the fact that intent is proven in some cases if it is prohibited because it is wrong—where it is wrong because it is prohibited or wrong because it is wrong, you prove intent by proving the commission of the act; you do not have to prove intent as a separate

element. So if the act was committed, it is *Malum in Se;* the intent is automatically, *ipso facto,* proven.

I used to teach a little course in law. I would like to go back and review it. If I am wrong, I will correct it. But I think you will discover that you prove intent in crimes which are considered to be *Malum in Se* when you prove a commission of the offense. Only in crimes which are *Malum Prohibitum,* or wrong because they are prohibited, not wrong in themselves, do you have to prove intent as a separate item. If not, there are a lot of people in jail today, that I put in there, that ought not to be there.

And I think we ought to have that same standard over here—that if proof that the effect of the law has been—and when we talk about proportion, that always comes into effect; you can never get away from that. Without some ascertainable, identifiable method of saying what is wrong, you simply cannot deal with it.

In the old days in Tennessee there was no speed law, and the only way you could charge a person with speeding was to prove they were driving recklessly. Today the speed law is 55; when you get above it, that may be proportional; I do not know what it is, but it is a number. When you exceed 55, you have violated the law.

I do not believe that we are going to be faced with a plethora of suits or a multiplicity of actions. I do not believe at all that the courts are going to be any more overwhelmed than they have in the past. I think there was no sinister motive, no hidden agenda in the Mathias-Kennedy-Rodino bills; they simply responded to the overtures of the civil rights community in asking that in extending the present Voting Rights Act you clarify a part which got mixed up in the *Mobile* case, so there would be no further question about it.

From our viewpoint—and I recognize it as not true from the viewpoint of those who oppose it, but from our viewpoint let me say again, that was not a change but a statement of clarification doing precisely what we thought the law already demanded, but which without any question the Supreme Court had held it did not demand. We wanted that clarified. That is not a substantive change; it is simply clarifying.

I must say, Senator, that we thought from 1965 until about 1978 or 1979 that that was precisely what the law was. We think that all the legislative history will attest to that, and the lower court decisions attest to that. Only when we got the *Mobile* case did we discover we had a problem, and we wanted that problem remedied. The bailout situation was introduced not by us but by others who felt—and that was sort of a trade off we gave, not anything that we wanted or actively lobbied for.

I support it because I think in good conscience and in honor that having given my word to those who said, "Would you accept this provision of bailout if we vote for it?" I am obligated to support it and to keep credit to my honor and to my word and to those of us who said we would do it. We cannot come here now and suggest that we want to back up on something we agreed to. I think that would be unfair to those with whom we agreed.

Senator HATCH. I have a number of other questions to submit to you. I would like to ask one more at the present time. But, first, let me just make the comment that neither the concepts of *Malum in*

Se nor *Malum Prohibitum*—has anything to do with intent. We will both look that up and be more sure on it. But I believe *Malum in Se* is simply a crime, such as a homicide, which is a wrong in and of itself.

Mr. HOOKS. In and of itself.

Senator HATCH. And a crime, *Malum Prohibitum,* is something like a criminal regulatory statute that statutorily establishes a crime. In other words, most crimes, *Malum in Se,* were crimes at common law; crimes, *Malum Prohibitum* were not, but it does not really relate to what we are talking about here today.

Let me just address one other issue and then we will turn to Senator Kennedy. In your testimony, you state that the House of Representatives examined the need for the results standard and concluded on the record before it that it was a necessary change.

Unless I recall the debate incorrectly, there were approximately two witnesses who testified on this issue during the entire hearings, neither of whom had any reservations whatsoever about it. In fact, that balance somewhat typified the entire set of House hearings on this issue.

I hope I am not incorrect on this, but I would like to know where the House record is that you are referring to that makes this case, because to my knowledge none exists.

Mr. HOOKS. I am sorry, you said the House record on the change——

Senator HATCH. The issue of results.

Mr. HOOKS. I do not think I said that. What I was trying to say is that in the civil rights community we went to a number of Senators and Representatives before any bill was introduced and talked about the fact that we were concerned about section 2 and the interpretation of the Court, and that we would like the extension to contain a clarification.

We went to various Senators and Representatives with that statement and did ask specifically Representative Rodino to introduce that change when we got into that. That was what I was trying to say. I did not intend to say—there had been extensive House testimony, and I do not know that I said that. If I did, I misspoke myself. I was saying that we talked with—as we do quite often on bills—to Senators and Representatives before the bill was ever introduced.

Senator HATCH. I am referring to your statement on page 5, for those who would be interested in it, right beneath the indented part.

Let me ask you this, Mr. Hooks: You have gone to the effort of preparing a 17-page statement. I presume you would like me to include that in the record?

Mr. HOOKS. Yes, I would.

Senator HATCH. We certainly will do that, and any other comments you would care to make.

Mr. HOOKS. And the memorandum?

Senator HATCH. The memorandum will also be included in the record immediately following your statement.

I apologize for taking so long here, but some of these issues are just very difficult. I have many more, but, Senator Kennedy, let us turn to you.

Senator KENNEDY. Thank you, Mr. Chairman.

As I understand from the House record, there were a number of witnesses who talked about the problems that antedated 1965 and who stressed the importance of the section 2 provision. There was a very extensive amount of information and testimony about the importance of section 2 to reach those particular needs. I think that is important to have on the record.

If I could have the attention of the chairman, as we go through the course of these hearings, Mr. Hooks, I think, very eloquently stated his understanding and the purpose for the provisions under section 2 and was questioned quite intensively about whether this in fact is going to make it a requirement that there be proportional representation in various elections.

There were quite a number of statements read into the record alleging that at least some people might draw conclusions that it would. I thought Mr. Hooks responded to those questions both thoughtfully and with an understanding which is shared by myself and I believe Senator Mathias as to what we intend with the legislation.

I would be interested in asking the Chair whether he differs with that objective that has been outlined by Mr. Hooks. Are we basically talking about altering or changing language to try and achieve what Mr. Hooks has stated, to give minorities an opportunity to participate in a meaningful way in these at-large elections? Are we differing on that point, or does the Chair agree with the objectives that Mr. Hooks has advanced, and are we really trying to find words to achieve that objective?

Senator HATCH. There is no question that I agree with the objectives of stamping out discrimination anywhere it exists in this country. The issue here happens to be whether the Rodino-Kennedy-Mathias revision of section 2 is an appropriate change in the law to facilitate attainment of this end. I vehemently disagree with the implication and remedy suggested in that section.

I am saying that present constitutional law, which I do not believe the Supreme Court will change, requires proof of intent, through direct, indirect, circumstantial evidence, or otherwise, including evidence of the effects or disparate impact of an action. But it does not allow the effects, as defined in this bill, to stand alone and establish a violation.

Whatever the law, I think that the intent test is good policy and ought to continue or be established as public policy. I hope that clarifies my meaning for the distinguished Senator.

Senator KENNEDY. Yes. I was interested in finding out whether the Senator agreed that in these questions, since one of the points that has been stressed and emphasized here today—and there have been a number of individuals whose views have been read into the record, and I understand Mr. Hooks' statement to be an interpretation of what is both my understanding of the language and Senator Mathias' understanding of the language, and those people Mr. Hooks represents and the others who will be testifying—their understanding of what the effect of it will be.

Does the chairman differ with that? If the chairman differs with that, then we have got an area where there can be no—evidently at least, that is an area where there cannot be adjustment. Is it

just a question of words, or does he just take issue with the point that Mr. Hooks made?

Senator HATCH. Let me say this: If you were saying that your point, Senator Mathias' point, and perhaps to a degree Mr. Hooks' point, was that this may not amount to proportional representation, yes, I do indeed disagree very strongly. I think it definitely amounts to a call for proportional representation, and I do not see how anyone, who has studied this issue and looks at the ultimate effect of what this section provides, could conclude otherwise.

It means nothing more than is meant by the concept of racial balance or racial quotas. Under the results standard, actions would be judged purely and simply on color-conscious grounds; there is no question about that under this language. This is totally at odds with everything that the Constitution has been directed toward since the Reconstruction amendments, since *Brown* v. *Board of Education*, as I said in my statement, and the Civil Rights Act of 1964.

The term "discriminatory results" is Orwellian in the sense that it radically transforms the concept of discrimination from a process or a means into an end or a result.

If it passes, that is the way this bill must be interpreted, and its impact will not just be felt in those States in the South that have had a past practice or pattern of discriminatory conduct; it will affect every municipality of any size and consequence in America, and it is going to permit calls for proportional representation all over America. I do not know how you can conclude otherwise.

Senator KENNEDY. The only point—and then I would like to get to the witness——

Senator HATCH. I would like to get to the witness, too.

Senator KENNEDY. Sure. The Supreme Court effectively made this very finding that the chairman refuses to think that any reasonable person or group of persons might make—both the *White* decision and the *Chavez* decision, in 1971 and 1973.

It is our intention to enbrace those decisions which explicitly barred proportional representation based upon percentages, as Mr. Hooks has testified to. It is an attempt to take what the Supreme Court has said in both of those cases and to insure that it would be the standard by which there would be measurement.

Let me move on. Quite frankly, Mr. Hooks, with all due respect, whatever was stated by my good friend and yours, Jesse Jackson, and by others who made comments or statements that were read into the record, they are not going to be codified into the law. They may be expressions of viewpoints, but as you quite appropriately pointed out, the law is what is in the statute; it is more, really, even than what is in the report, although we have heard comments about report language almost as if it were included in the statute itself. My understanding as one of the prime sponsors is in accord with yours and with the cases that you have cited.

I would like to just go back briefly to clarify some matters. They were made here earlier in the day and you made a comment on them, but I think it is important that we have the record complete.

I think you can see quite clearly now that there will be an attempt to at least represent the spokespersons for the civil rights community to basically support a simple extension of the Voting

Rights Act as is. That was at least the impression that the Attorney General wanted to give this morning in his statements and his exchange with me, and in his written testimony; I read the provisions of it. There has even been an attempt to suggest that that was your position earlier today.

As I understand it, in the spring of this past year there was a serious effort, while the administration was considering what its position would be on the Voting Rights Act, to alter and change section 5. I think anyone who was reading the newspapers at that time and was following the issue understood that there was a move on by many, both in this body and other places, to subvert section 5—as I understand, that was a very substantial concern to the members of the civil rights community.

At the meetings which took place with the Attorney General—and I had an opportunity to talk to a number of those who were involved in those discussions—they indicated, as you did today, that the efforts to subvert section 5 were very much alive at that period of time, and they wanted to make sure that section 5 would be maintained, and this was a primary concern, but that they also indicated—and you were one of those who participated in those meetings; we will hear from others, and I am eager to hear from them—that the section 2 provisions were very much on the agenda and very much in the minds of those who participated in that discussion. Am I correct?

Mr. HOOKS. Yes, I think we can say that from the very day of the introduction on April 7 of the Kennedy-Mathias-Rodino bill, we in the Leadership Conference on Civil Rights and NAACP came out in support of that bill. That included the change or clarification in 2; it did not include the final change in section 5.

In the meetings with the Attorney General, we pointed out how important it was to clear up the *Mobile* v. *Bolden* case. That was one of the primary points we covered.

I have tried to indicate that as it related to section 5, that we were accepting a compromise, and that was a very painful thing. We had to meet in committees, back and forth, by letter and by phone.

I do not think, however, that at the time we met with the Attorney General we had come to a conclusion on that section 5. We were still trying to come out for a stronger sort of bail-out thing.

I think it was subsequent to the meeting with the Attorney General that we accepted the Hyde amendment. I call it the Hyde amendment; he was the principal protagonist in that situation. But on section 2 we did point out very clearly——

Senator KENNEDY. It seems to me, if I could interject at this point, that a good deal of the steam went out from the administration's contemplation of changing section 5 when Mr. Hyde altered his position on that.

Mr. HOOKS. Yes, I think so. It represented, as I recall, a sort of compromise on both sides. I believe that Mr. Hyde did not get all that he was originally seeking and that certainly the civil rights community did not get what it wanted. I thought it represented an honorable and reasonable compromise on that, and we did that in order to get the largest possible bipartisan support for the major portions of the bill.

Senator KENNEDY. Earlier in the day, with the Attorney General, I reviewed at least some of the areas of very considerable concern, not only to me but to a number of citizens in this country, about positions that the administration has taken on the issues of civil rights. I believe those comments are accurate or factual. If they were not, I would have expected there would be some response to them. They were characterized in a certain way, but I think as someone who has followed these issues closely over a period of time, they were factual.

I raised them at that period of time because I think we have to view the provisions of the Voting Rights Act against the performance of the administration on the issue of basic and fundamental commitment to both voting and to other civil rights issues. I am just wondering whether you think that is a fair standard to use as we are considering the extension of this legislation.

Mr. HOOKS. Senator, I must say that I was present this morning when you went down the list of certain, what we consider to be, negative, regressive, or reactionary action on the part of this administration as it referred to either civil rights enforcement or civil rights legislation.

We have protested. Each of those things which you have cited we have talked about with somebody in the administration by phone, letter, or personal conference. In each instance we tried to say to Mr. Reagan personally when he came to the NAACP convention that in one sense the voting rights bill was the litmus test. At that point Mr. Reagan's public statements were not even as much in favor of the bill as they are now. It was nationwide, as I recall.

I thought you very eloquently went down the list, and certainly I would be in complete agreement with the assessment that the perception of the black community is that this administration is not very pro-civil rights. In that context, the Voting Rights Act, which was viewed as a major bill that has worked and performed well, ought to be adopted. That is where all this confusion, I think, has arisen about our statement that it ought to be extended as it was written.

It has been made to appear that the change in section 2 is of such moment that we have somehow changed our position. May I just state again for the record that basically we are still saying it ought to be extended as it was written, with the clarification—and it is our position that all of the accompanying legislative history of this bill indicates that what is being written in the bill now as it relates to effects or results was what was intended. That statement was made back and forth.

Therefore, I make no apology for supporting the bill in its present form, with the statement that we want an extension. But section 5 was something that was added in the give and take of the legislative process.

I cannot agree with Attorney General Smith—and I respect his ability as a lawyer; I cannot agree with Senator Hatch, and I respect his ability as a very powerful and persuasive legislator, powerful Senator, and great lawyer—that this is bad legislation versus good legislation.

I think the only difference—and I want to say that again, for whatever it means—is that the standard of intent that the admin-

istration would have us follow is a much more difficult standard to prove and may prove well nigh impossible.

Only to that extent does it change anything. It would mean that the civil rights community would be forced to an impossible burden to achieve any equity and parity in the kinds of procedures that have for so long dogged us.

I might point out, the fight has changed, the status is different. In my earlier days as a practicing lawyer and civil rights advocate, it was outright physical brutality, hostility, aggression, intimidation, fear, even murder, lynchings, and beatings. Today it is much more subtle. It is changing the place where you go to register. It is changing the rules about how you get off the road. It is a matter of changing the places where you vote. There are all kinds of things that have happened. Again, I refer to my written testimony.

It is those practices which can result in the things that we complain of that we ought to be able to deal with. I strongly maintain that that is as much of a standard of proof as we ought to have.

I must confess my inability to read into the word "results" some kind of code word for proportional representation; it just eludes me altogether.

I recognize that since I may be weakening my case, I want to come right back to say one thing. I maintain that whatever the word "results" would do so far as proportional representation is concerned, the word "intent" would do the same thing, the difference being that you put upon the plaintiffs—and the plaintiffs in this case would be those who were injured, those were aggrieved, those who were being shut out, left out, kept out, knocked out, locked out—upon us would be put the burden of an impossible situation.

We have proven that what you are doing has resulted in no black representation, or—let us go a little step further—inadequate black representation, whatever that may be in a given situation. We have proven that your laws have done that, your practices have done that.

And then the Court says, "But that is not enough. You must prove that the mayor, and the council, and the legislators who did this intended that result." The best way to prove intent is to put the person on the stand and say, "What is your intention?"

I agree with Senator Mathias. Any city attorney worth his salt, let alone his salary, is going to protect their principles from the question of intent. The easiest thing in the world to hide is intent.

I just think it puts on us a standard that, in good conscience, ought not to be put on by any administration that is really concerned about any aspect of this civil rights community, and in light of all of the other things we have talked about and which you enumerated this morning, only add salt to the wounds and convince us beyond perhaps any shadow of a doubt that the administration has no real intention of enforcing anything affirmatively in the field of civil rights.

Senator KENNEDY. That is a very eloquent and powerful statement and an accurate one, Mr. Hooks.

I do not know whether this covers a little of the same ground—we have other witnesses we want to hear from—but if it were to be the decision of the Congress for some reason to follow the adminis-

tration's recommendations in this area, what do you think that would mean to not only the minority citizens of this country, but I just think with regard to the majority citizens as well?

Mr. HOOKS. I think it has two distinct and separate meanings, but they are joined together. The most immediate meaning would be that the legal burden of proving that the Voting Rights Act has not been complied with would be made infinitely more difficult from a legal viewpoint, because intent is subjective; no matter how you spell it, it is subjective. I have practiced law long enough to know the difference between the subjective and the objective.

I understand very well that it is not a matter of what you intend to go 75 miles an hour or did not know you were going 75; it only deals with the penalty; it has nothing to do with whether you are guilty or not; I know that as a fact. That would be the first and most obvious result.

The second result is much more important and devastating. For almost 50 years in this country the black community has had the feeling that either the President, or the Supreme Court, or the Congress has been more or less concerned about the plight of blacks and poor.

If this Congress were to follow the lead of this President and put this much more difficult standard in effect, it would confirm the belief that at this stage of the game, 1982, neither the Congress, nor the Supreme Court, nor the executive branch is particularly concerned about the plight of poor and minorities. If that happens, it further weakens the resolve of minority people to be a vital and viable part of this country.

I think it signals to the white community, whether consciously or unconsciously, whether by deliberation or accident, that civil rights is not a high priority.

It puzzles me, Senator, today that this is one of the highest points of consideration and concern for the civil rights community in this Nation. We have agitated; we have lobbied; we have been up and down the Halls of Congress; we have written letters, sent telephone calls and telegrams; we have been to the Attorney General's office; we have talked to the President, the Vice President, and Members of the Cabinet. Since April this has been the main item on the agenda of black and minority Americans.

Yet, Senator Kennedy and Mr. Chairman, on this date, January 27, the Attorney General still does not know where he stands and does not know where the President stands. To me, that is saying that they do not give a very high priority to the considerations of black people.

I cannot understand how any administration from April to January——

Senator HATCH. I do not want to interrupt you, but I think——

Senator KENNEDY. Can we hear from the witness?

Mr. HOOKS. I am sorry if I went—I am saying though, my viewpoint is that I was flabbergasted when Senator Kennedy asked him, "Where do you stand on it?" From April through January this has been our top priority. We have tried to impress everybody.

We told Mr. Reagan, "This is a litmus test—where you stand on this legislation." And today, on January 27, after all of this talk I am met with the proposition that on the hypothetical question—

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and I must admit that that hypothetical question was much less detailed than your hypothetical question about Boston; yours was much better prepared. But Senator Kennedy's hypothetical question only involved two things: 389 people in the House had voted for, and 62 Senators are cosponsors. If that is the case, would the President sign it? And Mr. Smith said—and I can understand his answer—"I don't know." I can accept that.

But then he asked the other question, "What will you advise?" And he said, "I don't know until the law is passed." It makes me think that they listen but they do not hear. They are not aware of our anguish, our concern. They are not aware of our deep-felt need to have a definite trumpet sound somewhere in this administration.

I cannot point to one action of this administration that would give any hope or comfort to minority people on any front. That is a sad statement, a tragic statement, but a true statement.

I would have thought—fervently hoped—that at least on this issue—the news came to me in Utah that the President had decided that he would sign whatever bill the Senate and the House could pass. I was at the television station. They said, "What is your reaction to that?" I was about to give the President a glowing, great hand, and some inner instinct said, "Wait, you haven't seen that yet; you have only heard somebody say it." And, lo and behold, an hour later the news was that Attorney General Smith had vetoed that suggestion, and Mr. Reagan said he could not support the House-passed version. I was almost captured on tape for posterity, praising him for an action which he did not take. I am so glad——

Senator HATCH. That would be unique.

Mr. HOOKS. I escaped that fate.

Senator KENNEDY. Finally, the administration is basically urging us to accept their good faith. Is not our job here to make sure that their good faith is written into good law? Are we not under a responsibility as legislators to make sure that it is written into laws, not only for this administration but for any future administration?

Mr. HOOKS. I would say so, yes, very definitely.

Senator KENNEDY. I have other questions which I would like to submit, Mr. Hooks. I want to thank you very much for a fine presentation.

Senator HATCH. Mr. Hooks, the subcommittee counsel would like to ask you one question.

Mr. HOOKS. Yes, sir.

Mr. MARKMAN. Thank you, Mr. Chairman.

I would just like to ask one brief series of questions that perhaps may illustrate that there is a more significant difference between the intent and effect tests than simply the fact that one may be less difficult or more difficult to prove than the other one.

As Senator Hatch indicated earlier in the hearings, the process by which the Court implements the intent test is to look to the totality of circumstances, put those circumstances, as it were, in a pile before it, and ask itself the question, "Do these circumstances raise the inference of intent?"

This is a clear legal standard for evaluation. It is a standard that has been employed by courts in a variety of contexts for years,

indeed centuries. Can you explain to me on the other hand the process by which the "results" test is put into operation?

Let me give you a hypothetical situation, if I could. Suppose you have a community that lacks proportional representation in its city council. That, in and of itself, the House report suggests, is not a violation of section 2. The report, however, indicates—and I think your testimony has suggested—that the addition of some "objective factor of discrimination" would, however, consummate a violation.

The kind of objective factors that the House report mentions, some of which you touch upon in your testimony, include things like bloc voting and at-large systems of government.

Let us assume that this hypothetical community has a lack of proportional representation on its city council and has an at-large system; two-thirds of the municipalities in this country do. Why is that jurisdiction not thereby in violation of section 2? Could you please give me some specifics?

Mr. HOOKS. Yes, sir. I think your question is very good, and it is very to the point. Let me just suggest this: If I were trying the case before a court, and I proved the results—I think that is what you are saying; I hope I am following your analogy—in this particular city there are no blacks on the city council or the city commission, whatever the government body is—on the legislature if it were the State.

You are now asking how I prove those facts to the Court. The Court is now getting ready to make a decision. You are saying, what do they take into consideration?

They would take the results that I have been able to prove to them and then say, "Now, what led to those results? What practices? What kind of situations that are prohibited or illegal, are discriminatory, are wrong? What are the practices that have happened that have prevented it? Or what are the practices that are right?"

Suppose the Court asks, "Did the black folk vote at all?" and I said, "No, they all stayed home that day because it was Martin King's holiday," or because they were angry at something or other—for any reason.

In other words, you have got to find, counsel, as I see it, what the Court takes into consideration. The results stand surely as one part. But coupled with results are the practices, and that has to be tied together.

The only difference between that, as I see it, and intent is that intent takes you to another subjective realm of speculation, and that may not ever be proven to the satisfaction of some courts.

I have had some years of experience sitting as a judge, and I have had to deal with these kinds of problems, and I know the practical results. I would say that—and let me be very frank—simply proven results would not be enough to trigger the mechanism of section 2. It would only trigger it if the results were caused by some practice. Results simply trigger looking at the practices; that is all.

Mr. MARKMAN. You are absolutely right about that, but the premise of my question was that we had one of these additional objective factors that the report refers to that are of the sort that ex-

plain the lack of proportional representation. In this case, the explanatory factor is the existence of at-large voting.

Mr. HOOKS. I recognize that the whole issue of at-large voting is a stumbling block or a question that has to be considered, but may I respectfully suggest, it has to be considered in intent. What was the intent of the legislature or the city council in setting up at-large voting? At-large voting is not an end to itself; it is not a be-all and end-all; it is a part of a process.

In 1912—if we were to be honest and the Court were to look at why they set up at-large voting, would you say they set up at-large voting to keep black folk out? One answer would be, "Absolutely no, because blacks were not even running for office then; they would have been lynched; it was unheard of. We did not have to keep them out. It may have been for some other purpose." But if they had been called on to give an intent, they would say, "Oh, yes, that is a part of it too."

All I am saying is that when you deal specifically—the history of official discrimination in registration in voting, other special devices, the absence of a strong State nonracial policy in favor of the practice—there are all kinds of things the Court would have to look at when we have results, the same things they would look at, in my judgment, as they were looking at in intent, except that the standard of proof would at least be susceptible of carrying the burden of proof. The burden of proof in intent may be absolutely impossible. That is why I fail to see.

You may ask me the same question, and I might ask you, "Why are you so set on intent?" You could turn around and ask me, "Why are you so concerned and upset about nothing but results?" But my answer is very simple. The reason I am very upset about the word "intent" is that the standard of proof becomes well nigh impossible.

Mr. MARKMAN. With all due respect, I would just say that you are redefining what the results test is. In the *Mobile* case it was considered irrelevant that there was no intent on the part of *Mobile* in establishing their structure to discriminate against minorities.

Mr. HOOKS. Are you saying that in *Mobile* they did not consider results as a part of the intent test? Is that what you are saying?

Mr. MARKMAN. No, I am saying that I believe you are redefining what the results test is by suggesting that the Court would be likely to look to intent in considering whether or not the existence of at-large voting consummated a section 2 violation. What is your basis for saying that?

Mr. HOOKS. I will have to read that. I do not quite follow. I am simply trying to point out that the whole question of at-large voting has been a thorny political issue for a long time, and that is an issue that may be solved in some instances by the political process. I think it is important that we deal with that and that the intent test as defined by *Mobile* put a very negative inference on indirect and circumstantial evidence; I think that is a fact.

Senator HATCH. Mr. Hooks, just one final question. Do you favor or not favor abolishing at-large systems generally? Are you for or against that proposition?

Mr. HOOKS. Let me say this. You are probably familiar with the case of *Baker* v. *Carr*. You perhaps know that case arose in Tennessee. I was a very concerned participant in that case. We came out with a slogan, "One man, one vote." It should have been "One person, one vote." That indicated our inherent chauvinistic weaknesses at that point.

But I am not necessarily uniformly in favor of district versus at-large elections. I think it is a circumstance to be considered in the totality of all other circumstances. I have been involved personally, and the NAACP has an official position on it. That position is, it depends on circumstance.

We do not say that you have to, in every instance, have a district election rather than an at-large election, except that—I thought I heard something very strange this morning; maybe I did not hear right. I do not have any problem with the fact that Utah has two Senators and my adopted State of New York has two, and we are maybe 10 times your population.

It does not bother me that Mayor Koch is a mayor of a city of 7 million and Johnny Ford is a mayor of a city of 10,000. They are district units that are predetermined. To the extent that Detroit is a city, it has a mayor. But also Grand Rapids is a city and other smaller places. States differ geographically and populationwise. They are artificial districts which we accept, and I do not have any problem with that.

Within the city, whether you have at-large or district elections depends on the circumstances. I certainly think we have to look at that.

Senator HATCH. Thank you, Mr. Hooks.

We will submit any further questions to you in writing.

Mr. HOOKS. Thank you.

Senator HATCH. I personally am grateful that you have taken the time to be here. I respect you as a civil rights leader and as one of the great people in this country. We do happen to differ on this particular issue, however.

Mr. HOOKS. I appreciate having this opportunity. If it is not against the sunshine law, or the Freedom of Information, or getting together on a conspiracy, I would like to talk with you further, not necessarily under all these lights.

Senator HATCH. Yes, I do not think it will be against any of those. Thank you very much.

[The prepared statement of Benjamin L. Hooks and additional material follow:]

PREPARED STATEMENT OF BENJAMIN L. HOOKS

Mr. Chairman, and members of the Subcommittee, I am Benjamin L. Hooks, Executive Director of the National Association for the Advancement of Colored People. In my appearance here today, I am also speaking as Chairman of both the Leadership Conference on Civil Rights and the Black Leadership Forum--two organizations vitally interested in this issue - the extension of the Voting Rights Act.

The National Association for the Advancment of Colored People is a 73-year old civil rights association with more than 1800 branches and 600 youth and college chapters. We operate in all 50 states and the District of Columbia. The Leadership Conference on Civil Rights, founded in 1949 is a coalition of 159 organizations. The Black Leadership Forum is comprised of the Chief Executive officers of 15 national black organizations.

I am accompanied today by Ms Althea T. L. Simmons, Director of the NAACP's Washington Bureau and Leadership Conference officials, Ralph Neas, Executive Director and General Counsel, Joseph L. Rauh.

The organizations I represent appreciate the invitation to appear before the subcommittee today. We are here, Mr. Chairman, to announce once again our strong and unswerving support of the extension of the Voting Rights Act and specifically to support S 1992.

There is no doubt in my mind that the Voting Rights Act is the single most effective piece of legislation drafted in the last two decades. As significant as this legislation is, its potential has not yet been realized. We believe that the Voting Rights Act is as essential in the 1980's as it was in the 1960's. It is still needed to provide the mechanism to do what then President Lyndon B. Johnson envisioned when he made his remarks at the signing of the Act on August 6, 1965:

> "This Act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote. The wrong is one which no American in his heart can justify. The right is one which no American, true to our principles, can deny..."

We are all too aware that there are those who say the civil rights community is too difficult to deal with on the question of the Voting Rights Act; some question the continued need for this legislation and argue that it has served its purpose--that a 10-year extension, at most, should be satisfactory.

Some posit that the Act is punitive toward certain sections of the country; others say we ought to give the states an opportunity to show that they no longer have barriers to deny blacks and other minorities the right to cast a ballot or run and be elected to office. Some propose deleting the language minority provisions; others champion nationwide coverage. Still others resort to scare tactics either stating or implying that a vote for this measure is a vote for proportional representation. Mr. Chairman and members of this committee, I know of no group in the civil rights community that has advocated proportional representation.

Some challenge the bailout provisions as being unfair and "exceedingly difficult to meet"; and we cannot ignore the position taken by the Chairman of this Subcommittee that "intent" should be the standard of proof in discrimination cases.

Mr. Chairman, and members of the Subcommittee, these are the obstacles we face in 1982 as we try to guarantee the most fundamental of all rights to Americans--the right to vote.

The entire civil rights community strongly opposes a simple 10-year extension of the Voting Rights Act for several reasons. First, such a measure would incorporate the "intent" test, a standard of proof of discrimination that would jeopardize the voting rights of millions of Americans. Second, a simple extension would not extend until 1992 the bilingual provisions of the Voting Rights Act. The comprehensive record developed in the House of Representatives demonstrates conclusively that these provisions protect the voting rights of millions of language minority Americans.

The House-passed bill, H.R. 3113, and S. 1992, the measure before this Subcommittee, satisfy these two vital prerequisites. Some have suggested that the House-passed bill is too strict. The record indicates just the opposite. After more than five months of comprehensive hearings, intense and lengthy negotiations, mark-ups and floor debate, the House passed a compromise measure by the overwhelming vote of 389-24. And even more significant, every weakening amendment offered--amendments which are resurfacing once again--was defeated by at least a margin of two to one.

One crippling amendment which was resoundingly defeated in the House was an amendment which would ratify the Supreme Court's conclusion in City of Mobile v. Bolden, 446 U.S. 55(1980), that discriminatory intent or purpose must be proved to establish a violation of Section 2 of the Act.

Section 2 applies nationwide and prohibits the imposition or application of voting qualifications or prerequisites to voting, and the use of standards, practices or procedures which deny or abridge the right to vote. All challenged election practices or procedures adopted prior to 1965, and all challenges to practices of jurisdistions not covered by Section 5 of the Act, must be brought under Section 2.

Rejecting the "intent" amendment, the House found that the Supreme Court had misinterpreted the scope of Section 2--that it was not the intent of Congress that a discriminatory purpose be proved to establish a Section 2 violation. Moreover, the House found that the history and purpose of the Act, and the persistent voting rights violations, dictate that the Act retain the pre-Bolden "results" test. See Voting Rights Act Extension House Report, 97 Cong. Ist Sess., Rept. No. 97-227, pp 28-31 (1981).

Mr. Chairman and members of this Subcommittee, I urge you to reject the intent standard as did the House. The organizations I represent and the civil rights community, without exception, oppose the "intent" test. It is not only a difficult test---it is almost impossible, and is oftimes a code word for allowing discrimination to continue, even when discrimination is there for everyone to see.

The proponents of the "intent" standard suggest that the "results" test, which the civil rights community advocates and the House adopted, is contrary to the history of legal precedent; unconstitutional; would make voting rights violations too easy to prove; and would create a right to proportional representation. An examination of each of these contentions, belies them.

First of all, we need not guess at the legislative intent. Testifying for the Justice Department which drafted the Act, Attorney General Katzenbach expressly stated during the 1965 Hearings that Section 2 was to reach any practice or procedure "if its purpose or effect was to deny or abridge the right to vote on account of race or color." Hearings on S.1564 before the Committee on the Judiciary, U.S. Senate, 89th Congress, Ist Session, pp. 191-92 (1965) (Emphasis supplied).

The language in the legislative history referenced by proponents of the intent standard, indicating that Congress intended Section 2 to track the prohibition of the 15th Amendment, does not suggest a contrary interpretation. For, at the time the Voting Rights Act was enacted, it was not at all clear that intent had to be proved to meet the constitutional standard. The Supreme Court had not then taken that position. To the contrary---in 1965 the Court took the position that an electoral scheme was unconstitutional because, "designedly or

otherwise," it worked to dilute black voting strength. Forston v. Dorsey--U.S.-- (1965). It was not until recent years that the Supreme Court stated unequivocally that to make out a case of discrimination under the Constitution one must prove intent. See Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

At the time Congress adopted the purpose or effect standard, it was, in fact, tracking the Fifteenth Amendment as it was then interpreted. This accounts for the apparent difference between Congress' expressed purpose to outlaw in Section 2, voting practices or procedures with a discriminatory purpose or effect, and its intention to track the Fifteenth Amendment.

The remarks of Senator Javits attest to the unequivocal intent of Congress, in Section 2, to reach not only intentional voting rights violations, but also those which have a discriminatory result:

> "The bill was designed not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination... the bill would attempt to do something about those accumulated wrongs and the continuance of the wrongs." 111 Cong. Rec. 8395 (1965).

Opponents of the "results" test argue that even if Congress intended Section 2 to reach purposeful violations as well as those resulting in discrimination, such a standard is unconstitutional. Nothing could be further from the truth.

The Supreme Court has stated beyond peradventure that Congress has power to enact legislation which goes beyond any constitutional requirement (intent), in order to protect rights secured by the Constitution. City of Rome v. U.S., 446 U.S. 156, 64 L. Ed. 119 (1980); Fullilove v Klutznick, 448 U.S., 448; 100 S. Ct. 2758, 2774 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966). The enactment of legislation which goes beyond the specific requirements of the Constitution is appropriate where the legislation is designed to remedy the effects of past and present constitutional violations. See, id. Where a fundamental right has been denied or abridged over the years, as has been the case in the area of voting rights, there is a compelling reason for Congress to enact statutory provisions which impose a "more rigorous" standard, to ensure the victims' protection against continued Constitutional violations, and to remedy the present effects of past and present violations. This is particularly true where, as in the case of voting rights, the constitutional standard has proven ineffective to remedy the malady.

Proponents of an "intent" test also suggest that the "results" test should be rejected because it would make it too easy to prove voting rights violations, and that such violations should not be made easy to prove because they provide a basis for intrusive interference by federal courts into state and local processes. This argument is of the tenor of reverse psychology, for no court has found a "results" test, such as the one in S.1992,which requires an examination of an aggregate of objective factors, to be "too easy". The Supreme Court has, however, often noted the difficulty of proving intent.

Even in those cases where the High Court has required a showing of intent, it has nonetheless recognized the difficulty and often impossibility of meeting such a standard. Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra; Washington v. Davis, supra; Dayton Board of Education v. Brinkman, 433 U.S. 406 (1971). The Court has stated that "discriminatory intent" is not "amenable to calibration". Personnel Administrator of Massachusetts v. Feeney, 332 U.S. 256 (1979); Hazelwood School District v. United States, 433 U.S. 299, (1977); Arlington Heights, supra; Washington v. Davis, supra.

The right to vote is the most fundamental of all rights secured by our Constitution. It is "the essence of a democratic society and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). The difficulties inherent in establishing discriminatory intent should not be imposed as a barrier to free and unabridged participation in the political process, particularly since a results standard can accomplish the goal of the Voting Rights Act to eliminate discriminatory voting practices.

The House of Representatives examined the need for the more rigorous standard in Section 2 and concluded on the record before it, which was replete with examples of the need for a "results" test, that requiring a showing of discriminatory intent to prove a Section 2 violation would run contra to the legislative history of the Act, the purpose of the Act, and that such a test could not adequately meet the voting rights violations which remain manifest.

The testimony during the House hearings revealed, as the Senate records will by the close of the hearings, that the discriminatory results of at-large elections, racial gerrymandering, majority vote run-offs, full slate voting requirements, annexations, malapportionment and the like, remain manifest. It would be difficult to show that these election schemes or official actions were adopted for a discriminatory purpose. There is usually little or no evidence of the purpose of an election scheme or official action--many of which are decades old. There may be no record of the proceedings at which the discriminatory election

scheme or action was adopted, particularly in small, rural areas. If there is a record of the proceedings, it is rare that someone will have stated for the record that the action taken was for a discriminatory purpose. The sequence of events leading up to the discriminatory action may or may not be telling. Often the hiscorical background reveals nothing out of the ordinary. See, Arlington Heights, supra, and its progeny.

What is always "amenable to calibration", Mr. Chairman, is the result of a challenged election scheme. In many instances, no black will have been elected in the district's history despite the fact that there may be racial bloc voting and a minority population of fifty percent or better. In Jackson, Mississippi, no black has been elected to any city council position although blacks make up 40 percent of the city's population. Testimony in the House of Representatives revealed that in Virginia there are four counties where blacks make up 40 percent of the population yet there are no blacks on the board of supervisors of those counties. There are many other instances of this kind in the covered jurisdictions, Mr. Chairman. These two are cited as examples.

We are not suggesting, as the opponents of the "results" test would have you believe, that minorities have a right to proportional representation. The "results" test will not establish a quota of minority elected officials. The amendment to Section 2 expressly disavows these notions. It provides that:

> "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation."

Under a "results" test, minority representation will likely be a factor in establishing that an election scheme has a discriminatory effect; however, minority representation is not the central focus of the inquiry and in some instances, may not be a factor at all. Under a "results" test, the focal point of the inquiry would be on the dilution of black voting strength, not the ability of black candidates to get elected. There may be instances, as is the case with the 10th Congressional District of New Jersey (D-Rodino), where a black electorate elects a white candidate. The failure of that predominantly black district to elect a black candidate, without more, certainly would not lead to a finding of discriminatory result.

To prove that an election scheme has a discriminatory result, an aggregate of objective factors would have to be proved, such as:

- a history of discrimination affecting the right to vote.
- the use of devices or procedures designed to ensure that only the majority will get elected, such as a majority vote requirement, anti-single-shot provision, at-large elections, numbered posts, or purging of voter registation rolls;
- racial bloc voting
- all-white or predominantly white political organizations which control the slating process and exclude minorities or employ racial campaign tactics;
- access of minorities to the majority (whether minority candidates were afforded equal access to forums, public space, etc.)
- equal accommodation of minority voters (whether absentee ballots were provided for minority citizens in the same manner and under the same circumstances as whites; whether the polling places are accessable in the communities where the minorities reside, and times convenient for the voters.)

All of these factors need not be proved to establish a Section 2 violation. What would have to be clear, however, is that the persons challenging the scheme were effectively shut out of the electoral process--that they were denied equal opportunity to participate in the political process--or that their voting strength was effectively diluted.

Mr. Chairman, and members of the Subcommittee, while H.R. 3112 and S. 1992 are good and fair bills, it must be understood by this Committee and the Senate, that those who favor a strong Voting Rights Act view it as a major compromise because of the new bailout provision which will allow covered jurisdictions to bail out, either as entire states, or even separately by counties. This new bailout provision was agreed to by civil rights supporters, after agonizing consideration and lengthy negotiations, as an incentive for covered jurisdictions, even though the thorough House hearings (which included numerous opponents of the Act's extension) did not demonstrate any basis for changing the bailout provision that is currently in the law.

Nonetheless, there are those who would like to ignore the major accommodation represented by the liberalized bailout, and who now criticize the bailout provision as "exceedingly difficult to meet". In fact, the bailout standards are equitable and reasonable. Each of the provisions in S.1992 is necessary to insure that only those jurisdictions bail out that have (1) complied with the Act; (2) abandoned discriminatory voting procedures and practices; and, (3) taken positive steps to include minorities fully in the political process. These standards are achievable.

According to projections made on available data by the Joint Center for Political Studies, more than 20% of the counties in the covered jurisdictions will be eligible to apply for bailout in 1984.

When the Voting Rights Act legislation was introduced last year in the House of Representatives, my organization adamantly opposed any new bailout provision, because, despite the gains made in the enfranchisement of blacks in the covered jurisdictions, the promise of the Act has not yet been realized. Despite the legal protections presently afforded by the Act, problems of grave magnitude are still encountered by those seeking full voter participation. NAACP branches in Alabama, Florida, Georgia, Mississippi, North and South Carolina, Texas and Virginia report that current barriers to voter participation include:

- failure of covered jurisdictions to preclear election changes;
- insufficient voting hours and facilities;
- permissiveness in the location of rotating books;
- change of single member districts to multi-member districts;
- limited use of deputy registrars;
- racial gerrymandering of district lines;
- annexation of white suburbs or subdivisions to previously majority black districts;
- subtle intimidation of black voters at the polls;
- use of voter re-identification procedures in some areas to purge voter rolls, necessitating re-registration;
- lack of adequate notice regarding changes in polling places;
- inadequate publication of procedural rules for voting;
- lack of availability of registrars outside the 9 a.m. to 5 p.m. work day;
- certification of absentee ballots of non-residents;
- majority runoff requirements in areas where there is no districting;
- physical location of registrar's office in places not conducive to minority participation (in segregated clubs; close proximity to sheriff's office, etc.);
- lack of black deputy registrars;
- "open primaries" which require a majority vote to win office;
- racial bloc voting;
- prohibition of "single shot" voting
- increased filing fee;
- numbered post requirements with staggered terms.

Though there was no evidence presented during the House hearings regarding any counties eligible to bail out now, the civil rights community, against its best

judgment, agreed to a new, vastly modified bailout provision to serve as an incentive to covered jurisdictions to comply with the law and eliminate the need for a Voting Rights Act.

We support the continued jurisdiction for bailout suits being in the United States District Court for the District of Columbia rather than in local District Courts in the covered jurisdictions. When the Congress enacted the Voting Rights Act of 1965, it vested exclusive jurisdiction of bailout suits in the District Court for the District of Columbia to ensure uniform application of the bailout standards and impartial judicial decision-making free of local biases and political pressures. The U.S. Supreme Court, in South Carolina v. Katzenbach, 383 U.S. 301, 331-32 (1966) upheld this limitation of jurisdiction as an appropriate exercise of the constitutional authority of Congress to "ordain and establish" inferior federal tribunals (U.S. Const. Art. III, § 1).

The purposes of the bailout provision would be seriously undermined if jurisdiction were vested in local District Courts and the interpretations of the legal standards governing bailout applied in New York were different from those applied in Mississippi. Further, the 1965 legislative history of the Act shows that the extraordinary remedies provided by the Act (including administrative preclearance) were required because relief in voting rights cases filed in Southern District Courts was extremely difficult and sometimes impossible to obtain, and numerous appeals were required, even in cases presenting the most compelling facts. Testimony before the House Subcommittee on Civil and Constitutional Rights last year has demonstrated that, in significant instances, this is still the case. For example, the Mississippi legislative reapportionment case (Connor v. Johnson) went on for fourteen years--including nine trips to the Supreme Court--before effective relief for voting rights denials was finally obtained.

We therefore believe, Mr. Chairman, that, in addition, the D.C. District Court now has extensive experience in voting rights matters and that the experience coupled with a dispassionate forum for the litigation of bailout issues supports our position that there is a continued need for uniform application of the bailout standards.

Some have questioned the feasibility of considering the bilingual provisions at this time since those provisions do not expire until 1985. We strongly support their consideration at this time because we believe that there is no logical reason for the difference in expiration dates and because the bilingual

provisions are now under attack. S. 53, a bill to repeal bilingual provisions of the Voting Rights Act is now pending before the Senate.

We have been told that bilingual provisions are too costly, yet the testimony in the House of Representatives showed, without concrete refutation, that such is not the case where "targeting" is used by local registrars. In Los Angeles, during the 1980 General Election, the cost of providing bilingual materials to more than 45,000 persons was only 1.9% of the total costs of the election.

Mr. Chairman and members of the Subcommittee, we say to those who argue that providing bilingual materials is too costly--how much is the right to vote worth? No price tag can be put on this right, said by many to be the cornerstone of all other rights. We have never seen any reliable figures on how much the First Amendment rights are worth, or how many dollars could buy the 11th Amendment rights of the states. At such time as price tags can be put on these other fundamental protections, we will be more sensitive to the need to place price tags on the right to vote.

For the Hispanic adult who cannot speak or read English fluently, the right to vote has no meaning if it cannot be used. Against this backdrop, the mere inconvenience or costs of printing pales into insignificance.

Since the 1975 extension of the Act when the bilingual provisions were enacted, the political process has been opened up to many who were previously excluded and we believe that this protection is essential to preserve the rights of a group of citizens to participate fully in all aspects of American life.

The suggestion has also been made that coverage under the Voting Rights Act should be extended to all 50 states. Senator Cochran has introduced S. 1761, an amendment which would create a new preclearance procedure making the preclearance requirement under the Act nationwide. We oppose this amendment. The preclearance provision now covers all or parts of 22 states, including parts of California, Connecticut, Massachusetts, Michigan, New Hampshire and New York. States are "captured" for preclearance coverage based on a neutral triggering formula. The formula automatically applies to any state or political subdivision which had a literacy test for voter registration and where less than 50% of the voting age residents were registered or voted in presidential elections. The Act is nationwide now. It bans literacy tests and the poll tax nationwide and requires preclearance of any voting changes in any state or political sub-

division covered by the triggering formula. In addition to the preclearance provisions in Section 5, the Act contains two other sections which apply nationwide. Section 2 provides a basis for challenging discriminatory voting practices through a lawsuit in federal court. Section 3(c) authorizes preclearance of voting changes by a jurisdiction upon a judicial finding of voting discrimination. Sections 3(c) and 2 can be used to reach patterns of voting rights violations in areas not currently covered by Section 5.

We have serious doubts as to the constitutionality of nationwide coverage of Section 5. Secondly, nationwide preclearance would be an administrative nightmare. Every political subdivision--state, county, city, school board, water district, etc. would be required to submit every single change in their voting or election procedures for preclearance by either the Justice Department or to a Federal District Court in the District of Columbia. It would not be cost effective.

The Leadership Conference on Civil Rights, the NAACP and the Black Leadership Forum must disagree with those who oppose or question the value of the Voting Rights Act or who suggest that a presumption of legality should lead to ending coverage of the Act to see if former lawbreakers have now reformed. To state the proposition is to reject it. Once, as here, violations of the fundamental democratic rights of suffrage have been shown, the burden is upon those who were lawbreakers to prove they have turned the critical corner. We contend that the easiest way for that proof to be given is to operate electoral systems which are immune from the kind of challenges which the Voting Rights Act permits.

It is our contention that no jurisdiction which is free of the problems of voter exclusion will be bothered by the minor preclearance requirements imposed by this Act. We suggest that any covered jurisdiction which operates for the period between now and the changes effected by the 1990 census will have shown its eligibility for removal. Against a backdrop of generations of outright exclusion, showing the capacity to operate within the law for the generation of coverage from 1965 to 1992 is the least which should be required.

Mr. Chairman and members of the Subcommittee, the civil rights community is gravely concerned regarding the enforcement of the Voting Rights Act. The philosophical shift in interpretation of the role of the U. S. Department of Justice by the Attorney General and his assistants raises real concerns inasmuch as the new bailout provision of the Act will place an increased workload on the Department. Although in the past year, the Justice Department has

objected, properly, to several high profile state redistricting plans, this should not obscure the fact that overall there has been a serious failure by the Department to enforce the law and a serious politicization of the Department's responsibility of protecting voting rights. In 1981 the Department filed only 1 voting rights suit and 1 amicus brief. In contrast, the Department was involved in more than 80 cases for the period January 1, 1975, the last time the Act was extended, to December 31, 1980. Mr. Chairman we believe in preclearance, but we do have a problem when the Department preclears whether or not it moves or how it moves in voting rights matters in elected officials counties or states. Such a procedure circumvents the law. Examples include the stillborn amicus brief re Edgefield County, South Carolina; the withdrawal of an objection re Jackson, Mississippi; the watering down of a complaint in intervention filed in the Mobile, Alabama case and the withdrawal of an objection in Virginia after limited modifications were agreed upon with Virginia legislators.

Mr. Chairman, one of our organiaations' principal goals is to have the strongest bipartisan measure enacted into law as the Voting Rights Act of 1982. A strong measure has been passed by the U. S. House of Representatives. Two of the four principal authors of the House-passed bill, H. R. 3112, are Representatives James Sensenbrenner (R-Wisc.) and Hamilton Fish (R-N.Y.). A substantial number of Republicans supported the bill against all weakening amendments. This is not a partisan measure. The Voting Rights bills of 1965, 1970 and 1975 were all bi-partisan and the Leadership Conference on Civil Rights, The National Association for the Advancement of Colored People and the Black Leadership Forum believe that the U. S. Senate will duplicate the overwhelmingly bipartisan consensus that emerged from the U. S. House of Representatives. As you know some 60 senators are co-sponsors of S.1992 and we hope that in the weeks to come more will join as co-sponsors to send a strong and democratic signal to the world that the Congress is fully and irrevocably committed to protecting the most fundamental of all rights - the right to vote.

Thank you Mr. Chairman and members of the Subcommittee for affording us this opportunity to appear before you on the extension of the Voting Rights Act.

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January 26, 1982

MEMORANDUM

To: Participating Organizations

From: Ralph G. Neas, Executive Director

Subject: Amending Section 2 of the Voting Rights Act: "Intent" vs. "Result"

SUMMARY

Section 2 of the Voting Rights Act is the general prohibition of practices which deny or abridge the right to vote. S. 1992, like the House-passed bill, would add clarifying language to Section 2 so that it would explicitly state that any practice which "results" in such denial or abridgement is prohibited.

If the Attorney General or private plaintiffs challenge a practice in a jurisdiction not covered by the preclearance obligation of Section 5, they must sue under Section 2. In addition, Section 2 is the only recourse even in areas covered by Section 5 for laws or practices adopted prior to 1965. (Preclearance is required only for changes attempted after the Act was passed in 1965.)

An effective, usable Section 2 is an essential part of the Act. However, the recent Supreme Court decision of Mobile v. Bolden has cast a heavy cloud over Section 2's availability to challenge discrimination. A statutory amendment is needed to clarify the section and return the law to the original understanding of Congress that Section 2 would reach discriminatory results, whether or not plaintiffs proved a discriminatory purpose.

Minority voters do not view this needed amendment of Section 2 as a technical side issue to renewal of the Act. To blacks and Hispanic Americans, the need for a meaningful Section 2 remedy is just as crucial as is the need to maintain a strong Section 5 and to extend the bilingual election provisions of the Act. The effort of opponents of the amendment to substitute a "purpose" requirement in Section 2 would be a radical change in the law which has governed discriminatory vote dilution cases since the passage of the Act. It would be -- and would be clearly seen as -- a severe crippling of the Voting Rights Act.

The issues have been confused by opponents through persistent misstatements of what the law has been and of what the amendment would do. But merely repeating inaccurate statements over and over does not make them correct.

Specifically, the Justice Department and Senate opponents of the amendment assert that it would introduce a new and unprecedented standard; that it departs from the original intent of Congress and that it is unconstitutional. Most of all, in the face of repeated statements of the amendment's scope, they persist in the false assertion that the proposed "results" test would constitute a "quota requirement" of proportional representation.

This memorandum rebuts those distortions and explains why the Section 2 amendment in fact:

--reflects the original understanding of Congress in 1965;

--restores the legal standard that applied for most of the past 16 years;

--is clearly constitutional; and

--would not require quotas.

It would not make mere failure of minorities to win proportional representation a violation, even if that came as the result of at large elections. Plaintiffs would have to prove additional factors establishing that, in the total circumstances, minority voters not only failed "to win, but were effectively shut out of a fair opportunity to participate in the political process".

The amendment would codify the legal standard used by the courts until very recently.

For almost 15 years under this standard, the few cases which were brought were long and arduous. Even fewer were won. That track record simply belies the scare tactic claim that local governments across the land could be overturned left and right under a new and untested standard.

I. Legislative History of the 1965 Act

Section 2 of the Voting Rights Act provides that:

"No voting qualifications or prerequisites to voting or standard or practice or procedures shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

Opponents of the proposed amendment cite statements in the legislative history to the effect that Section 2 was thought to track the prohibition of the 15th Amendment. Since a plurality of the Supreme Court in the Mobile case has now said that the 15th Amendment requires proof of intent, they argue that the Congress must have meant to include an "intent" requirement when it enacted Section 2.

It is true that the legislative history contains statements that Section 2 was patterned after the 15th Amendment. But this representation of that history is so incomplete that it is badly misleading. In 1965, there was no general understanding that constitutional litigation of voting discrimination required proof of intent.

Therefore, it was possible for Congress both to view Section 2 as tracking the 15th Amendment, and also to intend that it reach either discriminatory purpose or discriminatory results. And that is precisely what the complete legislative history shows Congress did.

Attorney General Katzenbach testified for the Justice Department which had drafted the Act. In response to Senator Fong's question as to the scope of Section 2, he replied;

> "I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color." (Emphasis added.)

The Supreme Court subsequently cited this exchange in its analysis of Section 2. The Supreme Court also has recognized Attorney General Katzenbach's extensive role "in drafting the statute and explaining its operation to Congress." 1/

In 1970, the Attorney General John Mitchell proposed repealing Section 5 and offered in exchange language explicitly authorizing the Attorney General to challenge any practice

> "which has the purpose or effect of denying or abridging the right to vote on account of race or color . . . . " (Emphasis added.)

The Joint Views of Ten Members of The Judiciary Committee rejected his proposal on the ground that it added nothing to the Act. 2/ The Views stated that:

> "The Attorney General already has the authority to bring such suits /under Section 2./"

Thus, when Congress enacted Section 2, and when it reenacted the law in 1970, it regarded Section 2 as a restatement of the 15th Amendment, but viewed it as reaching discrimination whether or not intent was proved. There simply was no need in 1965 for Congress to choose between those two understandings.

In addition to their incomplete analysis, there is a time warp in the logic of those who oppose the amendment. What four justices said in 1980 the 15th Amendment requires is hardly evidence of what Congress intended in 1965 when the Court had not yet ruled that the Constitution required proof of discriminatory purpose. Congress must now decide whether to clarify Section 2 in order to maintain its original plan to reach discriminatory results. The Section then would no longer parallel the 15th Amendment. But it is untrue to say that such a clarification would be a departure from Congress' understanding in 1965.

II. The Legal Standard Under the Case Law Before Mobile

For 14 years, the courts heard allegations that districting and other practices illegally diluted minority voting strength, without applying an intent requirement. In 1965 the Supreme Court observed in Fortson v. Dorsey that a districting system might be unconstitutional because it worked to cancel out a racial minority's strength,

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1/ U.S. v. Sheffield, 435 U.S. 110, 131 (1978).

2/ Those ten members of the Committee, including Senators Hugh Scott and Robert Griffin, sponsored the Scott-Hart extension of the Act which became law. The Supreme Court has cited their Views as the committee report on the bill which was enacted. Seven of the ten Senators were sponsors of S. 1564, the bill enacted as the Voting Rights Act in 1965.

"designedly or otherwise." In Whitcomb v. Chavis (1971) and White v. Regester (1973) the Court looked to the "totality of the circumstances" to determine whether the challenged system effectively shut racial minorities out of the process. Whitcomb upheld at large elections in Indianapolis even though the dilution of black voting strength prevented blacks from electing candidates in proportion to their share of the electorate. The Court noted the lack of proof of discriminatory purpose. But its analysis focused on whether blacks had less opportunity than others "to participate in the political process and to elect legislators of their choice." 403 U.S. 124, 149 (1971).

White struck down at large elections in two Texas counties. The Court affirmed the trial court's "intensely local appraisal" of the total circumstances. Justice White (who also wrote the Whitcomb opinion) stated for a unanimous court that the right protected was not a right to proportional representation, but only the right of equal access to the process:

> "The plaintiff's burden is to produce evicence...that the political process leading to the nomination and election was not equally open to participation by the group in question." 412 U.S. 755, 766 (1973).

The Fifth Circuit Court of Appeals elaborated upon the factors found relevant by the White decision in the case of Zimmer v. McKeithen, decided the same year. White amd Zimmer did not require any proof of intent. They remained the controlling law until Mobile.

Meanwhile, however, the Supreme Court had decided two cases in 1976 and 1977, which held that the Constitution required proof of intentional discrimination to establish a violation. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The legal community regarded that development as a major change in the requisite for constitutional challenge to discrimination. The Fifth Circuit then tried to harmonize Washington and Arlington with the earlier vote dilution cases. In Mobile and companion cases, the Fifth Circuit for the first time reinterpreted the factors controlling in White and Zimmer as circumstantial evidence of intent.

Simply put, this was a basic change in the legal standard for vote discrimination cases.

The Supreme Court in its Mobile decision reversed the lower court order striking down Mobile's at large elections, although only four justices did so on the ground that there was insufficient evidence of intent and more direct proof was required.

The opponents of the "results" test in Section 2 try to suggest that there always had been an "intent" test in the pre-Mobile cases such as Zimmer. That is demonstrably untrue. The Supreme Court's plurality opinion in Mobile, itself, acknowledged that proof of intent was not understood to be required before Washington necessitated a reinterpretation of the earlier cases. Justice Stewart explained:

> "[Zimmer v. McKeithen] coming before Washington v. Davis, . . . was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause -- that proof of discriminatory effect is sufficient." (Slip Op. at 14) (Emphasis added.)

It is important to keep in mind the ultimate significance of this history. It is this. For many years prior to 1978, the legal standard was the same as the test which

the proposed amendment to Section 2 would codify -- a "results" test measured in the totality of the circumstances -- and without any intent requirement. It is not a new or untried standard. Yet during that long period, the White and Whitcomb standard posed a very difficult hurdle for any would be plaintiff. There were relatively few cases -- an average of about three to four per year. And there were no more than two dozen victories over a fifteen year period.

The cases were difficult, lengthy and costly. Under such a tough standard, civil rights groups with limited financial and legal resources did not waste them on frivolous challenges. And with ever increasing constraints on their resources today, they would not do so in the future.

In summary, the track record under the standard embodied in the amendment is a reassuring indication that only a selective number of truly eggregious situations would be successfully challenged, and that none could be challenged simply on the basis of election returns.

III. Consequences Of The Mobile Decision

The cases litigated since Mobile show that even blatant discrimination can be invulnerable if proof of intent is required. Those who discriminate do not commonly advertise that fact. Many of the practices go back decades and no records are available. Those involved may not even be alive. As the Birmingham Post Herald put it: "It would be quite a trick for anyone to subpoena them from their graves for testimony about their racial motivations." In the case of more recently adopted practices, there are problems of legislative immunity to scrutiny of the motivation behind an enactment. In a very recent case, the Fifth Circuit has ruled that decisions by the general electorate also are immune from such inquiry. Therefore, systems adopted or maintained by referendum votes would stymie even the most peristent lawyers' effort to meet the Mobile standard.

In one case, in Edgefield County, South Carolina, Judge Robert Chapman (recently elevated to the court of appeals by President Reagan) found the election system was discriminatory. His ruling was on April 17, 1980. Five days later Mobile was decided, and Judge Chapman was forced to reverse his decision and uphold the county election law.

The Justice Department misleadingly suggests that Section 2 "has been successful" in its present form and therefore need not be changed. In past litigation the parties and the courts focused overwhelmingly on the constitutional claims, rather than on Section 2. But to the extent litigation was successful on either level it was prior to the Supreme Court's decision in Mobile that both lines of attack required proof of intent. Without the proposed amendment, Section 2 will now become a useful avenue of relief in any but the most flagrant cases in which plaintiffs fortuitously find a "smoking gun" piece of direct evidence of intent. 1/

The Justice Department also claims that even under Mobile plaintiffs might win with traditional circumstantial evidence of intent. But the plain fact is that Mobile rejected the traditional elements of indirect evidence as having negligible weight. The clear result of Mobile is that plaintiffs will have little chance of prevailing in this Supreme Court without direct proof of intent.

1/ Even when some records are available, the effort required by insistence on proof of discriminatory purpose is like chasing rainbows. After the Supreme Court's decision in the Mobile case, that case went back to the district court for a new trial on the issue of purpose. That trial has been held and is now awaiting decision. It is estimated that the time necessary for all attorneys in the case was over 6000 hours, with another 7000 hours for paralegals, expert witnesses and research assistants. The total expenses not counting attorneys fees are estimated at $120,000.

How Would the Proposed Amendment of Section 2 Operate?

Beyond their misreading of the legislative and legal history, the Justice Department and the Senate opponents of the proposed amendment to Section 2 make the flat assertion that the text of the amendment will inevitably mean a quota approach and would establish a "right" to proportional representation.

This is once again a distorting scare tactic.

The legislative history in the House of Representatives made clear that the language is a return to the "totality of circumstances" approach of the earlier cases such as White and Whitcomb which repeatedly held that there was no such right to win offices or a particular proportion of seats.

More directly, the amendments to Section 2 expressly disavows any test of proportional representation:

> "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation."

Opponents of the amendment suggest that this disclaimer might not apply in the case of at large elections. There is simply no basis for that assertion. The disclaimer was specifically added to meet the question raised in the House of whether at large elections would be vulnerable merely because of the election results.

Indeed the sentence is taken almost directly from the Court's refusal in White to strike down at large elections because the minority's strength was not reflected in the returns.

The Senate Committee Report will be unequivocally clear that even in the case of at large elections, the mere failure of minorities to elect a proportion of the winners because of racially polarized bloc voting would not, without more establish a violation of Section 2, as amended. Additional proof of other factors would be required before a court would be empowered to find from the "totality of the circumstances" that plaintiffs had been denied equal opportunity to participate in the process.

CONSTITUTIONALITY OF THE AMENDMENT TO SECTION 2

The proposed amendment to Section 2 of the Voting Rights Act is a constitutional exercise of Congressional power.

The Court in Mobile said that only intentional discrimination is prohibited by the 15th Amendment.

However, the Court has long held that Congress need not legislate coextensively with the 15th Amendment, as long as there is a basis for the Congressional determination that the legislation furthers an enforcement objective related to the evils addressed by the Amendment. South Carolina v. Katzenbach, (383 U.S. 301, 317, 326 (1966)).

The Voting Rights Act is the best example of Congress' power to enact implementing legislation which goes beyond the direct prohibitions of the Constitution itself.

Congress clearly does have the power to enact measures going beyond the direct requirement of the 15th Amendment, if such measures are appropriate and reasonably adapted to protect citizens against the risk that the right to vote will be denied in violation of the 15th Amendment. That point was clearly established in South Carolina v. Katzenbach, and has not been seriously challenged in subsequent years.

The amended Section 2 of the Voting Rights Act will not stand as a Congressional definition of what violates the 15th Amendment. It will be a separate additional statutory protection which Congress believes necessary and proper to ensure full enjoyment of the voting rights guaranteed by the 15th Amendment. The same day that Bolden was decided, the Supreme Court in Rome, Georgia v. U.S. (446 U.S. 156, 173-177 (1980)) reaffirmed that Congressional power, even though it had just said that the litigation under the 15th Amendment itself requires intent.

Congress' reasons for amending Section 2 are that: (1) there is great difficulty in proving purposeful discrimination or its absence; (2) to require each Section 2 lawsuit to litigate the issue of intent to discriminate would create the risk that purposeful discrimination would go undetected, unpunished and undeterred; and (3) for those reasons, a results test contained in an amended Section 2 is necessary to protect 15th Amendment rights of minorities throughout the country.

In addition, this amendment is perfectly consistent with opposition to Congressional efforts to overrule Supreme Court interpretations of the Constitution.

The amendment to Section 2 of the Voting Rights Act is not an attempt to overrule the Supreme Court's interpretation in Mobile of what the 15th Amendment itself reaches or prohibits.

Congress cannot and should not attempt to overrule specific Supreme Court decisions interpreting the Constitution.

Unlike legislation proposed in other areas, S. 1992 does not attempt to restrict the federal court's jurisdiction in any way. It does not direct the result or the remedy that courts may reach with respect to claims brought under the 15th or 14th Amendments. Nor does it purport to redefine terms in either Amendment for purposes of constitutional adjudication.

Understandably Congress would, and should be reluctant about "overturning" Mobile.

Amended Section 2 does not overturn Mobile. The constitutional issue presented by the proposed amendment is not whether it prohibits practices that would violate the 15th Amendment. As explained above, the only constitutional question is whether the amended version of Section 2 is "appropriate legislation" pursuant to Congress' power to enforce the 15th Amendment.

Senator HATCH. Our next witness will be Vilma Martinez, the general counsel and executive director of the Mexican American Legal Defense and Educational Fund.

Ms. Martinez, we are very happy to have you here. We will proceed with your testimony at this time.

STATEMENT OF VILMA MARTINEZ, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Ms. MARTINEZ. Thank you, Senator, for your very kind invitation to testify.

If I may, I would like to submit my entire comments for the record but briefly summarize them.

Senator HATCH. Without objection, they will be placed in the record.

Let me get one other housekeeping matter out of the way before we proceed.

Statements by Senator Biden and Senator DeConcini will follow the statement of Senator Metzenbaum in the record, without objection.

Ms. Martinez?

Ms. MARTINEZ. Thank you.

Since the Voting Rights Act was expanded in 1975 to protect the voting rights of Mexican Americans and other language minority citizens, MALDEF has made enforcement of the act in Texas and elsewhere in the Southwest a major responsibility. Since 1975 we have participated in approximately 50 lawsuits under the Voting Rights Act in Texas, Arizona, California, and Washington State.

Mexican Americans are the victims of pervasive practices of voting discrimination in many parts of the United States. We are excluded from the political process today, not so much by prohibitions on voting or running for office as by election methods that minimize or even cancel our voting strength.

I am here today in support of S. 1992, a bill which, as H.R. 3112, passed by a vote of 389–24 in the House of Representatives in October. This excellent bill would extend with some amendments all the major features of the Voting Rights Act, some of which would otherwise expire in August of this year.

S. 1992 would extend the Federal preclearance requirement now applicable to those jurisdictions and States which have egregious histories of voting discrimination, but it would permit jurisdictions down to the county level to be released from the preclearance requirement if they can demonstrate a genuine record of nondiscrimination in voting and compliance with the Voting Rights Act for the previous 10 years.

It would, further, extend the bilingual voting assistance requirement until 1992, and it would incorporate a results test in section 2 of the Voting Rights Act to clarify standards of evidence needed to establish a section 2 violation. All of these provisions are important to Hispanics, because they are essential to an effective Voting Rights Act.

The importance of section 5 has always been considered the heart of the Voting Rights Act and cannot be overemphasized. It

requires the submitting jurisdiction to prove its change will not cause discrimination.

In 6 short years Texas has received more letters of objection to its submissions than any of the States covered under section 5 for 16 years, giving credence to the very eloquent statement made by social scientist Dr. Charles Cotrell who said, "Texas yields to no State in the area of voting rights violations."

The 85 letters of objection issued to Texas have included objections to proposed changes at the State, county, city, and school district levels in north, south, east, and west Texas, in rural areas, and in urban areas. There have been objections issued to statewide purging laws, annexations, redistricting plans, majority vote requirements, and polling place changes.

Officials who seek to minimize the voting strength of Mexican Americans and blacks in Texas have found ways to manipulate virtually every type of election change covered by section 5, even those which appear innocuous.

By dwelling on the need for section 5 in Texas, I do not mean to minimize the importance of retaining section 5 coverage for the Southern States with large black populations. Even after 16 years of section 5 coverage, the need and the justification for section 5 remain present in those States.

Turning to bailout, although we insist that section 5 must remain in effect in Texas and many other jurisdictions still eager to deny minorities voting rights, we recognize that some jurisdictions that have long abandoned discriminatory election practices should be allowed to exempt themselves from section 5 coverage upon a sufficient showing.

The new bailout provisions propose a substantial relaxation of the bailout provisions in the current law and would permit counties within a fully covered State to bail out independently of the State. I urge the Senate to adopt the bailout contained in S. 1992 and to reject attempts to weaken it further. Any voting rights practitioner would recognize, for example, S. 1975 as a thinly veiled effort to gut the act.

Turning to section 2, no less important than preclearance is section 2 of the Voting Rights Act, the basic prohibition against discriminatory voting and election practices. The continuing vitality of section 2 depends upon an amendment contained in S. 1992 and passed by the House in H.R. 3112 that would permit judicial findings of section 2 violations upon proof of the discriminatory effects or results of voting practices.

Recognition of an objective standard not dependent on proof of invidious motivation is critical to the efficacy of the Voting Rights Act because, as I have stated, the most devastating forms of voting discrimination are not overt but facially neutral, often highly technical election systems, and also because sensitivity to the judicial system has grown increasingly sophisticated, and racial motivations are diligently and effectively cloaked.

Early in the recent redistricting process in the Texas State Senate, an attorney pointedly warned members of the senate that statements made by the senators would be subject to discovery in litigation. To require direct evidence of a kind that is rarely, if ever, available in order to prove a violation of what has consistent-

ly been held to be a fundamental right is to ask the impossible of victims of voting discrimination.

In my judgment, the section 2 amendment reflects the original understandings of Congress in 1965, restores the legal standard that applied for most of the past 16 years, is clearly constitutional, and would not require proportional representation or quotas. Therefore, we are asking Congress to clarify its original aim in enacting section 2 by amending the statute, as 61 Senators have proposed in S. 1992, and adopting the results-effects standard for section 2.

With regard to bilingual elections, the bilingual election requirements, added to the Voting Rights Act in 1975, have brought the right to vote to uncounted numbers of non-English speaking U.S. citizens of Hispanic, Asian, Eskimo, and American Indian descent who have the right to vote as their birthright.

An extensive hearing record established during the recent House hearings on the Voting Rights Act reveal that bilingual elections are cost efficient, necessary, and capable of easy implementation by local election officials. Bilingual elections have indeed broadened the franchise for Mexican Americans, yet bilingual elections were greeted with hostility by the public. Unfounded charges that they are not needed and that they will foster cultural separatism continue to be made.

In an effort to examine these charges, MALDEF and the Southwest Voter Registration Education Project conducted an extensive survey, the preliminary findings of which I would like to share now with the subcommittee. The results of our survey will be published in final form in February, and with your permission, Mr. Chairman, submitted for the record at that time.

Senator HATCH. Without objection, they will be included in the record.

Ms. MARTINEZ. The continuing need for bilingual voting assistance is demonstrated by the fact that 16 percent of all respondents, all U.S. citizens, in our survey speak Spanish only, and 33 percent requested that the interview be conducted only in Spanish, suggesting that even though an individual may be bilingual, he or she may be more comfortable speaking Spanish.

According to our survey, 96 percent of Mexican-American voters think it is a good idea to provide help in Spanish for registering and voting. Yet, as you know, one of the most frequently asked questions on this subject is, "If they are citizens, why don't they speak English?" The inability of many adult Mexican-American citizens who were born here or who came here as young children to speak English is a direct consequence of the denial of educational opportunities to them as children.

Federal courts have recently found such segregation in dozens of localities across the State of Texas. In January 1981, a Federal court found that the Mexican schools were invariably overcrowded and inferior in all respects to those open exclusively to Anglo students.

The history, by the way, of segregation of Mexican-race students in separate schools is not limited to the State of Texas. A Federal court struck down segregation of Mexican Americans in Orange County, Calif., in 1946. Another did likewise in Oxnard, Calif., in

1974. Federal courts found that Arizona school districts had segregated Mexican Americans in cases from Tolleson, Maricopa County, and Tucson; and the same segregation has been found in Colorado's largest district, Denver.

In conclusion, Hispanics and other language minority citizens have had the protections of the Voting Rights Act for only 7 years, a short time in which to remedy generations of exclusion. I urge the subcommittee and the Senate to support S. 1992 without amendment.

Senator HATCH. Thank you.

Ms. Martinez, in your testimony before the House Judiciary Committee, you note that the city of San Antonio, which has a Mexican American majority, has only elected a handful of city councilmen when elections were conducted on an at-large basis. Can you explain to me how at-large elections can ever be held to be discrimination against a minority?

Ms. MARTINEZ. Can I explain to you what, Senator?

Senator HATCH. Can you explain to me how at-large elections can ever be held to be discrimination against a majority? Excuse me.

Ms. MARTINEZ. Easily. This majority is a minority in terms of how people are treated, viewed, and what kinds of educational opportunities and political opportunities have been afforded them by the jurisdiction.

You are not asking me to explain, I understand, how it is that an at-large system may result in discrimination against a minority group?

Senator HATCH. No.

Ms. MARTINEZ. Do you want me to? I could.

Senator HATCH. That would be fine too. Go ahead.

Ms. MARTINEZ. Yes, because I think that is a terribly important question, and you have raised it.

Senator HATCH. First let me raise a preliminary question. Do you feel that at-large elections should be outlawed?

Ms. MARTINEZ. No; I do not take the position that at-large elections, per se, discriminate against minority people. I think that one needs to look at facts in any and all instances.

In looking at the facts, and in looking in particular at our litigation in Texas; for example, we filed that *White* v. *Regester* lawsuit, in conjunction, I might add, with the Republican Party in the State of Texas, to challenge the at-large method of electing people to the Texas State Legislature, because of the very extensive factual record that we compiled showing that the at-large method excluded minority voters, Republicans, Mexican Americans, and blacks.

The court in *White* v. *Regester* ultimately encouraged and required the Texas State Legislature to go from an at-large to a single-member district.

I am sure that you as a politician know better than I that it is much easier to run in a particular isolated geographic location; it is much less expensive to run in a single-member district, as opposed to being asked to run at large, when you are part of a minority group within that large community, when you do not have the money to run an at-large campaign.

This, coupled with all kinds of findings of discrimination against Mexican Americans and blacks in Texas, is what led to the disman-

tling of the at-large method of electing people to the State legislature in Texas.

Senator HATCH. In your statement you support limiting Federal jurisdiction on section 5 issues to the Federal courts in the District of Columbia. You state in part that this is necessary to insure "impartial decisionmaking free of local biases and local political pressures."

If you have any evidence to this effect, about Federal courts of the United States in any particular area, I can assure you that this committee will be interested in looking at those courts. Do you have any evidence to this effect?

Ms. MARTINEZ. I certainly have a lot of indirect evidence to this effect. In all of our school desegregation cases, for example, Mr. Hatch, we argued that Mexican race students had been segregated into Mexican race schools and that under *Brown* v. *Board of Education* we were now entitled to a desegregation education.

The school board members lawyers argued that they had always considered Mexican Americans white and had never segregated us. We lost all of those cases except one in the district courts. It was only on appeal that we were able to reverse those findings of local judges.

Senator HATCH. Yes.

Ms. MARTINEZ. And I said it was indirect.

Senator HATCH. But let me limit it to section 5, since we are talking about the Voting Rights Act. Do you have any evidence of courts that really would not enforce section 5?

Ms. MARTINEZ. I would be glad to put that together for you. I think we could come up with instances of courts that have not implemented clear mandates of section 5.

Senator HATCH. I would like to have chapter and verse of any evidence of any instances, such as you describe.

Ms. MARTINEZ. And Joaquin Avila, the director of our voting rights litigation, will be here, I am told, on the 4th.

Senator HATCH. If you will do that for us, I think that will help the committee, and personally I would like to review it.

Do you support each of the provisions of S. 1992?

Ms. MARTINEZ. Pardon me?

Senator HATCH. Do you support every provision in S. 1992?

Ms. MARTINEZ. We certainly support the provisions of S. 1992. As you know, it was something that we worked on diligently, that represented a compromise for many of us, that does have a good bailout.

This was not something we came recommending, but in part because of the genuine concerns of people such as yourself—certainly Congressmen Hyde and Sensenbrenner—that people who have behaved properly should be permitted to bail out, and that they should be permitted to bail out even at the county level.

We heard them, we worked with them, and we have something that we can live with, that we are proud of, that we would like to see you support, that we would like to see the Senate support, and that we would like to see the President sign.

Senator HATCH. The reason I ask that question is because I wonder if you support section 208 which reads that "Nothing in this act shall be construed in such a way as to permit voting assist-

ance to be given within the voting booth unless the voter is blind or physically incapacitated."

I ask this question that is because of your efforts in *Garza* v. *Smith,* where MALDEF succeeded in having a Texas trial court declare unconstitutional a State law denying assistance at the polls to illiterates. So I wonder if you yourself believe that section 208 is constitutional.

Ms. MARTINEZ. I believe that we need to look very carefully at section 208, and I would like to submit something at a later time for the record on what we think about section 208.

Senator HATCH. All right.

In your statement you indicate that, "without action by Congress, some of the major features of the Voting Rights Act are scheduled to expire this year." Can you tell me which, if any, provisions of the act are scheduled to expire?

Ms. MARTINEZ. My understanding is that section 5 coverage would end as of this year if no action is taken by the Congress.

Senator HATCH. Section 5 would not expire; some jurisdictions, however, would be allowed finally to bail out after 17 years of good conduct. You have been extremely critical of the legislation, S. 1995, introduced by our colleague, Senator Grassley, because you say its provisions are vague. Perhaps this may be the case. I am studying it and will have to study it further.

Ms. MARTINEZ. Good.

Senator HATCH. Can you tell me, however, what the House bill means when it states that no jurisdiction shall be permitted to bail out unless they have demonstrated that they have engaged in "constructive" efforts at expanded opportunity for minorities in the election process? What does that all mean, in your view?

Ms. MARTINEZ. I would think there would be a variety of ways to do that. A jurisdiction could say, "Look, we took the bilingual election provisions seriously," for example; "We have reduced how much it costs us to insure that people have access to this;" "We have targeted voters who need bilingual materials;" "We have made them available."

They could show, for example—they now are very aggressively, in Spanish and other needed languages to reach citizens, talking to them about how to register to vote and telling them what the vote is in our society. It seems to me that there are a variety of things that a jurisdiction could do to show constructive efforts.

Senator HATCH. I am glad that that is not "vogue." We are very happy that you came. We appreciate your testimony, and we will place it in its entirety in the record.

Ms. MARTINEZ. Thank you very much.

Senator HATCH. Senator Kennedy is on his way here. We will wait for a minute until he comes.

Ms. MARTINEZ. Thank you.

Senator HATCH. Let me just ask one more question. It is my understanding that in San Antonio, the Texas State director for LULAC, Mr. Oscar Moran, last week endorsed straight extension of the Voting Rights Act without any change at all. Is that true? Do you know about that?

Ms. MARTINEZ. I really do not know, but you can rest assured, Senator, that I will be in touch with him and urge him to qualify that statement. [Laughter.]

Senator HATCH. That is one thing I like about you; you are energetic, and you are a good student.

Ms. MARTINEZ. No, no, this is a serious issue for us; it is a terribly important issue for us. We have worked very hard on it; we have compromised on it; we feel we have something that is workable, that meets the concerns of people such as you who want good jurisdictions to bail out; we feel we have done all of that. We would really like to have your support, and we would like to have the support of the administration.

Senator HATCH. All right. Thank you.

Senator Kennedy?

Senator KENNEDY. Thank you.

You are very welcome here before the subcommittee. I have had the good opportunity to work with you on a number of different issues affecting the Hispanic community. No matter what committee you appear before, we always benefit from your statement and comment. I am very much aware from personal knowledge of the very noble efforts that your organization makes in terms of eliminating discrimination in our society. I just welcome very much your presence here.

I think it is important to recognize the group that you are speaking for. I know that you will be in touch with the LULAC and perhaps the other Hispanic organizations, so that we get comments or statements by their leaders, because I think it is extremely important that we understand how those that are going to be the most affected by this legislation—what their view about this program is.

We have heard Ben Hooks speak and we have heard you speak. It is my understanding, with regard to not only the minorities in this country who have been most affected by the 1965 act as it was interpreted up to 1978, that they are in strong support of what Senator Mathias, I, and the House of Representatives have attempted to do.

I think it is important that there be no confusion within the Senate about what the views are among the Hispanics in this country, and you may be able to help us on that in just your own contacts with some of the various groups. Maybe we can talk about that later.

Let me just ask you what your own interpretation of the enforcement of the Voting Rights Act is by the Justice Department at the present time. We had a statement by Mr. Hooks about his very considerable concern that there is not vigorous enforcement. I did not get into that area of inquiry with him, but he does indicate that in his formal statement.

I would be interested in what the view of your organization, that has been so active in this issue—what your own understanding is of the attitude of the Justice Department in pursuing the Voting Rights Act as it has affected Hispanics.

Ms. MARTINEZ. As you know, Senator, we take very seriously our job of looking to see what any and all administrations are saying about issues that would affect us. Based on that careful examination of the record of this administration, I would have to say that I

have little confidence in the commitment of this administration and this Department of Justice to enforce the civil rights laws, including the Voting Rights Act.

This administration and its Attorney General have subverted equal employment opportunity and affirmative action by inviting the Supreme Court to overrule *Webber,* and by refusing to seek meaningful remedies for employment discrimination.

In my judgment, they have reinstituted "separate but equal" as the goal for minority educational opportunities, they have taken the outrageous position that the U.S. Government has no interest in whether the equal protection rights of several thousand alien schoolchildren are violated in the *Plyler* v. *Doe* case, and have recently overlooked a court order by granting tax-exempt status to private schools that practice racial discrimination.

Given this record of indifference or hostility to civil rights of minorities, we view with suspicion the administration's real intentions with regard to the Voting Rights Act. I wish I could say to you that I see in our Attorney General a moderate supporter of the act. I do not. I see a skillful and subtle opponent.

Senator KENNEDY. Well now, I think if the Attorney General was here, he might comment that that was a political statement, as he did when I——

Senator HATCH. I think he might just have that feeling.

Senator KENNEDY. But I think what you are stating, what I have stated this morning, and what Mr. Hooks stated are basically facts.

Ms. MARTINEZ. These are facts.

By the way, Senator Hatch, I want to reassure both you and Senator Kennedy that I have worked over the years with Attorney General Smith. We are both members of the board of regents for the University of California. I said hello to him this morning. I informed him we would be disagreeing.

Senator KENNEDY. This is the background in which members of your organization view at least the attitude of this administration on the Voting Rights Act.

What will be the reaction, do you think, among the Hispanics in this country should the administration's view prevail and if they were to get their way in terms of their position on the title 2 recommendations? What would be the attitude among Hispanics, and what, most importantly, would be the effect, do you think, on the involvement of individuals who are Spanish speaking and American citizens from participating in the voting process?

Ms. MARTINEZ. Yes, that is a very good question. The reaction will be mixed. Those of us who have for so long worked so hard for an effective extension of an effective Voting Rights Act will have to thank the administration and the Congress for the bilingual provisions, because they are included in the extension to 1992. I would have to say thank you for that.

However, you are asking me a tougher question. You are saying, "What will people on the street think? How will they act?" My judgment is that the person on the street will say, "Well, score one more loss for civil rights in this country. Those people who argue that this country really doesn't want us and doesn't want to take us seriously"—they will start believing that, and they will not participate.

That, of course, is what I fight and will fight most vigorously, because I believe that it is not only a privilege but an obligation to vote, but I fear that the reaction will be, "Oh, well, those who told us they really don't want us in the system were right."

Senator KENNEDY. Do you feel as strongly then about the sections 2 and 5 as well as the bilingual provisions?

Ms. MARTINEZ. Oh, yes, very strongly. You know, I have had to work with this act. We have tried lawsuits. I do not have the fears that the Attorney General has been articulating about what this extension of section 2 means. I would remind him that section 2 has been there since 1965. There has been nationwide coverage since 1965. And I would further argue legally with him that preclearance in section 5 is terribly different from having a right to go into a Federal court, make your case, sustain a burden of proof, and win.

There are very few of us who have the resources, and those of us who do can only do so many cases. I do not think that people ought to be that fearful that every jurisdiction is going to be challenged about everything overnight. That is just not reality.

Senator KENNEDY. Let me ask you this: It has been suggested that these bilingual provisions are extremely costly in terms of the establishment of the rules, regulations, and other paperwork. That is contrary to my understanding. I am interested in your response.

Ms. MARTINEZ. We have studied this issue, and we have found that there are cost effective ways to have bilingual ballots. In fact, Representative McCloskey, who continues to oppose the bilingual provisions, nonetheless admits and agrees that cost very simply is not a factor.

In Los Angeles for example, the registrar there, Mr. Pannish, substantially decreased the cost of bilingual ballots from one election to the next by doing what is called targeting—finding out who are the people in the population who need and want bilingual materials and providing it only to those members of the population. So certainly cost cannot be an argument for saying we should not do it.

Senator KENNEDY. Can you comment upon the intent test that is proposed by the administration? Mr. Hooks has indicated what in his understanding would be the effect on registering and encouraging black Americans to participate in the electoral process. If that were to be adopted, do you think that, looking at it from the point of view of Hispanics, there would be similar kinds of problems in proving the intention of those individuals who may or may not still be alive who have developed various procedures to discriminate against Hispanics? Do you have the same kinds of concerns? I know you were here when he testified. Would those same concerns be true about Hispanics?

Ms. MARTINEZ. Those are the same concerns that I would have, and they would be, frankly, aggravated by other factors. For example, not too many people in this country understand the history of pervasive discrimination against Mexican Americans. There are very few people who would say that blacks were not subjected to slavery. In that sense, we would have an even tougher time.

The other factor which would greatly aggravate the situation for us is that we are challenging discrimination that is subtle and sophisticated, hard to articulate, and hard to remedy.

If you leave us with only an intent test, then we will not succeed. That is why those of us who have litigated in this area believe that what the 1992 language does is to, frankly, reflect the original understanding of Congress in 1965, that it would restore the legal standard that we all used for the past 16 years, except for the time we have had since Bolden. We argue that it is constitutional, and we certainly argue that it would not require proportional representation or quotas.

Senator KENNEDY. How do you respond to the question of the chairman that in every phase of court procedures, whether it is criminal procedures or even civil, that intention of violations of the law have to be proven?

Senator HATCH. If the Senator would yield, I did not say in every case.

Senator KENNEDY. All right. If the Senator wants to pose the question——

Senator HATCH. No, you may ask the question, but I would like to make it clear that I did not say "in every case. To be specific," I said, "in all criminal cases and in many civil cases."

Ms. MARTINEZ. I would appreciate your restating the question.

Senator HATCH. In criminal cases you have a standard of proof of intent beyond a reasonable doubt. In many civil cases you have to prove intent by a preponderance of the evidence. That is true, is it not?

Ms. MARTINEZ. But the *Mobile* standard, as we read it and as we have been living with it, is tougher than that, and it goes beyond that. That is why we oppose it, and that is why we recommend what you are now calling the results test.

What I would like to do is request that this question be raised with our voting rights litigator, Joaquin Avila, when he comes here on the 4th. If you do not raise it, I certainly will ask him to address it.

Senator HATCH. We will be happy to.

Senator KENNEDY. Fine. I hope he will.

Senator HATCH. I look forward to that myself.

Ms. MARTINEZ. Good.

Senator KENNEDY. I want to thank you very much. I am very grateful for your effective presentation.

Ms. MARTINEZ. Thank you.

Senator HATCH. Thank you, Ms. Martinez.

[The prepared statement of Ms. Martinez follows:]

PREPARED STATEMENT OF VILMA S. MARTINEZ

Mr. Chairman, Members of the Subcommittee, my name is Vilma S. Martinez. I am President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund. MALDEF is a national civil rights organization dedicated to the protection of the civil and constitutional rights of close to 15 million Mexican Americans and other Hispanics—nearly 7 percent of the U.S. population. Since the Voting Rights Act was expanded in 1975 to protect the voting rights of Mexican Americans and other language minority citizens, MALDEF has made enforcement of the Act in Texas and elsewhere in the Southwest a major responsibility of our San Antonio office, where two attorneys and two paralegals work full-time

on voting rights litigation. Since 1975 we have participated in approximately 50 lawsuits under the Voting Rights Act, in Texas, Arizona, California, and Washington State.

Mexican Americans are the victims of pervasive practices of voting discrimination in many parts of the United States. We are excluded from the political process not so much by prohibitions on voting or running for office as by election methods that minimize or even cancel our voting strength. To combat these practices, we have been involved in redistricting at the local (school board, city council, county commissioners), state and Congressional levels. We have challenged a myriad of subtle and blatant techniques adopted and maintained to dilute minority voting strength, such as majority vote requirements, at-large elections, numbered posts, polling place changes, and rules against single shot voting.[1] The Voting Rights Act has been our best and often only legal armor in those battles.

I'm sorry to say that we have not witnessed a notable decline in any of these discriminatory practices since 1975. Without a Voting Rights Act which requires close federal scrutiny of the actions of state and local election officials and which permits effective legal challenges to discriminatory election practices, there is every reason to believe we will see an increase in voting discrimination. I am happy to say that the Senate has before it exactly the bill that is needed.

I am here today in support of S. 1992, a bill which, as H.R. 3112, passed by a vote of 389-24 in the House of Representatives in October. Provisions of the bill have received the endorsement of Republicans and Democrats, conservatives and liberals, the American Bar Association, the National League of Cities, the Catholic Church, the American Jewish Congress, the League of Women Voters, and hundreds of other large and small organizations. Indeed, to my knowledge, there is no organized public opposition to S. 1992. I urge the Subcommittee on the Constitution and the Senate to pass S. 1992 expeditiously and without modification.

This excellent bill would extend, with some amendments, all the major features of the Voting Rights Act, asome of which would otherwise expire in August of this year. The bill addresses potent but fair remedies to each of the major types of voting discrimination which still afflict minorities in the United States. S. 1992 would extend the federal preclearance requirement now applicable to those jurisdictions and States which have egregious histories of voting discrimination; but it would permit jurisdictions, down to the county level, to be released from the pre-clearance requirement if they can demonstrate a genuine record of non-discrimination in voting and compliance with the Voting Rights Act for the previous ten years. It would extend the bilingual voting assistance requirement until 1992. And it would incorporate a "results" test in Section 2 of the Voting Rights Act to clarify standards of evidence needed to establish a Section 2 violation. Each of these provisions is important to Hispanic voters, and taken together, they will permit us, in time, to realize the promise of the Voting Rights Act.

President Reagan has generally endorsed re-enactment of the Voting Rights Act, and has particularly endorsed the extension of the bilingual elections provisions. We were pleased to receive the President's support of bilingual elections.

As important as the bilingual provisions are to Hispanics, they do not represent the extent of our interest in this bill because, quite simply, they do not reflect the extent of the voting discrimination we face. President Reagan's support of the bilingual provisions stops far short of addressing the breadth of the problem.

SECTION 5 PROVISIONS

The importance of Section 5, the federal preclearance requirement[2] which has always been considered the heart of the Voting Rights Act, cannot be overempha-

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[1] "At-large" election systems allow all voters in a political jurisdiction to vote on candidates for all positions, rather than dividing the jurisdiction into smaller districts or wards. In such a system, minority voting strength is submerged. The effect is compounded by majority vote requirements, which prevent election by a plurality and require runoffs where necessary for one candidate to win an absolute majority and by "anti-single shot" rules which prevent minority voters from increasing the effective strength of their vote by casting ballots for only one minority candidate in an election involving several positions. "Numbered places" turn several at-large contests into a series of head-to-head choices which similarly frustrate minority voters' ability to focus their votes on one candidate.

[2] Section 5 requires covered jurisdictions, which are those portions of the country that have a history of voting discrimination, to obtain federal approval of election law changes either by administrative action of the Attorney General or by declaratory judgment of the District Court for the District of Columbia. 42 U.S.C. § 1973c.

sized. One of the provision's most important features is the shifting of the burden of proof from the victim of discrimination to the jurisdiction proposing to make an election change. Instead of requiring proof of discrimination by affected voters as do the legal standards governing constitutional litigation, Section 5 requires the submitting jurisdiction to prove that its change will not cause discrimination. Minority citizens are thereby released from the often insuperable legal and practical burden of policing the entire election process in jurisdictions bent on denying minority voting strength. The inadequacy of litigation as a means of resolving these problems is shown by two cases which MALDEF was forced to litigate in Texas before imposition of the pre-clearance requirement. These cases' histories illustrate the wisdom and efficiency of the pre-clearance procedures. In one case the trail court found unconstitutional a law that denied illiterates assistance at the polls which was given to blind persons and others with physical handicaps. It required several years of litigation and two separate appeals to secure the constitutional rights of illiterate citizens—most of whom were minorities—to vote.[3] In another case, a state law which required voters to register every year during a four month period was held to disenfranchise a large class of citizens—again, disproportionately minorities—arbitrarily and without justification.[4] The State's response to this ruling was to enact a series of alternative measures to purge the voter rolls in an attempt to evade the court's ruling. These measures would undoubtedly have continued for years, with severe impact on minority registration, had Section 5 not become applicable.

One of these alternative purging measures, SB 300, enacted in 1975, became subject to Section 5 pre-clearance. It was, in fact, the first proposed election change in Texas to which the Attorney General objected. SB 300 would have purged the voter rolls for the entire State of Texas and would have had a devastating effect on the political participation of the 33 percent of Texas' population who are minorities—21 percent Mexican Americans and 12 percent blacks[5]—for years to come because all the obstacles to minority registration would have been confronted anew. Because of the new Section 5 coverage, SB 300 was invalidated within months of its enactment and before it could decimate minority voter registration.[6]

SB 300 was only the first of the approximately 85 letters of objection Texas and its subdivisions have received since 1975.[7] In six short years, Texas has received more letters of objection than any of the states covered under Section 5 for 16 years,[8] giving credence to the very eloquent statement made by social scientist Dr. Charles Cotrell who said, "Texas yields to no state in the area of voting rights violations. . . . When attempting to describe Texas' long train of voting abuses, one is faced with the imposing challenge of where to begin."[9]

Mexican Americans in Texas have been barred from equal access to the political process by laws such as those I have described above as well as by at-large election systems, racial gerrymandering, violations of the one person/one vote principle and by extensive racially polarized voting.[10] A recent MALDEF survey of 100 Texas counties revealed that *all* of them were gerrymandered to dilute the Mexican American vote. These practices and conditions, singly and together, created the need for Section 5 in Texas in 1975. As these practices continue unabated, so must Section 5 be continued.

The 85 letters of objection issued to Texas have included objections to proposed changes at the state, county, city and school district levels in north, south, east, and

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[3] *Garza* v. *Smith*, 320 F. Supp. 131 (S.D. Tex. 1970), vacated 401 U.S. 1006 (1971), on remand 450 F. 2D 790 (5th Cir. 1971).

[4] *Beare* v. *Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), aff'd sub nom. *Beare* v. *Briscoe*, 498 F. 2d 244 (5th Cir. 1974).

[5] U.S. Bureau of the Census, 1980 Census of Population and Housing, *Final Population and Housing Unit Counts*, series PHC 80-V (Advance Counts), p. 4. These figures include 2.9 million Mexican Americans and 1.7 million Blacks—a total of 4.6 million minorities.

[6] *Flowers* v. *Wiley*, —— F. Supp. —— (E.D. Tex. No. S-74-103-CA, December 30, 1975) (three-judge court).

[7] Data provided by United States Department of Justice (1981).

[8] Texas' objections account for over 20 percent of all Section 5 objections, although Texas is only one of 9 states covered in toto and 25 states affected by Section 5, and even though most other covered jurisdictions began to submit election changes ten years before Texas.

[9] See, for example, *White* v. *Regester*, 412 U.S. 755 (1972), where the Court upheld findings of "the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes," and of a long history of invidious discrimination against Mexican Americans in many areas including voting, 412 U.S. at 766–769.

[10] *A Report on the Participation of Mexican Americans, Blacks, and Females in the Political Institutions and Processes in Texas*, prepared by Dr. Charles Cotrell, Jan. 1980 (unpublished), p. 142.

west Texas, in rural area and urban areas. There have been objections issued to statewide purging laws, annexations, redistricting plans, majority vote requirements and polling place changes. Officials who seek to minimize the voting strength of Mexican Americans and Blacks in Texas have found ways to manipulate virtually every type of election change covered by Section 5, even those which appear innocuous.

For example: Since 1975, Jim Wells County, Texas, with a 67.2 percent Chicano population, has tried three times to adopt a county redistricting plan which discriminates against Mexican Americans, and three times the Department of Justice has objected to the plans. There has never been more than a single Mexican American county commissioner. Because of this series of objections—resulting from the recalcitrance of the county commissioners' court—there has not been an election in Jim Wells County since 1976.[11]

Frio County, Texas, with a Mexican American population of 68.2 percent, had never elected a Mexican American to the county commissioners court until 1974. In early 1976, following letters from MALDEF and the Department of Justice, Frio County submitted for pre-clearance a 1973 county redistricting plan. In April 1976, Justice objected to the plan because it discriminated against Mexican American voters. Frio went ahead to implement the plan; MALDEF had to file a lawsuit to prevent the County from conducting elections under the plan, which was invalid.[12] Frio County Commissioner, Adolfo Alvarez, elected in 1980, testified before the House Subcommittee on Constitutional Rights that "It is only because of the VRA that Chicanos in Frio County have representation. The county still would like to weaken our voting strength, and if not for the VRA, they would get away with it. The Chicano community in Frio County does not earn a great deal of money and we cannot afford the time and money it takes to ask the courts for help each time the county tries to do something to weaken us."

In Terrell County, Texas, the redistricting plan in effect in 1973 has grossly malapportioned and discriminated against Mexican Americans. In 1975 when the Voting Rights Act passed, we notified the county, and in 1976 we contacted the county and reminded it of the Section 5 submission requirement, but it submitted nothing. The 1976 election went by and we continued to wait. In 1978 we filed a successful lawsuit to force the county to submit the 1973 plan, secured a letter of objection, and finally obtained a fair redistricting plan.[13]

In Texas' three largest cities—Houston, Dallas, and San Antonio—minority representation on the City Council was dramatically enhanced as a result of Section 5 application.[14] San Antonio contains Texas' largest concentration of Mexican Americans and is a majority-minority city (in 1980, 53 percent Mexican American and 7 percent Black in population). Yet until 1977, San Antonio's Anglo community, although a numerical minority, effectively monopolized political power through at-large districting. A Section 5 objection to local annexation plans brought an end to this discriminatory system of political control, and since 1977 Mexican Americans and blacks have held a majority or near-majority on the City Council. In 1981, the first Mexican American Mayor, Henry Cisneros, was elected. Without Section 5, none of this could have been possible.

By dwelling on the need for Section 5 in Texas I do not mean to minimize the importance of retaining Section 5 coverage of the Southern States with large Black populations. Even after 16 years of Section 5 coverage, the need and the justification for Section 5 remain present in those states. Indeed, for us Mexican Americans whose major stake in Section 5 is in Texas, perhaps the main lesson of the experience of blacks in Georgia and the other covered states is that voting discrimination is far too entrenched to be rooted out in only seven years.

BAILOUT PROVISIONS

Although we insist that Section 5 must remain in effect in Texas and many other jurisdictions still eager to deny minority voting rights, we recognize that some jurisdictions that have long abandoned discriminatory election practices should be al-

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[11] *Arriola* v. *Harville*, S.D. Tex. No. C-78-87, a MALDEF suit, finally compelled the county to submit an acceptable plan, approved by the Attorney General in 1981, which will create three Hispanic-controlled districts.

[12] *Silva* v. *Fitch*, W.D. Tex. No. SA-76-CA-126.

[13] *Escamilla* v. *Stavley*, — F. Supp. — (W.D. Tex. No. DR-78-CA-23, 1980).

[14] Houston's City Council got its first Hispanic minority member after a negotiated redistricting replaced a plan to which the Attorney General objected. Dallas' had no representation until after constitutional litigation was finally resolved in the Section 5 preclearance process. See *Wise* v. *Lipscomb*, 437 U.S. 535 (1978). As to San Antonio, see text, *infra*.

lowed to exempt themselves from Section 5 coverage upon a sufficient showing. The new "bailout" [15] provisions adopted by the House and proposed in S. 1992 meet both objectives: they ensure continued coverage of discriminatory jurisdictions without burden to other entities. They would prevent jurisdictions like Terrell County, Frio County, and the many others "deserving" of pre-clearance requirements from prematurely bailing out. They would, at the same time, permit jurisdictions with a genuine record of non-discrimination in voting to gain release from the pre-clearance requirement.[16]

Under current law, Texas and Arizona could bail out in 1985, and have only to prove that they had not used a discriminatory test or device for ten years. While we had originally sought to extend the year of the bailout until 1992, political pressures in the House were such that House members compromised with the greatly softened bailout contained in S. 1992. This continues to protect minority voting rights while permitting jurisdictions with clean records to bail out without further delay.

The new bailout provisions propose a substantial relaxation of the bailout provisions in the current law, and would permit counties within a fully covered state to bail out independently of the state. Of the more than 800 counties now covered, approximately one fourth of them would meet the objective criteria for bailout in 1984 and 1985. This measure fully answers the need for greater flexibility that some Section 5 critics have called for. The record before the House strongly supported the need to continue Section 5, not to weaken it. In light of this record, the generous provisions for bailout contained in S. 1992, which may permit 200 counties to be released, cannot fairly be called "impossible" or "unreasonable". Therefore, I urge the Senate to adopt the bailout contained in S. 1992 and to reject attempts to weaken it further.

I am particularly concerned by one such attempt introduced by a member of this Subcommittee, Senator Grassley. His bill, S. 1975, would permit almost every jurisdiction now covered to bail out on August 7, 1982. S. 1975 permits a jurisdiction to bail out if it can show that for the previous five years it has not used a "test or device" as that is defined in the Act; that for the previous five years it has "made all substantial submissions in compliance with Section 5" and that "there remain no unremedied objections by the Attorney General to any submission made" under Section 5. This is a meaningless standard because literacy tests were permanently banned in 1975, and English-only elections were prohibited in areas with large non-English speaking voting populations.

Nowhere in this bill is a "substantial submission" defined: have some discriminatory voting changes been more "important" than others, contrary to the intent of previous Congresses, as approved by the U.S. Supreme Court? [17] And if so, which ones, and why? Is a polling place change which prevents 800 Mexican Americans from voting more or less important than a redistricting which splinters the Mexican American population among four districts so that this otherwise contiguous community cannot elect a representative of its choice? In sum, a bailout provision which can be met by every covered jurisdiction is merely an excuse for repealing Section 5 by subterfuge.

Sen. Grassley's bill makes no mention of letters of objection. Clearly, it would permit Medina County, Texas, which has received three letters of objection to its county redistricting plan within two years to bail out as long as the county had "remedied" the objection by the Attorney General. Along with Medina would go Frio County, Bexar County (San Antonio), Jim Wells, Harris County (Houston), Jefferson, and almost every other county in Texas and Arizona whose election changes have been found to have a discriminatory impact on Mexican Americans and Blacks. Release of such jurisdictions from their Section 5 obligations would break the promise of voting equality made so recently to minority citizens, and would imperil the fragile gains made in some of these places. The bill would make litigated

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[15] "Bailout" refers to a declaratory judgment action, authorized by Section 4(a) of the current Act, 42 U.S.C. § 1973b(a), seeking a covered jurisdiction's permanent release from Section 5 preclearance obligations. Very few jurisdictions have been able to bail out under this strict provision. Under H.R. 3112 and S. 1992, bailout is made much more widely available and easily obtained than under current law. See p. 12, *infra*.

[16] The House-passed bailout provisions of S. 1992 would allow termination of Section 5 coverage when a jurisdiction demonstrates that it meets a number of criteria, including most significantly, that: it has not discriminated and has complied with the Voting Rights Act including Section 5 coverage for ten years; it has eliminated election methods and structural barriers that dilute minority voting strength; it has not been subject of a judgment, decree, or settlement necessary to remedy voting discrimination.

[17] See, *Allen* v. *State Board of Elections*, 393 U.S. 544, 556 (1969); *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971) ("all changes, no matter how small, [shall] be subjected to § 5 scrutiny").

final judgments in dilution lawsuits a bar to bailout, while permitting jurisdictions which have entered into consent decrees or settlements to bail out, even if these settlements have resulted in the abandonment of a discriminatory voting practice. A consent decree, settlement, or agreement resulting in the abandonment of a voting practice challenged as discriminatory is generally considered to constitute a *de facto* admission that the challenged practice was, in fact, unlawful and discriminatory.[18] To adopt this proposed measure would be counter-productive. It gives strong incentive to private plaintiffs and an enforcement-minded Government to eschew settlements and insist on obtaining a litigated judgment. Where adequate relief could be obtained through settlement, this extra litigation would be a needless drain on public and judicial resources and would artificially prolong lawsuits which at best cast uncertainty onto the electoral process.[19]

Finally, S. 1975 would move bailout suits from the District Court for the District of Columbia to local district courts. It would require a three-judge panel, made up of judges from outside the covered jurisdiction; appeal would be made directly to the U.S. Supreme Court. These changes would greatly weaken the Voting Rights Act. Limiting bailout jurisdiction to the D.C. District Court is necessary to insure uniform application of the bailout standards and impartial judicial decision-making, free of local biases and local political pressures. While a three-judge panel may have the appearance of impartiality, it is still "too close to home" for such sensitive assignments. Uniform results are not assured by the requirement that appeals be directed to the Supreme Court because the Court will, of necessity, limit the number of cases that can be considered on appeal. The Supreme Court reviews only a fraction of the cases that are brought before it, and will certainly not grant plenary consideration to more than a few bailout suits. Moreover, to remove bailout suits from the District of Columbia court at this point in time would waste the extensive and valuable experience, research, and familiarity with bailout actions accumulated by the distinguished judges of that court.[20]

Any voting rights practitioner would recognize S. 1975 as a thinly veiled effort to gut the Act, and I urge you to reject it as unworthy of consideration in a democracy that holds dear the right of all persons to cast an equal vote.

SECTION 2

No less important than pre-clearance is Section 2 of the Voting Rights Act, the basic prohibition against discriminatory voting and election practices. Section 2 was intended by Congress to prohibit all forms of voting discrimination throughout the Nation, and reaches voting practices not subject to pre-clearance because they were enacted prior to 1965 (in the States originally covered by Section 5) or (in Texas and other areas brought under Section 5) 1972. In concert with pre-clearance, Section 2 permits the Voting Rights Act not only to "correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also . . . [to] deal with the accumulation of discriminaton. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs." 111 Cong. Rec. 8295 (1965) (Sen. Javits). Section 2's application was not geographically limited; it was also intended to protect Blacks outside the covered jurisdictions. When the Voting Rights Act was amended for the second time in 1975, Section 2 coverage was extended to language minority citizens in all areas.

The continuing vitality of Section 2 depends upon an amendment, contained in S. 1992 and passed by the House in H.R. 3112, that would permit judicial findings of Section 2 violations upon proof of the discrimnatory "effects" or results of voting practices. Recognition of an objective standard not dependent on proof of indious motivation is critical to the efficacy of the Voting Rights Act because, as I have stated, the most devastating forms of voting discrimination are not overt but facially neutral, often highly technical election systems.[21]

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[18] See, e.g.. *United States* v. *Columbus Municipal Separate School District*, 558 F.2d 228, 230 n. 8 (5th Cir. 1977), cert. denied 434 U.S. 101 (1978).

[19] An amendment to H.R. 3112 which would have changed the bailout provision as Sen. Grassley proposes in S. 1975 was defeated on the House floor by a vote of 285–92; many House Republicans opposed the amendment. 1981 Cong. Record, House of Representatives, H. 6948 (daily edition, October 5, 1981).

[20] The same transfer of jurisdiction was proposed as a floor amendment to H.R. 3112. It was defeated by a vote of 277–132 with many Republicans voting to retain exclusive jurisdiction in the Court here in Washington. 1981 Cong. Record, *supra*, n.19, H. 6996.

[21] The success of Section 5 is largely attributable to its incorporation of an "effects" test.

The confusing and seemingly contradictory 1980 U.S. Supreme Court opinions in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) a constitutional challenge (not decided by a majority of the Court under Section 2), threatens to obliterate the original intent of Congress as it moved in 1965 to correct the effects of almost a century of disenfranchisement of Blacks. By requiring proof of discriminatory purpose, a plurality of Justices in *Mobile* cast doubt on not only the original intent of Section 2 but also the prevailing standards of evidence that had been required to prove the denial or abridgement of a voting practice or procedure.[22] Indeed, the standards required to prove a violation of the Constitution under the *Mobile* plurality opinion are nearly impossible for victims of voting discrimination to meet. If applied to Section 2, they would render it meaningless and would leave minority citizens in the U.S. speechless and voiceless when they look to the courts for justice that is promised them under the Voting Rights Acts.

Under *Mobile*, the victims of discrimination must prove, in order to prevail in a constitutional attack, that the challenged election practice was established or is maintained with a discriminatory purpose. Direct evidence of discriminatory intent is required. Challenges brought under Section 2 often, as in *Mobile*, might involve laws that were passed decades ago, sometimes laws that were passed in the last century. The burden of having to prove what was in the minds of legislators who passed a law in 1980 is nearly impossible: it is a rare public official who will admit publicly and on the record—or even put to paper—the racial motivation behind one of his bills. Rarer still might be the historical document, dated 1903 or 1921, that told us the "real reason" behind a decision by the city council to opt for at-large elections, or the "real reason" why the county commissioner precincts were drawn the way they were. The federal court most familiar with such cases has noted this dilemma.[23]

Indeed, "sensitivity" to the judicial system has grown increasingly sophisticated, and racial motivations are diligently cloaked. Early in the recent redistricting process in the Texas State Senate, an attorney pointedly warned members of the Senate that statements made by the Senators would be subject to discovery in litigation. Later, Senator Ogg, Chairman of the Subcommittee on Redistricting, told his colleagues: "We have to be very careful as to what we do and say, particularly prior to these public hearings." [24]

To require direct evidence of a kind that is rarely, if ever, available, in order to prove a violation of what has consistently been held to be a fundamental right, is to ask the impossible of victims of voting discrimination. It is also to ask these victims to suspend any faith in the ultimate logic of the law or the viability of legal actions to defend civil and constitutional rights. An observer has noted:

"Inquiries into congressional motives or purposes are a hazardous matter . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." H.R. Rep. No. 97-227, 97th Cong., 1st Sess., at 29 n. 97 (Sept. 15, 1981).

There is an unquestionable need for Section 2 to challenge methods of election and voting practices which dilute and, in many cases, exclude, minority participation, and which are not subject to federal scrutiny under Section 5. For example, in my own State of California at-large voting is used for most local city council and school board elections, while at the state legislative and congressional levels district lines have historically been gerrymandered at Hispanics' expense. The result has been a drastic under-representation of Hispanics at all levels of government with less than half the percentage of Hispanic officials elected even in Texas.[25] Yet, be-

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[22] See, e.g., *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978); *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978), rev'd 446 U.S. 55 (1980); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976).

[23] "We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, 'We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate.' Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply there will be no 'smoking gun'." *Lodge* v. *Buxton*, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981), cert. granted O.T. 1980 No. 80-2100.

[24] Evidence from *Seamon* v. *Upton*, E.D. Tex. No. P-81-49-CA, summarized in post-trial brief of intervenors Garcia and Rodriguez, pp. 36-38.

[25] The State legislature is now at an all-time high of 5% Hispanics, while Hispanics comprise only about 6% of local elected officials. We are, in stark contrast, 20% or more of the State's population.

cause the "smoking gun" of overt discrimination is rarely left visible in California, and because for decades California politicians with an eye to their multi-ethnic electorate have assiduously avoided open reference to ethnic considerations, we are legally powerless to sue successfully under the Constitution as interpreted in *Mobile*.[26] Likewise, consider the case of a jurisdiction which does not change but continues to discriminate as it always has; such an election system would remain beyond Section 5's reach.[27] Indeed, many jurisdictions which utilize at-large election schemes and therefore need not reapportion every ten years can escape effective review in this manner.[28]

There is also unquestionable need to amend Section 2 to clarify and assure the meaning originally intended by Congress and therefore to give minorities a foot in the door to political participation. The language and legislative history of Section 2 leave little room for dispute as to the intent of Congress in enacting this section of the law. Attorney General Katzenbach testified in 1965 that Section 2 reached all procedures with the "purpose or effect" of discrimination.

"I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color." *Hearings on S. 1564 before the Committee on the Judiciary*, U.S. Senate, 89th Congress, 1st Sess., (1965).

Though the language of Section 2 does not specifically incorporate either an intent or a result/effects test, in six other provisions of the Act, Congress did condemn "tests and devices" and "voting practices" used "for the purpose *or with the effect*" of "denying *or abridging* the right to vote on account of race or color" (Sections 3(b), 3(c) 4(a), 4(d), 5 and 10(a) (iii)) (emphasis added). Proof of purpose in addition to effect was not required in any of these sections, and it cannot fairly be read into the original meaning of Section 2.

S. 1992 would incorporate a "result" standard in Section 2 and thereby clarify the Voting Rights Act by specifying its adoption of pre-*Mobile* standards of evidence.[29] Using the result standard, victims of discrimination would be required to show "an aggregate of objective factors, such as a history of discrimination affecting the right to vote, racially polarized voting, discriminatory elements of the electoral system, such as at-large elections, a majority vote requirement, a prohibition on single-shot voting, and numbered posts which enhance the opportunity for discrimination, and discriminatory slating or the failure of minorities to win party nominations." See H.R. Report No. 97-227, 97th Cong. 1st. Sess., at 30 (Sept 15, 1981). This "totality of circumstances" approach was endorsed by the U.S. Supreme Court in *White* v. *Regester*, 412 U.S. 755 (1973), a landmark "dilution" decision severely eroded by *Mobile*.

Critics of this amendment and this standard incorrectly contend that we seek to enact a requirement of "proportional representation" of minorities in governmental bodies. Clearly the standard outlined above requires far more than proof of lack of "proportional representation." At a minimum, minorities would have to show racially polarized voting together with other objective factors which effectively preclude their participation in the political process or dilute the value of their vote.[30]

The issue then, is not proportional representation, but equal access to the political process. This does not guarantee that minorities will be elected to office; it does guarantee that minorities who are barred from holding office or whose votes are debased because of their race or membership in a language minority group will have legal channels through which to challenge their exclusion. By exclusion I mean far more than an outright bar on voting or running for office. The Supreme Court has consistently held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the

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[26] See, *Aranda* v. *VanSickle*, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), where the Court required proof of intent in a case where Mexican Americans constituted about 45% of the City's population but had never been able to elect a single Mexican American to the City Council.

[27] *See., Beer* v. *United States*, 425 U.S. 130, 138–39 (1976).

[28] The City of Lockhart, Texas, is such a jurisdiction. Although Lockhart is 55 percent minority (41 percent Mexican American and 14 percent Black), it never elected a Mexican American to the local governing board until 1978. In a case pending before the Supreme Court, Lockhart contends that it can continue to use its discriminatory election practices because they have not changed. *City of Lockhart* v. *United States*, F. Supp. (D.D.C. No. 80–0364, July 30, 1981) (three-judge court), appeal pending, O.T. 1981 No. 81–802.

[29] The *Mobile* decision does not decide or preclude the application of an intent—or effects—standard to Section 2. See, *United States* v. *Uvalde Cons. Ind. Schl. Dist.*, 625 F.2d 547, 554 n.12 (5th Cir. 1980). The Supreme Court may address this issue in *Lodge* v. *Buxton*, *supra*.

[30] See, *City of Mobile* v. *Bolden*, *supra*, 446 U.S. at 122 (Marshall, J., dissenting).

free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964); see also *White* v. *Regester, supra*, 412 U.S. at 766.)[31]

Mexican Americans are excluded from the political process, by racially polarized voting in combination with methods of election that minimize and, in many cases, cancel out their votes. A result-oriented Section 2 is critical to our ability to address this pervasive type of discrimination.

The prevalence of racially polarized voting cannot be over-emphasized. "It is a situation where, when candidates of different races are running for the same office, the voters will by and large vote for the candidate of their own race." *City of Rome* v. *U.S.*, 472 F. Supp. 221 (D.D.C. 1979), aff'd, 100 S. Ct. 1548 (1980). When combined with an otherwise neutral method of election, such as an at-large election, numbered posts, or majority-vote requirement, racially polarized voting can guarantee that a minority candidate will not be elected, unless the candidate's race makes up far more than half of the population.

Racially polarized voting in Texas extends throughout the state. Letters of objection to proposed voting changes under Section 5 of the Voting Rights Act are not issued unless there is evidence of racially polarized voting. The 85 letters issued since 1975 bear witness to the prevalence of polarized voting.[32] In addition, numerous studies of local Texas elections in which electors voted overwhelmingly for candidates of their own race in November 1981 were presented during a trial challenging the redistricting of the 23rd Congressional District in Texas.[33]

Legislation cannot change the way people vote; our hope in amending Section 2 to incorporate an effects test is rather to give victims of discrimination a reasonable and fair opportunity to challenge official election practices and methods of election adopted prior to the Voting Rights or outside Section 5 jurisdictions which—when combined with racial bloc voting—shut minorities our of the political process.

Congress has the constitutional authority—and the obligation—to clarify its original aim in enacting Section 2 by amending the statute as 61 Senators have proposed in S. 1992. This body is well within its power to amend the statute pursuant to its authority to enforce the Fourteenth and Fifteenth Amendments. It "has the power to enact legislation which goes beyond the specific prohibitions of the Fourteenth and Fifteenth Amendments themselves so long as the legislation is appropriate to fulfill the purposes of those constitutional provisions.[34] The Supreme Court was confusingly splintered in *Mobile*. Only four Justices held that discriminatory motivation was required to prove a Fifteenth Amendment or Section 2 violation and that the plaintiffs had not met that burden; one Justice held that the plaintiffs had met the burden of proving intentional discrimination. One Justice held that the standard of proving a violation should be based on objective rather than subjective, motivational factors. Three Justices dissented and agreed that the plaintiffs had met the burden of proving intentional discrimination. One Justice reasoned that proof of discriminatory effect is sufficient to prove a violation of this fundamental right. The confusion brought about by these conflicting or, at fest, bewildering opinions results, in words of Justice White, in leaving "the courts below adrift on uncharted seas with respect to how to proceed on remand", 446 U.S. at 103 (White, J., dissenting).

It is up to the Senate now to set the course straight and to adopt the results/effects standards for Section 2, as contained in S. 1992.[35]

BILINGUAL ELECTION REQUIREMENTS

The bilingual election requirements added to the VRA in 1975 have brought the right to vote to uncounted numbers of non-English speaking U.S. citizens of Hispanic, Asian, Eskimo and American Indian descent who retain the right to vote as their birth right. Long held as "a fundamental right because it is preservative of all

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[31] Although the plurality purported not to disturb this principle in its *Mobile* decision, Justice White dissented because he felt that the "dilution" principle was being threatened. See *City of Mobile* v. *Bolden, supra*, 446 U.S. at 102 (White, J., dissenting).

[32] Of course, polarized voting, while the *sine qua non* of Section 5 objections, does not itself invalidate submissions. A far larger number of submissions, approved by the Attorney General on other grounds, has demonstrated racially polarized voting.

[33] Social scientists testified to the existence of racial bloc voting in elections for city councils, county commissioners courts and justices of the peace in countries throughout the challenged 23rd Congressional District. *Seamon* v. *Upton*, E.D. Tex. No. P-81-49-CA, post-trial brief for intervenors Garcia and Rodriguez, at pp. 13–24.

[34] H.R. Rep. No. 97-227, 97th Cong. 1st Sess., at 31 (Sept. 15, 1981). The Supreme Court's decision in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325–327 (1966), is the original source of this restatement of Constitutional authority.

[35] Sen. Grassley's substitute, S. 1975, omits any amendment to Section 2 and would therefore fail to meet this important need.

rights,"[36] the right to vote had effectively been denied these citizens until 1975, except in a handful of instances where federal courts had ordered bilingual elections[37] and, the unique case of New Mexico, where the state's long tradition of bilingualism extended to the polling place.

An extensive hearing recorded established during the recent House hearings on the VRA revealed that bilingual elections are cost-efficient, necessary and can be implemented with ease by local election officials. Leonard Panish, Registrar of Voters in Los Angeles County, one of the largest election districts in the country, has developed a system for providing bilingual election materials that is one of the most efficient we have seen.

In the 1980 general election over 45,000 voters requested Spanish language materials in L.A. County; the cost to the county was 1.9 percent of the total election cost. Figures like these forced Rep. Paul McCloskey, a long-time opponent of bilingual elections because they were too costly, to concede during his testimony at the House hearings that "It seems to me that it can no longer be argued that the cost is excessive for the bilingual ballot. I do not make that argument."

Nevertheless, bilingual voting assistance was the subject of intense, extended debate on the House floor during consideration of the Voting Rights Act. Yet two amendments, one of which would have repealed all bilingual assistance—that is, oral and written—and another, which would have repealed only the bilingual ballot requirement, were defeated by margins greater than 2 to 1. Members of the House, Republican and Democrat, were convinced overwhelmingly of the need for the bilingual election requirements. The votes seemed to echo the words of House Majority Leader, Jim Wright, who said during the debate, "We have never made a mistake when we broadened the franchise."

THE MALDEF SURVEY

Bilingual elections have indeed broadened the franchise for Mexican Americans. Yet bilingual elections were greeted with hostility by the public; unfounded charges that they are not needed and that they will foster "cultural separatism," continue to be made. In an effort to examine these charges, MALDEF conducted and extensive survey, the preliminary findings of which I would like now to share with the Subcommittee. The results of our survey will be published in final form in February and with the permission of the Chairman of the Subcommittee submitted for the record at that time.

Our study consisted, in part, of indepth interviews begun in December, 1981 with 749 U.S. citizens of Mexican descent who live in East Los Angeles, Bexar County (San Antonio), and Uvalde County, Texas. The interviews reveal the extent of the need and usage of bilingual voting materials, and the value of these materials to Mexican American voters. We found that bilingual materials were particularly valuable to the elderly citizen, who, because of poor and often non-existent educational opportunities when he or she was a child, was never educated in English.

NEED FOR BILINGUAL VOTING ASSISTANCE

The continuing need for bilingual voting assistance is demonstrated by the fact that 16 percent of all respondents—all U.S. citizens—in our survey speak Spanish only, and 33 percent requested that the interview be conducted only in Spanish, suggesting that even though an individual may be bilingual, he or she may be most comfortable speaking Spanish.

Looking more closely at our respondents, we see that: 13 percent in San Antonio speak only Spanish; 15 percent in East L.A. speak only Spanish; and 21 percent in Uvalde, a rural county, 80 miles southwest of San Antonio speak only Spanish.

USAGE OF BILINGUAL VOTING ASSISTANCE

The Voting Rights Act requires both oral and written bilingual assistance during registration and voting. In addition to bilingual ballots, bilingual poll workers are required to assist voters, many of whom are unfamiliar with the voting process because of their long exclusion from it.

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[36] *Yic Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)

[37] *Puerto Rican Organization for Political Action* v. *Kusper*, 490 F.2d 575 (7th Cir. 1973) (Chicago); *Marquez* v. *Faicey*, Civil No. 1447-73 (D.N.J. Oct. 9, 1873); *Ortiz* v. *New York State Board of Elections*, Civil No. 74-455 (W.D.N.Y. Oct 11, 1974) (Buffalo); and *Arroyo* v. *Tucker*, 372 F. Supp. 764 (E.D. Pa 1974) (Philadelphia).

MALDEF's survey reveals that 26 percent of all respondents who voted in the 1980 general election received Spanish assistance and 23 percent of those who voted used Spanish language materials when voting. The latter figure was higher for Uvalde (33 percent) and lower for the urban areas (San Antonio: 18 percent; East L.A. 12 percent).

The elderly in Uvalde accounted for the majority of those who used bilingual voting assistance and materials in the 1980 general election. Seventy-four percent of those over 65 years old used the Spanish language ballot in Uvalde, and 56 percent took advantage of Spanish language oral assistance at the polling place.

VALUE OF BILINGUAL VOTING ASSISTANCE

According to our survey, 96 percent of Mexican American voters think it is a good idea to provide help in Spanish for registering and voting. Those over 65 years old in Uvalde are unanimous on this issue. Perhaps more revealing are the following figures:

35 percent of all respondents would be less likely to register if there was no one to help in Spanish (among those over 65 years, 44 percent agreed with this statement),

33 percent of all respondents would be less likely to vote if there were no ballot in Spanish (among those over 65 years, 43 percent agreed with this statement).

Again, the elderly in Uvalde seemed to be among the most enthusiastic supporters of the bilingual provisions. Sixty-four percent said they would be less likely to register if there were no one to help in Spanish; 64 percent said they would be less likely to vote if there were no ballot in Spanish.

I look forward to presenting to the Subcommittee the results of our completed survey and hope that they, along with other testimony you receive on this issue, will lay to rest many of the misconceptions that have surrounded the issue of bilingual elections and caused confusion and often hostility in the minds of legislators and the public.

One of the most frequent questions asked on this subject is, "If they're citizens, why don't they speak English?" I would like now to turn to some of the reasons why there are significant numbers of U.S. citizens who do not speak English and for whom bilingual election assistance was intended.

The inability of many adult Mexican American citizens who were born here or came here as young children to speak English is a direct consequence of the denial of eductional opportunities to them as children. Many Mexican American children have been denied a chance to learn English by virtue of their confinement, as a result of *de jure* segregation practices to predominantly or completely Mexican American schools, known colloquially as "the Mexican schools." Federal courts have recently found such segregation in dozens of localities across the state of Texas. Early last year, a federal judge who surveyed this sorry record has twice concluded, in separate decisions, that the State of Texas has practiced intentional discrimination against Mexican American students on a statewide basis.[38] In many of these cases, the former existence of one or more "Mexican schools," expressly maintained to isolate Mexican American students in Spanish speaking schools, was proved. In January 1981, a Federal Court found that "the 'Mexican schools' were invariably overcrowded and were inferior in all respects to those open exclusively to anglo students."[39] The decision goes on to say that "There can be no doubt that the principal purpose of the practices described above was to treat Mexican Americans as a separate and inferior class."

Nor is the history of segregation of Mexican Americans into separate schools limited to the State of Texas. A federal court struck down intentional segregation of Mexican Americans in Orange County, California in 1946,[40] and another did likewise in Oxnard, California in 1974.[41] Federal courts found that Arizona school districts had intentionally segregated Mexican Americans in cases from Tolleson, Maricopa County,[42] and Tucson.[43] And the same segregation has been found in Colorado's largest district in Denver.[44]

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[38] *United States* v. *State of Texas* (Gregory-Portland ISD), F. Supp. ——— (E.D. Tex. 1980); *U.S.* v. *State of Texas* (Bilingual Education), F. Supp. ——— (E.D. Tex. 1981).

[39] *U.S.* v. *Texas* (Civil Action 5281, January 9, 1981).

[40] *Mendez* v. *Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), aff'd 161 F.2d 774 (9th Cir. 1947).

[41] *Soria* v. *Oxnard School District*, 488 F.2d 579 (C.D. Cal. 1974), F.2d ——— (9th Cir. 1974).

[42] *Gonzalez* v. *Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951).

[43] *Mendoza* v. *Tucson School Dist. No. 1*, F. Supp. (D. Ariz. 1978), aff'd 623 F.2d 1338 (9th Cir. 1980).

[44] *Keyes* v. *Denver School Dist. No. 1*, 413 U.S. 189 (197—).

The eradication of discriminatory educational practices will not automatically produce well-educated, well-adjusted students. In Texas, for examples:

While many of the overt forms of discrimination wreaked upon Mexican Americans have been eliminated, the long history of prejudice and deprivation remains a significant obstacle to equal educational opportunity for these children. The deep sense of inferiority, cultural isolation, and acceptance of failure, instilled in a people by generations of subjugation cannot be eradicated merely by integrating the schools and repealing the 'No Spanish' statutes . . . . The severe educational difficulties which Mexican American children in Texas public schools continue to experience attest to the intensity of those lingering effects of past discriminatory treatment.[45]

The effects of educational policies such as the ones we have worked to eliminate can be seen most clearly in statistics which characterize our population, particularly older Mexican Americans. I would like to submit for the record two tables which examine educational achievement levels for Hispanics and non-Hispanics Only 7.1 percent of all Mexican Americans 65 years or older have completed four years of high school or more compared to 38.6 percent of all non-Hispanics. These figures improve considerably for younger Mexican Americans. Fifty-one percent of Mexican Americans between 25–29 years old have completed four years of high school or more. Yet, this figure is shockingly low compared to non-Hispanics in this age group, 87.1 percent of whom have had four years or more of high school.

Using another measure, again, older Mexican Americans are the least well-educated of any group of Hispanics and fall far below the educational achievement of non-Hispanics. Sixty-five percent of Mexican Americans 65 years or older have had less than five years of school compared to 8 percent of non-Hispanics. Younger Mexican Americans, those between the ages of 25 and 29, fared much better than their parents and grandparents but fell significantly below their non-Hispanic counterparts. More than seven percent of Mexican Americans in this age group had fewer than five years of school, compared with non-Hispanics, who accounted for only .6 percent of those with fewer than five years of school.

When Congress enacted bilingual election requirements in 1975, it did so based on a series of judicial findings which can be summarized in this decision in *Torres* v. *Sachs:*

"In order that the phrase 'the right to vote' be more than an empty platitude, a voter must be able effectively to register his or her political choice. This involves more than physically being able to pull a lever or marking a ballot. It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired."[46]

Also significant was the Seventh Circuit affirmation of the lower court holding in *Puerto Rican Organization for Political Action* v. *Kusper,* which found that "if a person who cannot read English is entitled to oral assistance, if a Negro is entitled to correction of erroneous instructions, so a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand."[47] Based on this decision and others brought on behalf of Puerto Ricans under Section 4(e), which was part of the original Voting Rights Act, bilingual elections have been conducted in New York, parts of New Jersey, Philadelphia and Chicago since the mid-1970's.

Senator Hayakawa and other opponents of bilingual elections have alleged that bilingual election materials discourage non-English speaking U.S. citizens from learning English. When Congress enacted the bilingual provisions in 1975, this issue was considered. The House Judiciary Committee concluded that the purpose of bilingual election assistance—or its absence—was not educational:

"To be sure, the purpose of suspending English-only elections and requiring bilingual elections is not to correct the deficencies of prior educational inequality. It is to permit persons disabled by such disparities to vote now. [Bilingual elections] are a temporary measure to allow such citizens to register and vote immediately; it does not require language minorities to abide some unknown, distant time when local election agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election." [48]

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[45] *U.S.* v. *Texas* (Bilingual Education) p 14.

[46] *Torres* v. *Sachs,* 73 Civ. 3921 (S.D. N.Y. July 25, 1974, Slip Opinion at pp. 6–71).

[47] *Puerto Rican Organization for Political Action* v. *Kusper,* (490 F. 2nd 575, 580 (7th Cir. 1973).

[48] U.S. House of Representatives, Judiciary Committee Report on the Voting Rights Act, p. 26, 1975.

I would only add that when this Congress suspended the use of literacy tests in 1965, it did not send out a message advocating illiteracy. It was not suggested that any person should be satisfied with not knowing how to read or write. Similarly, bilingual election materials do not limit the primacy of the English language. To the contrary, they stimulate interest and participation in a system in which voters felt they have a voice. This feeling of belonging further stimulates and encourages active citizens to improve their English language skills.

In the meantime, Spanish speaking citizens have ample opportunity to become informed voters through our extensive Spansih language media. Today there are 139 Spanish language radio stations throughout the country, thirteen Spanish language television stations, eight Spanish daily newspapers and scores of weekly and biweekly newspapers and magazines. The Spanish International Network has a nightly broadcast each night from Washington, D.C. In San Antonio and Uvalde, 70 percent of the respondents in our recent survey said they watched Spanish language television and 68 percent said they listened to Spanish language radio. More than 50 percent tune into the Spanish media more frequently than the English media.

CONCLUSION

Hispanics and other language minority citizens have had the protections of the Voting Rights Act for only seven years—a short time in which to remedy generations of purposeful exclusion. But in that short period of time, we have begun to enter the mainstream of American political life, not without obstacles but with the protective shield of the Voting Rights Act. Now is not the time to diminish these protections and retreat from the national commitment to minority voting rights embodied in the Voting Rights Act of 1965 and reaffirmed in 1970 and again in 1975.

I urge the Subcommittee and the full Senate to support S. 1992 without amendment.

The Condition of Education for Hispanic Americans

Feb. 1980

by

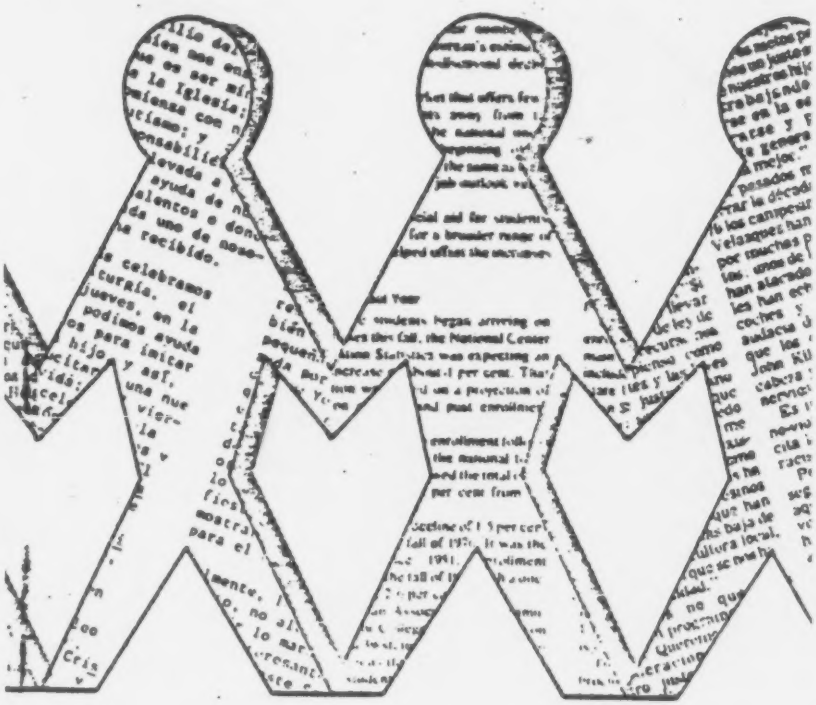
George H. Brown
Nan L. Rosen
Susan T. Hill

National Center for
Education Statistics

and

Michael A. Olivas

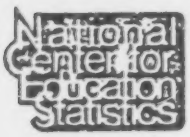
LULAC National
Educational Service
Centers, Inc.



U.S. Department of Health, Education, and Welfare
Patricia Roberts Harris, *Secretary*

Education Division
Mary F. Berry, *Assistant Secretary for Education*

National Center for Education Statistics
Marie D. Eldridge, *Administrator*



National Center for Education Statistics

"The purpose of the Center shall be to collect and disseminate statistics and other data related to education in the United States and in other nations. The Center shall . . . collect, collate, and, from time to time, report full and complete statistics on the conditions of education in the United States; conduct and publish reports on specialized analyses of the meaning and significance of such statistics; . . . and review and report on education activities in foreign countries."–Section 406(b) of the General Education Provisions Act, as amended (20 U.S.C. 1221e-1).

Table 1.09.–Percent of Hispanic and non-Hispanic population aged 25 years or older, who completed 4 years of high school or more, by age category and subgroup: March 1978

Age category	Non-Hispanic	Total Hispanic	Hispanic subgroup			
			Mexican American	Puerto Rican	Cuban	Other Hispanic
Total, 25 years and over	67.1	40.8	34.3	36.0	49.1	58.5
25–29 years	87.1	56.6	51.3	52.1	*	74.5
30–34 years	84.4	50.1	44.1	43.7	*	67.8
35–44 years	76.9	44.2	37.2	35.2	57.8	62.7
45–64 years	62.7	30.3	21.4	26.0	40.9	51.1
65 years and over	38.6	17.3	7.1	*	34.9	28.3

*Percent not shown where estimate is less than 20,000 persons.

SOURCE: U.S. Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: March 1978*, Current Population Reports, Series P-20, No. 339, 1979.

Table 1.10.–Percent of Hispanic and non-Hispanic population aged 25 years or older, with less than 5 years of school, by age category and subgroup: March 1978

Age category	Non-Hispanic	Total Hispanic	Hispanic subgroup			
			Mexican American	Puerto Rican	Cuban	Other Hispanic
Total, 25 years and over	3.0	17.2	23.1	15.0	9.3	5.9
25–29 years	.6	5.7	7.6	4.3	*	1.0
30–34 years	.6	9.6	12.6	8.2	*	3.5
35–44 years	1.1	11.2	15.9	12.4	2.2	1.7
45–64 years	2.7	24.9	34.3	23.0	10.2	9.3
65 years and over	8.7	45.0	65.4	*	20.5	19.2

*Percent not shown where estimate is less than 20,000 persons.

SOURCE: U.S. Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: March 1978*, Current Population Reports, Series P-20, No. 339, 1979.

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Senator HATCH. Our final witness today—and we apologize to you for it has been a marathon session, is Ruth Hinerfeld, who is president of the League of Women Voters. I assure everybody that tomorrow we are going to limit witnesses in total time on both sides of this issue. We cannot spend this time every day, but I felt today was particularly important, meriting additional time to establish the groundwork for this debate.

We are delighted to have you here, and we look forward to your testimony at this time.

Senator KENNEDY. May I also join in welcoming you? I have had a good opportunity to meet with the league in recent days. They are very, very actively involved in the Voting Rights Act matters. You are a credit to the organization for making the efforts you have on this issue.

Senator HATCH. Proceed, Ms. Hinerfeld.

STATEMENT OF RUTH J. HINERFELD, PRESIDENT, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, ACCOMPANIED BY SALLY LAIRD, DIRECTOR, LEGISLATIVE ACTION DEPARTMENT

Ms. HINERFELD. Mr. Chairman and Senator Kennedy, I am Ruth Hinerfeld, president of the League of Women Voters of the United States. With me today is Sally Laird, who is the director of our Legislative Action Department.

May I begin by requesting your permission to submit my full testimony for the record?

Senator HATCH. Without objection, we will put your full statement in the record.

Ms. HINERFELD. Thank you.

We appreciate this opportunity to present the views of our members about the Voting Rights Act and S. 1992, the Voting Rights Act Amendments of 1981.

Ours is an organization whose very existence is based on citizen participation in government and especially on expanding and protecting voting rights. The league was established, in fact, by women who had finally won the battle for female suffrage in 1920, and league members today are as committed as they were at that time to making the right to vote a reality for all citizens.

I come before you in support of S. 1992, the bill that as H.R. 3112 was passed by the House with such an overwhelming majority that there can be no doubt of the widespread support it commands in all regions of our country. And I come before you to remind this subcommittee of the range of remedies that S. 1992 provides and some of the problems it addresses.

We support those remedies. We support extension of section 5 and believe that the proposed bailout provisions are both tough and fair, and should not be weakened. We support extension of the bilingual elections provisions to assure that all eligible voters have access to the ballot.

We support the language in section 2 of the bill that, in effect, provides that both existing and new acts of voting discrimination be held to the same results standard of proof; and let the record show that we supported that language in our House testimony last May.

Furthermore, the league believes that S. 1992, as it stands and as it was so unequivocably endorsed by the House of Representatives, is both workable and effective.

The purpose of my testimony is to share with you examples of discriminatory attitudes and practices as told to us by our local leagues in covered jurisdictions. Based on their findings, those leagues have concluded that their local governments are still unwilling to recognize or accept the concept of full participation of minority citizens in the political process.

Their findings attest to the fact that the Voting Rights Act and section 5 coverage must continue to play a major role in our elections system in order to remove subtle and invidious barriers to effective minority representation.

I would particularly like to point out to the subcommittee that our findings substantiate many of the criteria in the proposed bailout procedures contained in S. 1992.

We surveyed local leagues in areas covered by section 5 to determine the manner in which voter registration and voting is conducted in their communities. Based on their information, we have reached the conclusion that the persistence of discriminatory practices and attitudes toward registering minorities in covered jurisdictions still inhibits progress toward the goal of full minority political participation.

These practices and attitudes are indicative of a climate that is still hostile to the idea of minority participation and representation. They are also indicative of the continuing need for special protections to preserve the fragile gains made in minority registration and voting.

Leagues in covered jurisdictions report that barriers to registration remain high. Inconvenient registration times and places, lack of outreach to minority communities, and unwillingness on the part of registration officials to cooperate or work with community groups, or voluntarily take steps to make registration more convenient and accessible continue to discourage minority registration. These practices work hardships on all potential voters, but the hardships fall most heavily on the minority population which is more likely to be poor, transient, and undereducated.

One does not need to be black nor a member of a language minority to recognize the latent hostility of some officials to minority registration and political participation. Patronizing treatment and laggard service are all too familiar tactics for discouraging minority citizens from registering and voting. Let me give you two examples.

The first one involves the obstructive attitudes minorities often encounter in the registration process. The League of Women Voters of New York City told us that in New York, minority groups that request quantities of the voter registration forms for a planned registration drive report that the board of elections is unwilling to cooperate with them or comply with their request. Yet, a telephone call from the League of Women Voters usually suffices to obtain the form.

The second anecdote is an example of the kind of subtle harassment common in the voting process. This incident was reported to us by the Edinburg-McAllen, Texas League of Women Voters as

follows: "In north Mission [Texas], the business manager of the school district ordered only one [voting] machine, even though the turnout was predicted to be high. That machine was filled up by 3:30 p.m. For about 45 minutes, until another machine was brought in, voters were not able to vote in the school election. The election judge for the school told us all the trouble started last year when "those Mexicans started to vote." Too many election judges and clerks are untrained and racist; they are not cooperative; in some cases they don't know enough about Spanish pronunciation and spelling to find names of minority people on the registration lists. Training sessions are not mandatory and are pretty much of a joke anyway."

Leagues also reported that even when local election officials are empowered by State law to authorize deputy registration, institute Saturday or evening registration hours, or set up satellite registration sites, all steps that would make registration easier and more accessible to minorities, they rarely choose to exercise this option.

While such examples may not be express violations of the act, I have cited them in order to convey to you a sense of the climate in which voter registration is administered in covered jurisdictions despite the act's protections.

The factors which contribute to this climate are very important in considering whether or not a community is indeed ready to come out from under the protection of section 5. Violations of section 5 do occur, of course, yet section 5 continues to serve a positive function in protecting minority voting rights, as illustrated by recent events in De Kalb County, Ga. In that county, the board of elections has persistently acted to restrict the registration of minority citizens, contrary to the purposes of the Voting Rights Act.

When we testified before the House Subcommittee on Civil and Constitutional Rights last May, we described in detail one such incident. For several years, the league and other citizen groups—most notably the NAACP—have conducted registration drives in De Kalb County. Those drives, conducted in more accessible locations and at more convenient times than registration provided by the county board of elections, have resulted in significant increases in voter registration.

For example, league volunteers registered over 1,300 citizens at 4 major shopping centers on 1 day, February 2, 1980, while only 2,700 were registered at the 115 established county sites in the whole month of January of that year.

During the 1980 general election year, the board of elections abruptly discontinued its practice of authorizing the League and other civic groups to register voters in such places as supermarkets and libraries. This policy change had the effect of making voter registration less accessible, particularly to minority citizens.

The De Kalb County board of elections, in defiance of section 5 of the Voting Rights Act, had failed to submit this change in policy to the Department of Justice. The De Kalb County League of Women Voters and the De Kalb County chapter of the NAACP filed a lawsuit and in June, 1980, obtained an injunction based on the preclearance violation. When the board finally submitted the change, the Department of Justice rejected it, and the board rescinded its policy.

When we testified before the House subcommittee in May, we believed, as did the De Kalb league, that this was the end of the story. We were wrong. In September, 1981, the county board came up with a new restriction on registration drives by civil organizations. This new policy would permit these organizations to continue conducting their registration drives in election years but would no longer allow them to conduct drives in off-election, odd-numbered years.

But registration lists are purged in odd-numbered years, and civic groups have been highly successful in registering and reregistering voters during these years. As an example, over 3,800 voters were registered during a 3-month period in 1981, 3,000 of them black voters. The proposed change has been submitted to the Department of Justice, and the De Kalb County League of Women Voters has filed a lengthy objection.

The De Kalb County story illustrates our major point, which bears repeating. Even in the area of voter registration, where we know that the greatest progress has been made, it is coverage by section 5 that protects and preserves those gains. Without it, the changes in De Kalb County and probably a number of other discriminatory changes in policy, practices, and procedures would go into effect.

The league believes that the best argument for retaining the act's highly effective administrative enforcement mechanism is the remarkable success it has had in increasing minority registration and removing many of the barriers to minority political participation.

Although the statistics show progress, they also show that there is still a long way to go before all traces of the discriminatory systems of the past are erased. If increased registration rates are to be meaningful, they must go hand-in-hand with increased participation in all facets of political life.

I would like to quote the League of Women Voters of Georgia, which said.

> The Voting Rights Act has been the most far-reaching, beneficial piece of civil rights legislation that has come along in recent history. It must be extended. We are being dragged, kicking and screaming, into the 20th century, but there can be no other way of doing it. Attitudes toward blacks have not changed. We still have a long way to go to educate the electorate and remove the fears of the blacks, whose jobs may depend on the degree of political activity they engage in.

Adding my own words to those of the Georgia league, in closing, I must emphasize the league's belief that at a time when many covered jurisdictions are still marked by racially polarized voting patterns, unequal and inconvenient registration opportunities, and persistent attempts by State and local officials to make discriminatory changes in voting and election procedures, there is little evidence that covered jurisdictions are ready to accept full minority political participation without the effective protections of the act's special provisions. Those that are ready, those that do not continue to discriminate, those that do remove barriers to voting and election participation, those that engage in outreach activities to make registration in voting more accessible to minority citizens, will meet the criteria set forth in the bail-out section of S. 1992.

S. 1992 will provide a strong, positive incentive to many jurisdictions covered by section 5 that wish to comply fully with the letter and the spirit of the Voting Rights Act.

Senator HATCH. Thank you, Ms. Hinerfeld.

In your testimony before the House Judiciary Committee, you indicated the support of the League of Women Voters for a 10-year extension of preclearance. The House instead chose to make those provisions permanent. What is the league's present position with regard to these provisions?

Ms. HINERFELD. Yes, Mr. Chairman, we supported a 10-year extension at that time and had no position in support of bail-out provisions at that time. I believe that in our mind, as in perhaps the minds of many others who have developed this legislation, one was the corollary of the other.

When we saw that it would in fact be possible within a reasonable period of time for jurisdictions under coverage to bail out if they met fair and effective criteria, we then recognized that the need for the 10-year time period had been obviated by the fact that the provision for bailing out was meeting that need.

Senator HATCH. In your statement you state that the Voting Rights Act is still needed because of "continued threats to minority voting rights." This is illustrated by the fact—and I will quote you again—"that minorities remain "under-represented" on elected bodies at all levels of government." How is this under-representation evinced, in your view?

Ms. HINERFELD. In the full statement we have submitted, we have citations by individual leagues who are of course speaking to the situations in their communities. They are most familiar with the size of the representation of minorities on their local governing bodies, be they school boards, town councils, or whatever, and the size of the minority population. I think they are drawing conclusions from that that continued protections of the act are still necessary for the next stages of political maturity in terms of minority political participation.

In other words, the doors to political participation perhaps have been opened by voting registration, which has been made more equitable and accessible, but the next steps we have begun to see happen—and those next steps are, I think, logical next steps—will be increased representation in the full political life of a jurisdiction.

Senator HATCH. How, precisely, will we know when minorities are no longer under-represented?

Ms. HINERFELD. Mr. Chairman, I do not think that there is any single formula whereby this determination can be made. Of course, it is a question that will depend on the particular community and the situation in the community, and a whole host of considerations—the full range of the kinds of things that will have to be taken into account under section 2, which I believe is what you were speaking to, when determinations under section 2 are made.

Senator HATCH. There was a fairly common understanding with regard to the House debate that any vote for any amendment to the revised Civil Rights Act on the House floor was considered a vote in opposition to civil rights. What is your position on this in the context of the present Senate debate? As I view your state-

ment, you are at least somewhat flexible with respect to changes and modifications of the House bill. I hope it will not be billed as a legislative matter where any and all changes in the Senate bill will be considered "wrong" votes.

Ms. HINERFELD. I think I will have to comment on our view as to what is right and what is wrong here. If my statement conveyed to you the impression that we are open to modifications in the House bill, then my statement misrepresented our view.

Senator HATCH. In other words, you do not think any amendment in any way, shape, or form, is acceptable, or do you believe that any vote for any amendment to the bill is a vote against civil rights?

Ms. HINERFELD. I will not be that doctrinaire or arbitrary.

Senator HATCH. That was the attitude on the House side, by the way.

Ms. HINERFELD. But I will say that in terms of the main provisions that we discussed—the provisions that are primarily at issue, the provisions that I have just cited in my testimony—we will undoubtedly look not very kindly on any attempt to modify what the House has done.

Senator HATCH. The express constitutional justification for preclearance procedures in section 5 in the case of *South Carolina* v. *Katzenbach* was of course the existence of extraordinary conditions in the South. Do these "extraordinary conditions" continue to exist today? And, I might just ask as an extension of that, how will we know when they no longer exist?

For instance, I have heard some southern Senators and Congressmen say that in their States they do not believe these extraordinary conditions continue to exist. How long will the South have to be subject to the will of the rest of the country with regard to the Voting Rights Act?

They have also interpreted the present bailout as providing no opportunity to bail out at all, because its requirements are so stringent that there is in reality little way that any community could bail out once they come under the onus of section 5.

My question is, do you know of any extraordinary conditions that continue to exist today such as those that were considered in the *Katzenbach* case?

Ms. HINERFELD. The extraordinary conditions that existed at that time, of course, are not the conditions that exist today, and I think we are all grateful for that fact.

However, it was the intent of my statement today to indicate that, while those conditions of the bad old days no longer prevail, we have a new set of conditions which, while not as overt, not as blatant, not as—well, I guess I would have to use the word "obscene" in political terms—as they were at that time, certainly do present obstacles to full minority participation and are in need of correcting.

If I may add a footnote to what you said about the conditions in the South and covered jurisdiction, coming from the State of New York as I do, I think I would have to remind you that New York City itself is covered under section 5, and it is not only the South that remains under section 5 coverage.

Senator HATCH. Of course some of these people feel that there is much more discrimination in areas of the North than there is in the South. Whether that is true or not I cannot say, but some of them feel very deeply that the very people who are imposing what they consider onerous obligations on them come from areas of the country where the conditions are just as bad if not worse. I cannot be the judge of that. All I can say is that those are the arguments that I hear on both sides of this issue.

Although New York may be covered in part, there are of course many other jurisdictions where much discrimination exists that are not covered.

Ms. HINERFELD. I agree with you that I cannot judge that. Just for the record, it is not all of New York City. It is a limited number of boroughs in New York City.

Senator HATCH. Maybe it should cover all of New York City.

Ms. HINERFELD. That is not for us to decide right now.

I would like to return, however, to your question of how you know when it is time to bail out. How do you know when we have reached what you have characterized as perhaps a state that is very difficult to reach?

Senator HATCH. Can it be reached at this point?

Ms. HINERFELD. We think it can be reached. As I indicated, we believe that the bailout provisions, which would insure that the kind of thing that entailed coverage in the first place is no longer occurring and has not occurred for 10 years, are fair. They are tough; they are intended to be tough.

Senator HATCH. I think they are impossible. I am not saying that preclearance should not be there because, as you must have noticed, my argument is with section 2. I am for a simple extension of the bill.

I think the changes in section 2 are very bad, and I think there are other inadvisable changes too, but I think section 2 is a particularly bad provision. I think it is particularly detrimental to the entire country, not just the South. Even if it only applied to the South, I think that the way section 2 is rewritten by this particular bill is not only unconstitutional but reprehensible.

Its constitutionality is predicated upon the same theory as the so-called "Human Life Bill," opposed by so many constitutional observers.

It is amazing to me that the very same people now, because it personally pleases them or appeals to their sense of social justice, want to overrule a Supreme Court decision which seems to be based in the law that has always existed in this country and yet find so much fault with others who want to do the same on other issues. I find fault with both positions, to be honest with you.

Ms. HINERFELD. Mr. Chairman, I have neither the legal background nor the inclination to debate you on——

Senator HATCH. I do not want a debate, I just want your ideas.

Ms. HINERFELD. On the Supreme Court interpretation and the relation of this proposed legislation to that interpretation. However, I think that what both my predecessors here on this stand, Benjamin Hooks and Vilma Martinez, said would represent my point of view very well.

Coming back to your point on bailout, I understand that among the witnesses who will be before you, there will be someone who will make a presentation based on examination of the situation in covered jurisdiction which will ascertain those jurisdictions which are probably ripe for bailout right now, and will so cite them.

Senator HATCH. I will be very interested in that.

In your testimony you discuss in some detail the sort of subtle discrimination, or nonovert discrimination, which still exists in the country, but you make no reference to the continued existence of the sort of overt and explicit discrimination against which the act was originally directed, except that in your answers you have indicated those conditions no longer exist.

Just to be sure on that point, do you know of any incidents in recent years of persons who have actually attempted to register and been denied that right or of persons who have actually attempted to vote and who have been denied that right? Do you know of any specific instances in those two areas?

Ms. HINERFELD. I know of no instances because that kind of overt practice is what was outlawed by the act, and the fact that such instances do not come to my mind is, I think, a ringing endorsement for the success in bringing us to where we are today.

Senator HATCH. Does that mean that we now have to go far beyond where present law currently is?

Ms. HINERFELD. Mr. Chairman, again I would have to reaffirm what Benjamin Hooks said before me—that in his view and in ours as well, what S. 1992 purports to do is not take us well beyond where we were in forging new grounds in terms of the extension of rights where rights were not intended to be extended by the Voting Rights Act of 1965.

What it does is try to keep us where we are today and hold us in a pattern whereby future progress and the prevention of remission to the practices of the past is possible.

Senator HATCH. The thing that bothers me on this issue, is the assertion that it is all right for certain interests to advocate overruling Supreme Court decisions, but it is not all right for other interests to advocate that same course of action. There are not two sets of constitutional theory based upon the "progressiveness" of the Supreme Court decisions in question.

You speak about direct and indirect evidence of discriminatory effect on page 3 of your testimony. Could you give me some illustrations of each category of evidence—for instance, some examples of direct evidence of discriminatory effect and indirect evidence of discriminatory effect? I am not sure that I understand either concept.

Ms. HINERFELD. I think that was perhaps a paraphrasing of the terms "intent" and "result" in terms of the rules of evidence.

Senator HATCH. On page 5 of your testimony you allude to "wondrous tales of discrimination" including instances of voting registrars asking potential voters to interpret constitutional provisions. I am a little bit confused on that. Are you still suggesting that this is taking place, and, if it is, where is it taking place?

Ms. HINERFELD. No, you are citing the example given by one of the leagues. It was the Norfolk-Virginia Beach, Va., league. What

they were talking about in that instance—and I think a careful reading would reveal that—was what had been true in the past.

Senator HATCH. In the past—I see.

Ms. HINERFELD. Yes. And contrasting that with that——

Senator HATCH. So you are not claiming that this is presently the case?

Ms. HINERFELD. No, no.

Senator HATCH. OK. You speak at length about what you refer to as psychological pressures facing potential voters. You observe for example that "persons in low income projects are fearful of registering to vote because they feel information obtained will be given to the housing authority and the Department of Social Services."

I have to admit, I am personally sorry that these psychological circumstances exist, as I am sure that they do, but what is the relevance of that to the legislative debate that is now taking place?

Ms. HINERFELD. That of course is one of the examples of the kind of subtle harassment that potential registrees and voters face.

I think that for somebody like you, Mr. Chairman, or like me, where we might go to register would not be of any consequence. We are not intimidated by official places; we are not intimidated by neighborhoods where we do not feel welcome. But as we try to state in the cases we cited, for many of these people for whom registering to vote can be something of an act of courage, certain places are considered so inhospitable that they are afraid to appear in them and they are afraid to be registered by certain people that they perceive might be misusing a list of names.

Senator HATCH. I agree with you. I feel sorry that such psychological pressures exist or that they continue, but what precisely can the Voting Rights Act, or any law for that matter, do to alleviate these unfortunate psychological pressures?

Ms. HINERFELD. Again, here we have a possibility of a situation where in any given jurisdiction the site of places for registration or voting might be changed---for example, from the schoolhouse to the county courthouse, from private homes to the jailhouse, which may not be an accurate example, but that is the kind of thing that can happen and can be as effective a deterrent to voting participation as saying, "OK, let's see you interpret this section of the Constitution before you vote."

Senator HATCH. Many of the violations of voting rights that you describe as being "subtle" are, in my opinion, indeed so subtle that I am not even sure that I understand the theory under which they constitute discrimination, even under your own attempts at definition in your statement.

What, for example, is wrong with the laws in Pima County, Ariz., that require deputy registrars to maintain and keep copies of a record of the voters they register? And what is wrong with their laws requiring proof of naturalization for persons born outside of the United States? Is there something wrong with either of those?

Ms. HINERFELD. We did not cite those examples as illustrations of practices where there is something wrong, Mr. Chairman. We cited those as an illustration of a situation where changes were made without their being submitted to the Department of Justice under preclearance requirements and thus violating those requirements.

Senator HATCH. You state, "For many minorities, registering to vote is not worth the effort when it does not result in increased minority representation." Frankly, I have always thought that there were other incentives for free persons to vote in a free society, but let me accept your premise for a moment.

Is it constitutionally required, in your view, that in order to enhance incentives for these individuals, we increase the numbers of minority representatives? Is that what you understand the Constitution to demand?

Ms. HINERFELD. No, of course the Constitution does not outline that as a necessity, but I think, Mr. Chairman, the problem we get into in this kind of situation is looking at hypothetical cases whereby we try to define, almost to the point of absurdity, where the line lies between what is considered the right kind of representation that would satisfy requirements under section 2 and what section 2 really purports to try to do.

I think we tend to forget that we are dealing with situations that have been so bad in the past that we have had to secure the strongest kind of legislation to correct them, and we are now at the point in time where, indeed, it might be perceived by a member of the minority community that if in fact the system keeps being juggled around, through gerrymandering or whatever process, to deprive a minority population of a minority representative in ways, as I say, contrived to accomplish just that purpose, clearly that is a disincentive to anyone to participate in the political system.

Senator HATCH. I do not disagree with you where they are contrived or where there is an intent to discriminate; there is no question about it.

We appreciate your coming. I think, with that, we will recess these hearings until tomorrow. Thank you so much for coming; we appreciate having you here.

Ms. HINERFELD. All right. Thank you.

[The prepared statement of Ruth J. Hinerfeld follows:]

PREPARED STATEMENT OF RUTH J. HINERFELD

Mr. Chairman, members of the Subcommittee, I am Ruth Hinerfeld, President of the League of Women Voters of the United States. We thank you for this opportunity to present the views of our members in strong support of S 1992, a bill to extend the Voting Rights Act of 1965.

The League of Women Voters of the United States is a nonpartisan citizen organization with members in all 50 states as well as the District of Columbia, Puerto Rico and the Virgin Islands. Ours is an organization whose very existence is based on citizen participation in government -- and particularly on expanding and protecting the right to vote. In fact, the League was established in 1920 by the women who had finally won the battle for female suffrage. And League members are as committed now as they were then to making the right to vote a reality for all citizens. I address this subcommittee, therefore, on behalf of a representative, an informed, and a concerned constituency who have studied, analyzed and struggled longer and more consistently than perhaps any other citizen's group to overcome the obstacles that keep citizens from full participation in the electoral process.

Every school child learns that no right is more fundamental to the full exercise of American citizenship than the right to register and vote, and to have that vote count on an equal basis. Yet, in many states and localities, systematic denial of that right kept generations of minorities out of the political process and ensured that their citizenship remained second-class. It is precisely because the Voting Rights Act at last unlocked this first, essential door to political participation that it has been called the most important of the civil rights gains of the 1960's.

The Voting Rights Act and its special provisions have accomplished what two constitutional amendments and a hundred years of litigation could not accomplish: the enfranchisement of hundreds of thousands of minority Americans. Since its enactment, registration and voting rates for minorities have risen dramatically.

Yet, the tremendous progress made under the Voting Rights Act does not mean that threats to minority voting rights are a thing of the past. Minority registration still lags behind non-minority registration, and minorities remain underrepresented on elected bodies at all levels of government.

Therefore, we are here today to testify that the special provisions of the Voting Rights Act must be retained until all citizens are afforded an equal opportunity to register, to vote, to run for office -- in short, to exercise those rights which we all believe are ours under the Constitution.

We come before you in strong support of S 1992, the bill that, as HR 3112, was passed by the House with such an overwhelming majority (389-24) that there can be no doubt of the wide-spread support that it commands in all regions of our country. S 1992 is the product of considered deliberations which sought to accomodate all legitimate views on what would constitute a fair and effective extension of the Voting Rights Act. We support extension of Section 5 and agree that the proposed bail-out provisions are both tough and fair and should not, under any circumstances, be weakened. We support extension of the Bilingual Elections provision until 1992 to ensure that all eligible voters have access to the ballot. We support the language in Section 2 of the bill that provides that both existing and new acts of voting discrimination be held to the same standard of proof, namely direct and indirect evidence of discriminatory effect. This language restores the protections against voting discrimination that were in effect before the Supreme Court's decision in City of Mobile v. Bolden. Furthermore, the League believes that S 1992, as it stands and as it was so unequivocably endorsed by the House of Representatives, is both workable and effective.

The purpose of this testimony is to document the persistence of discriminatory attitudes and practices that have led local Leagues in covered jurisdictions to conclude that their local governments are still unwilling to recognize or accept the concept of full and equal participation of minority citizens in the political process. We will show that the Voting Rights Act and Section 5 must continue to play a major role in order to remove subtle and invidious barriers to effective minority representation. And, in making the case for renewal of Section 5, our findings will show the need for the criteria carefully drafted in the proposed bail-out procedures contained in S 1992.

We will discuss problems of access to the election process, election schemes that serve to dilute minority voting strength and the importance of the bilingual election provisions of the Voting Rights Act to the protection of the rights of non-English speaking citizens. Other organizations and individuals will come before this subcommittee to discuss these issues in detail. We will focus our remarks on voter registration.

VOTER REGISTRATION

The League has long been closely identified with voter registration: no other organization has our history of service to voters and commitment to the principle that all citizens have the right to participate in the electoral process on an equal footing with every other eligible citizen. For over 60 years local Leagues across the country have conducted grassroots voter registration and voter outreach efforts, and have worked to eliminate the barriers to voter registration that stand in the way of full citizen participation in the political process.

For minorities, as for all citizens, registration is the first, the most crucial step toward full political participation. For this reason, the experiences of minority citizens who seek to register are extremely important. If the cost of registering in terms of time, energy, inconvenience, personal pride or security is too high, a citizen may not register or not vote. And when minority citizens are discouraged from registering or voting, they are unable to eject candidates of their choice to public office or to have a meaningful voice in political decision-making in their communities.

Local Leagues Describe Registration Practices

We have asked local Leagues in areas covered by Section 5 of the Voting Rights Act to describe how voter registration is conducted in their areas. Based on this information, we see evidence that subtly discriminatory attitudes and practices persist in covered jurisdictions. The incidents cited in this testimony document the widespread use of practices and procedures that serve to discourage minority registration. While some do not involve express violations of the Voting Rights Act, they are cited in order to convey to you a sense of the climate in which voter registration is administered in covered jurisdictions, a climate that, despite the act's protections, is still hostile to the idea of equal participation and representation of minority citizens in all facets of political life. The Norfolk-Virginia Beach League reports:

> "The Voting Rights Act has made many people aware that voting is an inalienable right that cannot be denied. Without the Voting Rights Act hanging over Virginia, any gains made would quite dissolve. Longtime residents of both our cities (Norfolk and Virginia Beach) tell wondrous tales of discrimination: 'white paper' registrations where the applicant was handed a piece of blank paper and asked to interpret a section of the

> Constitution. Others tell of having to produce their poll tax receipts. We have not progressed very far from that sort of mind-set when so many employees of the registrar still argue that 'registration should be made hard so they appreciate the right.'"

Seventeen years (six years in the case of bilingual elections) can only begin to exorcise the discriminatory attitudes that led to 100 years of violent abridgement of the constitutionally guaranteed voting rights of minority Americans. In the words of the President of the Roanoke Area, Virginia League of Women Voters:

> "I am convinced that unless there are federal requirements regarding voting that even the minimal attention given to minorities would be forsaken."

Access to Registration

Despite the protections afforded by the Voting Rights Act, Leagues in covered jurisdictions report that registration costs continue to be high. Inconvenient registration times and places, lack of outreach to the minority community, and unwillingness on the part of registration officials to cooperate or work with community groups, or to voluntarily take steps that would make registration more convenient and accessible continue to discourage minority registration. These practices work hardships on all potential voters, but the hardships fall most heavily on the minority population, who are more likely to be poor, transient and under-educated. One does not need to be black or a member of a language minority to recognize the latent hostility of some officials to minority registration and political participation. Patronizing treatment and laggard service to minority registrants are all too familiar tactics for discouraging minority citizens from registering and voting.

The widely held belief that voting is a privilege, not a right, has inevitably affected the conduct of voter registration, and has led to the retention of practices that make registration less, rather than more, accessible in most covered jurisdictions. For example, many counties have only one permanent registration place, located in the town hall or county courthouse, and persons in rural areas, or those who work or lack transportation, are often inconvenienced. The Mississippi League reports that:

> "Current registration laws in Mississippi impose a hardship on blacks and poor people. Getting to the city hall or the county courthouse during regular working hours makes it difficult for working people and persons dependent on others for transportation to register. Also, these locations are intimidating because they are symbols of white domination and white control."

The Georgetown, South Carolina League reports that the registrar's office in their county is located in the rear of the sheriff's office. In Alabama, the Tuscaloosa League notes that the only registration site for a large, rural county is the courthouse, open only during business hours and closed during lunch time. The Charlottesville-Albemarle County, Virginia LWV observes:

> "The principal barrier [to minority registration] is the law which requires citizens to appear in person to register. Minority and low-income citizens often are employed in jobs where absenting themselves to register would endanger their jobs."

Furthermore, registration times, places and deadlines may only be publicized through a small legal notice in the local newspaper, or in a few libraries -- usually not in minority neighborhoods. According to the Alexandria, Virginia League of Women Voters:

> "...not everyone subscribes to the local newspaper or goes to two particular libraries. Community groups must take it upon themselves to produce and/or distribute their own materials and do their own voter outreach."

Registration by Minority Organizations

When minority community groups do seek to service the minority community with registration drives and voter information, they are frequently obstructed or hampered by the negative attitudes they encounter when they request assistance or authorization from election officials. The Goldsboro-Wayne County, North Carolina League of Women Voters explains:

> "An attitudinal problem exists. Last year, the Wayne Citizens for Minority Affairs wanted to hold registration drives throughout the county at various intervals. Upon discussion with the Board of Elections chairman, the election supervisor commented

'the League (LWV) knows what they are doing, we have no problems with them. Your people make so many errors. Why don't you just let the League hold the drives?' The lack of respect and overall cooperation is evident to minority groups."

In New York City, minority groups who request quantities of the voter registration forms for a planned registration drive report that the Board of Elections is unwilling to cooperate with them or comply with their request, yet a telephone call from the League of Women Voters of New York City usually suffices to obtain the forms.

Minority citizens attempting to register often encounter disparaging treatment. Subtle harassment and intimidation can be as effective in inhibiting minority registration as the old overt terror tactics and reprisals. For example, the Goldsboro-Wayne County, North Carolina League of Women Voters testifies to the psychological pressures that minority registrants are frequently confronted with:

"...Persons in low income projects are fearful of registering to vote because they feel information obtained will be given to the Housing Authority and the Department of Social Services. This is an imbedded fear...Many rural persons are told by their employer or landlord when to register and who to vote for."

Lack of Outreach Efforts

Local election officials are generally given broad discretionary powers to implement state election laws. This discretion was ostensibly provided so that local election administrators would have the margin of flexibility they need to assure the access of all citizens to vote under the varying social, economic and geographic conditions that exist within each state. However, this discretion is often exercised in a manner that impedes rather than enhances a citizen's right to vote.

Registration officials rarely use their authority to take steps that might increase minority registration and political participation, or to make the registration process easier or more accessible for minorities. The use of volunteer deputy registrars to conduct voter registration is a common example of a statutory power that, even when expressly authorized by state law, is rarely exercised on the local level. For example, the Georgia state code permits local election boards to appoint volunteer deputy registrars. Yet, according to the Griffin-Spalding, Georgia League

of Women Voters, the current registrar of voters in Spalding County has chosen to interpret the state law as not permitting voter registration to be conducted outside of one permanent registration office. The Griffin-Spalding League feels that the registrar's unwillingness to make use of such procedures as deputy registration, or to institute Saturday or evening hours for registration, or set up satellite registration sites in more convenient locations, has inhibited minority registration in that community.

The Virginia election code stipulates that "no registrar shall actively solicit any application for registration or any application for ballot." This rule is frequently cited by local voter registrars as the reason they are unable to comply with requests for more and convenient places for registration, despite another provision of the state code specifying that "the appearance by the general registrar or assistant registrar in public places at preannounced hours shall not be deemed solicitation or registration."[1] According to the Virginia Beach League of Women Voters, voter outreach or special efforts to increase registration are rare because of this rule:

> "The present interpretation of the no soliciting rule...allows registrars to run their offices under the narrowest definition of service to the public."

Furthermore, deputy registrars in Virginia Beach are almost always merchants, yet the League reports that "there is nothing in their stores to indicate that they can register voters. A pharmacist once placed a small sign in his window saying 'register here' and it had to be removed -- no soliciting!"

Local Leagues report that when election authorities do exercise their option to appoint volunteer deputy registrars, minority registration invariably increases. A large number of the local Leagues surveyed attribute increases in minority registration in their areas to the registration and voter outreach efforts of minority group organizations such as the NAACP. However, many covered jurisdictions fail to make use of options and resources available to them for increasing minority registration.

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[1] Virginia Election Laws, Sections 24.1-46. 24.1-49.

The Importance of Section 5

Section 5 review is truly the heart of the Voting Rights Act. Enacted in response to the "legislate and litigate" strategy of Southern governments,[2] Section 5 was designed to prevent new discriminatory practices from replacing the old ones once they were enjoined by court orders -- a common cycle before 1965. The Voting Rights Act's effectiveness lies in the potent combination of remedial measures in Section 2, and the preventative mechanism of Section 5, working in tandem to eliminate long-standing discriminatory election schemes and prevent new ones from taking their place. Without Section 5, attempts to make discriminatory voting changes would go unchallenged, and enforcement of the Voting Rights Act would be a futile exercise.

Based on the actual experiences of state and local Leagues, the League of Women Voters does not believe that Section 5 is an unduly complicated or burdensome process. Section 5 review is a simple administrative procedure, and submissions that are clearly nondiscriminatory are routinely expedited by the Department of Justice, rarely requiring more than 60 days. Furthermore, the Department of Justice's guidelines for the administration of Section 5 contain provisions for providing expedited consideration of a proposed change if the submitting authority finds it necessary to implement a change within the 60 day review period.

The Supreme Court has upheld the constitutionality of Section 5 in numerous court challenges, most notably in Allen v. State Board of Elections [393 U.S. 544, 567 (1969)]. In that ruling, the Supreme Court recognized that even minor changes in election procedure, such as changes of polling places, can, in fact, be used to perpetuate discrimination and should be subjected to Section 5 scrutiny. The Edinburg-McAllen, Texas League of Women Voters attests to the ease with which such seemingly minor changes can frustrate citizen exercise of the right to vote:

> "The most obvious change that the Voting Rights Act has brought about is that the practice of changing polling places at whim has stopped; it used to be 'great fun' every election day to try to find out where you were supposed to vote this time."

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[2] Harvard, The South: A Shifting Perspective in the Changing Politics of the South, 19 (W. Harvard, ed. 1972).

Such practices impose a particular hardship on minority voters, who may not have access to the communication channels by which other voters are informed of changes, or may experience greater difficulty getting from one location to another.

Section 5 also provides an important vehicle for interested citizens to have input into the Department of Justice's decision on proposed voting changes. There is no belief more central to the League's raison d'etre than the belief that informed citizen participation is essential to the healthy working of democracy. Citizens and community organizations are often able to recognize problems in election procedures that officials tend to overlook or deny. We know that citizen input, while rarely sought by local officials, can provide valuable insights into proposals for changing the election system. Section 5 regulations require that the Department of Justice maintain a registry of interested citizens and minority group organizations who wish to be notified when a voting change is submitted for pre-clearance. This gives the citizens a rare opportunity to share information about the effect a proposed change will have on minority political participation -- information that the Department of Justice may have no other way of obtaining.

Section 5 in Use

Recent events in Pima County, Arizona and DeKalb County, Georgia illustrate the need for continuing the protections of Section 5. The League of Women Voters in Tucson, Arizona has found it necessary, just this month, to inform the Department of Justice about two unsubmitted changes in registration procedures. The County Recorder of Pima County made these changes upon taking office on January 1, 1981. One of the new provisions requires persons born outside the United States to swear or affirm as to the method of attaining citizenship. The other requires deputy registrars to maintain and keep a copy of a record of the voters they registered. The League of Women Voters of Tucson believes that these changes inhibit non-English speaking minorities from registering because of their sensitivity to questions concerning citizenship and their concern about the use of registration records by deputy registrars, most of whom are designated by the political parties. Whether or not these changes are in fact discriminatory they must be submitted under Section 5's pre-clearance requirements. The Tucson League has sought to prompt both the County Recorder and the County Attorney of Pima County to submit these changes for the past six months, without success, and on January 7, 1982, the League brought the situation to the attention of the United States Assistant Attorney General for Civil Rights.

In DeKalb County, Georgia, the Board of Elections has persistently acted to restrict the registration of minority citizens contrary to the purposes of the Voting Rights Act. When we testified before the House Subcommittee on Civil and Constitutional Rights last May, we described, in detail, one such incident.

For several years, the League and other citizen groups, most notably the NAACP, have been conducting registration drives in DeKalb County. These drives which were conducted in more accessible locations and at more convenient times than the registration practices provided by the County Board of Elections, resulted in significant increases in voter registrations. For example, League volunteers registered 1,302 citizens at four major shopping centers in one day, February 2, 1980, while only 2,700 citizens were registered at the 115 established county sites in the whole month of January of that year.

During the 1980 general election year, the Board of Elections abruptly discontinued its practice of authorizing the League of Women Voters and other civic groups to register voters in such places as supermarkets and libraries. This policy change had the effect of making voter registration less accessible, particularly to minority citizens.

The DeKalb County Board of Elections, in defiance of Section 5 of the Voting Rights Act, failed to submit this change in policy to the Department of Justice. The DeKalb County League of Women Voters and the DeKalb County chapter of the NAACP filed a law suit and, in June, 1980, obtained an injunction based on the pre-clearance violation. When the Board finally submitted the change, the Department of Justice rejected it and the Board rescinded the policy.

When we testified before the House Subcommittee, we believed, as did the DeKalb League, that this was the end of the story. We were wrong. In September, 1981, the County Board came up with a new restriction on registration drives by civic organizations. Although these organizations would be permitted to continue conducting their registration drives in election years, they would no longer be able to conduct drives in off-election, odd-numbered years. Registration lists are purged in odd-numbered years and civic groups have been very successful in registering and reregistering voters during these years. To give a recent example, 3,838 voters were registered during a three-month period in 1981, 3,000 of them black voters. The proposed change has been submitted to the Department of Justice. The DeKalb County League of Women Voters has filed a lengthy objection.

The DeKalb County and Tucson stories illustrate our major point, which bears repeating: even in the area of voter registration, where we know that the greatest progress has been made, it is Section 5 which protects and preserves those gains. Without Section 5, the changes in DeKalb and Tucson and probably an undocumented number of other subtly discriminatory changes in policy, practices and procedures would go into effect. Without Section 5, the League and the NAACP in DeKalb County would have had the burden of proving the discriminatory nature of the change in order to continue registering voters. Without Section 5, the only way to stop discriminatory election practices and to eliminate barriers to registration and voting would be case-by-case litigation, a long, drawn-out, costly and tedious process.

The Deterrent Effect

The existence of Section 5 has deterred covered jurisdictions from making changes in election procedures that they know the Department of Justice will find objectionable. In the words of the Brazos County, Texas League of Women Voters: "The Voting Rights Act is like Big Brother; election officials don't like him, but they're not going to cross him, either."

The Charlottesville-Albemarle County, Virginia League of Women Voters feels that Section 5 pre-clearance has protected minority voting rights by:

> "...ruling out, in advance, possible actions which might have limited minority political participation. One gets the impression (although this would be difficult to prove) that some actions are not proposed because of the Voting Rights Act and that others would not be taken without it."

This deterrent effect is crucial. Surely, it is simpler to prevent discriminatory laws and practices than to eliminate them after they are put into effect. We believe that the remarkable success of the Voting Rights Act in increasing minority registration and removing many of the barriers to minority political participation is the best argument for retaining the act's highly effective enforcement mechanisms. Although the statistics show progress, they also show that there is still a long way to go before all traces of the discriminatory systems of the past are erased. Even with the outer door to political participation unlocked, the doors to elective office and political power, for example, have proven to be

difficult ones for minorities to push open. And if increased registration rates are to be meaningful, they must go hand-in-hand with increased participation in all facets of American political life.

ACCESS TO ELECTIONS

Once the barriers to registration have been overcome, there are still road-blocks to the casting of a meaningful vote. One problem is the often inadequate training given to voter registrars and election officials. This results in reinforcing uncooperative attitudes and contributes to the frequency of irregularities and "errors" in the administration of registration and voting -- particularly in heavily minority precincts or districts. One such incident was reported to us by the Edinburg-McAllen, Texas League of Women Voters:

> "In north Mission [Texas], the business manager of the school district ordered only one [voting] machine, even though the turnout was predicted to be high. That machine was filled up by 3:30 p.m. For about 45 minutes, until another machine was brought in, voters were not able to vote in the school election. The election judge for the school told me all the trouble started last year when 'those Mexicans started to vote.' Too many election judges and clerks are untrained and racist; they are not cooperative; in some cases they don't know enough about Spanish pronunciation and spelling to find names of minority people on the registration lists. Training sessions are not mandatory and are pretty much of a joke anyway."

According to the Goldsboro-Wayne County, North Carolina League:

> "Two years ago when black commissioners were appointed by the Wayne County Board of Elections, the Board of Elections supervisor would not provide them with adequate training. As they began to work, there were areas they did not understand. One commissioner, Mr. Williams, was repeatedly harassed by the supervisor..."

DILUTION OF THE MINORITY VOTE

Discriminatory attitudes and practices in the administration of voter registration, when combined with the use of election schemes that have the effect of diluting minority voting strength or that make it difficult for minorities to elect public officials who will represent their concerns, will inevitably result in decreased minority voting participation. For many minorities, registering to vote is not

worth the effort when it does not result in increased minority representation or access to the political system. The converse is also true. For example, the Tupelo, Mississippi League of Women Voters attributes the increase in minority registration in their city to the change of the election system for the city Board of Aldermen from at-large elections to wards. According to the President of the Tupelo League:

> "Most of the blacks [in Tupelo] live in one section of the town, and with ward elections they can, and did, elect a black citizen to the Board."

Unfortunately, such voluntary changes in election procedures that result in increased minority representation and political participation are the exception rather than the rule. According to a report issued by the Lawyers' Committee for Civil Rights Under Law,[3] thirteen counties in Mississippi have attempted to switch to at-large elections for members of the county boards of supervisors, and 22 counties have attempted to switch to at-large elections for county school board members with the purpose or effect of preventing the election of blacks. Efforts to implement these changes persisted as late as 1977, but were blocked by Section 5 and court challenges. Without the protections afforded by Section 5, many -- if not most -- of these switches to at-large voting would be in effect today.

STANDARDS OF PROOF

Even with Section 5, the only way for minorities -- or the Justice Department -- to challenge discriminatory practices that were in place before the Voting Rights Act was adopted is through case-by-case litigation. And in 1980, even this type of remedy was suddenly undermined by the Supreme Court's decision in City of Mobile v. Bolden, which contradicted precedents set in the early 1970's for proving voting discrimination. In order to preserve the ability of minorities to challenge long-standing as well as proposed voting changes under the Voting Rights Act, we support the provision in S 1992 that adds language to Section 2 of the law prohibiting practices that "result in the denial or abridgment of voting rights." It is hoped that this key change will firmly establish that both intent and effect are legitimate grounds for overturning old forms of discrimination as well as preventing new ones.

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[3] Frank Parker, "Voting in Mississippi: A Right Still Denied." Lawyer's Committee for Civil Rights Under Law, April 1981.

I think that it is important to note that while voter turnout and voter registration rates for the nation have steadily declined, the South is the only region in the country that could boast of increased voter registration rates. This positive example must be nurtured and protected. However, lasting gains will not be achieved until the climate in this country is one that actively seeks to ensure full and equal minority political participation at all levels of government. At a time when many covered jurisdictions are still marked by racially polarized voting patterns, unequal and inconvenient registration opportunities, and persistent attempts by state and local officials to make discriminatory changes in voting and election procedures, there is little evidence that covered jurisdictions are ready to accept full minority political participation without the effective protections of the act's special provisions. Those that are ready, those who do not continue to discriminate, those who do remove barriers to voting and election participation, those who engage in outreach activities to make registration and voting more accessible to minority citizens will meet the criteria set forth in the bail-out section of S 1992. This section, we hope, will provide a strong incentive to many jurisdictions covered by Section 5 who wish to comply fully with the letter and the spirit of the Voting Rights Act.

BILINGUAL ELECTIONS

The League reaffirms its strong support for the 1975 expansion of the Voting Rights Act to protect the voting rights of Hispanic Americans and other language minorities. We believe that the bilingual election provisions have played an important role in increasing the voter participation and representation of language minorities. The best justification for extending these crucial protections for non-English speaking citizens can be found in the 1975 law itself:

> "The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by state and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that where state and local officials conduct elections only in English, language minority citizens are

> excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the U.S. Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices."

We believe that repeal of the bilingual election provisions would effectively deny non-English speaking Americans any voice in the political decision-making process in their communities. Compliance with these provisions, however, has been half-hearted, and language minorities are often frustrated by some of the same discriminatory attitudes and practices that discourage minority registration in areas covered by the original trigger of the Voting Rights Act.

The Voting Rights Act has created a new climate of awareness among minority citizens in covered jurisdictions that has made them more conscious of their rights to participate fully in their communities' political decision-making process. It has made election officials wary of abridging that right. Many Leagues believe that their area's coverage under the act's special provisions has made public officials more accepting and sensitive to the needs of the minority community. Most of all, the Voting Rights Act has been of great symbolic importance to the nation as a statement of national commitment to the equal access of all to the ballot. The passage of S 1992, a strong, fair, widely endorsed bill, would be a signal to the nation that this commitment still stands.

I wish to again thank this subcommittee for this opportunity to present the views of our members on extension of the Voting Rights Act. I would hope that all of us in this room share a deep and abiding commitment to the preservation and protection of our constitutionally guaranteed right to vote. We look forward to working together with you to ensure that the process is meaningful for all American voters.

VOTING RIGHTS ACT

THURSDAY, JANUARY 28, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, East, Grassley, Biden, and Kennedy.

Staff present: Stephen Markman, chief counsel; Claire Greif, clerk; Prof. Laurens Walker; and William Lucius, counsel.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. We will call this Senate subcommittee to order.

Ladies and gentlemen, this marks the second day of hearings by the Subcommittee on the Constitution on the Voting Rights Act. Today's hearings, as with the opening day of hearings yesterday, will attempt to define the major issues involved in the forthcoming Senate debate on the Voting Rights Act.

Again, we are fortunate to have with us an outstanding group of witnesses of varying perspectives on the voting rights debate.

As I indicated yesterday, I believe that there is no more important constitutional issue that will be addressed by this Congress than the section 2 issue in the Voting Rights Act.

By redefining the standard by which we define discrimination in the 15th amendment from the present intent standard to a never-before-utilized results standard, I believe that the House version of the Voting Rights Act is effecting a radical change in the traditional notions of representative government and federalism.

The House bill would establish within the Voting Rights Act, and effectively within the Constitution itself, an understanding of discrimination and civil rights that is at sharp odds with what the great majority of people in this country—black and white—understand to be discrimination and civil rights.

While there was sharp disagreement yesterday over the description of the new section 2 standard as a standard of proportional representation by race, I have yet to hear a credible alternative description.

We heard a great deal yesterday about the results test being necessary to promote equal access to the political process or opening

up doors for minorities or ensuring equal participation in the electoral process or preventing vote dilution or establishing an effective vote for minorities. That is all fine rhetoric. These are all fine objectives. I agree with those objectives. But what do they all mean, in practice?

Indeed, the more I think about it, the more convinced that I am that the real distinction between the intent standard and the results standard is even greater than the issue of proportional representation.

The real issue is whether or not we're going to define civil rights in this country by a clear, determinable standard—through the rule of law, as it were—or by a standard that literally no one can articulate. And I see, if we watched the witnesses yesterday very carefully who were proponents, there was a great lack of articulation as to what this standard means and as to what it really amounts to.

Indeed, I cannot put it any better than Ben Hooks, the president of the NAACP, put it yesterday. Under the results test, he said, "You know discrimination when you see it." Indeed, that is precisely what it is all about.

The hard fact is that the results test has absolutely no coherent or understandable meaning beyond the concept of proportional representation, however much its proponents labor to muddy the waters with generalities and meaningless vagaries. There is absolutely no standard for evaluating evidence under the test, short of simplistic racial head counting.

The "you know it when you see it" theory of racial discrimination is unacceptable. It is unacceptable that such a standard be used to impose new forms of government upon municipalities across the country. It is unacceptable that such a standard be the basis by which Federal courts intrude constantly into the process of redistricting and reapportionment. And it is unacceptable that such a standard be the means by which the Justice Department and the judiciary analyze the policies and practices of State and local governments throughout this country.

Every time that I attempted to pursue an understanding of the results test yesterday and how it would work in practice, I was met with the response that the court would simply have to consider the totality of the circumstances or would have to weigh all the factors. That, again, is all very fine. That is also irrelevant.

The missing point is how do you evaluate the totality of the circumstances? How do you weigh all the factors? What is the question that the court asks itself in doing all this? What question, really, does the court ask itself?

Under the intent test, it considers all the circumstances and then asks itself, "Do these raise an inference of intent to discriminate?" What is the comparable question under the results test? I hope somebody is going to try to give us that answer. I'm going to be prepared to cross-examine the individual who tries to give us that answer, because I can tell you I don't see it.

What, again, does the court ask itself in looking at the evidence? I hope we can get an answer to that.

This may seem like a rather esoteric legalism to some people, but let me assure them, and let me assure all of you, that there are few

more critical issues that will have to be considered by this Congress or by any other Congress. To adopt the effects test would be to transform beyond all recognition what the average person in this country has always understood racial discrimination and civil rights were all about.

To summarize, in conclusion, several observations about the intent standard, observations that I don't believe were refuted yesterday.

First, there is absolutely no requirement under the intent standard that there be a "smoking gun" or a confession of discrimination. Circumstantial and indirect evidence have always been considered admissible to raise an inference of intent, and nobody who understands the law would fail to assert that. You can try and cloud the issue, you can try and confuse the issue, but that's a fact. This point has been made explicit in case after case before the Supreme Court, including *Mobile, Washington* v. *Davis, and Arlington Heights.*

Second, it is not an impossible standard. Indeed, in at least two major voting rights cases decided by circuit courts since *Mobile,* the *Escambia County* and *Lodge* v. *Buxton*—cases, discriminatory intent was found to exist in the establishment of particular structures of municipal government. And any attorney worth his salt is going to be able to prove intent by indirect evidence, as well as direct evidence—by circumstantial evidence, if you want another term for indirect evidence.

Third, the intent standard is not a new standard. We are not returning to the status quo prior to *Mobile* by instituting a results standard. That was established as being unmitigated hogwash yesterday and certainly can claim no greater credibility today. While there may be an isolated lower court case that can be looked to in order to show use of an effects standard, this theory has never been accepted by the Supreme Court, nor, really, by anybody else, for that matter.

Going back to a series of 15th Amendment cases in the 1940's, the requirement that purposeful discrimination be proven has always been the constitutional standard. This in no way was changed—or indeed could have been changed—by the Voting Rights Act.

Finally, the intent standard imposed by *Mobile* is not somehow a unique or aberrational standard imposed in Voting Rights Act or 15th Amendment cases. The Equal Protection Clause of the 14th Amendment has always required purposeful discrimination and school desegregation cases have always required purposeful discrimination. There is no question about that, so for people to come in here and act like it's otherwise, like I say, is hogwash. It is a standard that can be satisfied and that, in fact, has been satisfied repeatedly in these contexts.

I welcome all of our witnesses today. I believe that yesterday's hearing—with its occasional displays of passion—shed a great deal of light on the section 2 issue and other important issues in the Voting Rights Act. I am confident that today's hearings will do the same, and I look forward to these hearings. This is the second in a series of, I believe, nine hearings on this particular issue.

We're really happy to have with us today the distinguished Senator from Mississippi and our colleague, Senator Cochran. And, Senator, we'll certainly look forward to hearing your testimony today, and we'll turn the time over to you.

Senator COCHRAN. Thank you very much, Mr. Chairman.

Senator KENNEDY. Mr. Chairman, could I also join in welcoming Senator Cochran.

Senator HATCH. Oh, excuse me. I didn't see you sit down, Senator Kennedy. You certainly may.

Senator KENNEDY. I think both of us had the good opportunity to work with Senator Cochran on the Judiciary Committee, and he was extremely involved in many of these similar matters, and we very much appreciate having his comments and his suggestions in this committee.

Glad to have you, Senator.

Senator COCHRAN. Thank you very much, Senator Kennedy.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Mr. COCHRAN. Mr. Chairman, it's a real pleasure to be back in the Judiciary Committee hearing room, having been absent now for about a year on other committee assignments.

I want to say this morning that I present testimony in support of a proposal that I have made in the form of a bill that was introduced last year, focusing on the preclearance procedures under section 5 of the Voting Rights Act. My testimony this morning will be limited to an explanation of that proposal, and I ask, if it's permissible, Mr. Chairman, to simply submit my prepared statement, and then I intend to read some excerpts from that and enlarge upon some of the comments that are in the prepared statement.

Senator HATCH. Without objection, it will be placed in the record.

Let me make one other explanation. We went a rather lengthy hearing yesterday, because of it being the first day, but today we're going to limit witnesses to 10 minutes. We would appreciate your summarizing your testimony. All statements of the witnesses will be placed in the record as though fully delivered before the committee, and I will enforce that rule today.

We'll certainly have some leeway for Senators and Congressmen, if you feel that you need that, but all other witnesses, we're going to limit you to 10 minutes.

Senator KENNEDY. Well, does that mean the questioning of the witnesses?

Senator HATCH. No, but the questioning will be on a 10-minute rule also. I think that's the way we'll handle it.

Go ahead, Senator Cochran.

Senator KENNEDY. Do we know how much time was used yesterday by the different members of the committee in questioning?

Senator HATCH. Well, no, but I don't think anybody is going to be limited in time. It's just that we'll rotate on a 10-minute basis.

Senator KENNEDY. I see.

Senator HATCH. I don't have any problem with that. The questioning can take longer, but witnesses are going to testify for 10 minutes and then we'll put the full statement into the record.

Senator Cochran?

Senator COCHRAN. Mr. Chairman, the purpose of the amendment which I have proposed is to assure the nationwide protection of voters' rights by making available a preclearance procedure in every State. I'm urging adoption of this change so that the Government can act when it needs to to protect the right to vote and to full participation in the political process of every citizen in this country, not just those who live primarily in the South. Rather than weakening enforceability, this amendment would enlarge upon the Government's ability to protect the voting rights of citizens wherever they may live.

This proposal is S. 1761, and on six different occasions I've taken the Senate floor in an effort to explain the purpose and the practical impact this amendment would have. If it would be permissible, Mr. Chairman, I would like to have copies of those floor remarks attached as an addendum to my prepared statement in the record.

Senator HATCH. Without objection.

Senator COCHRAN. My amendment relates only to section 5. It creates a new procedure which is applicable in all States.

This idea, incidentally, wasn't developed by me but came from Judge William Keady, who is a U.S. district judge for the Northern District of Mississippi, and Prof. George Cochran, who is not a relative of mine, who is a professor at the University of Mississippi School of Law. They have prepared and had published an article entitled "Section 5 of the Voting Rights Act: A Time for Revision," which was recently published in the Kentucky Law Journal. Professor Cochran, incidentally, I think has been invited to testify before the committee to further explain this proposal.

Senator HATCH. That is correct.

Senator COCHRAN. This proposal, Mr. Chairman, would require political units to apply for a declaratory judgment in local Federal district court for the preclearance of any change in election or voting laws. The complaint would name the United States as the defendant, and process would be served upon the Attorney General. The relief sought would be identical to that now provided in section 5, and the burden of proof would still remain upon the submitting political unit.

Any person or group who would like to, may have their names placed in a registry with the court so they could receive notice of the complaint, and any person or group who would like to intervene would have a right within 60 days after notice of the action to participate in the proceeding, and the United States would have 60 days to answer. That's the time period now provided under the section 5 preclearance procedure that we have that permits the Department of Justice to respond, approve, or disapprove an application.

These actions would be given a priority setting by the court. Any decisions adverse to the United States or any interested party could be stayed upon notice of appeal, and there is a provision for an expedited appeal included to the court of appeals, so that there won't be any inordinate delay in getting a decision about the submission—whether or not a change in election laws would be permissible under the law.

I would like to stress, Mr. Chairman, this is a new proposal. It has not been previously considered by either the Senate or the other body. Now, there have been suggestions for nationwide application of the Voting Rights Act, but none of them have actually created a new procedure for preclearance, and this is the suggestion that's being made this morning to the subcommittee.

What distinguishes this proposal from those previous suggestions is that this vests jurisdiction in administering the procedure in the Federal district courts, but it wouldn't take away the responsibility that's now vested in the Department of Justice for review and in effect advising the court whether or not the Justice Department thinks the application should be granted or not, so their action would continue in pretty much the same fashion that it does now, except that we would have the extra dimension of Federal district court participation and nationwide application.

Mr. Chairman, I believe the proposal I've made will bring the Voting Rights Act into the 1980's. This is a workable, expeditious alternative to the administrative procedures now available under the act, which by necessity are restricted in their application to just several States and subdivisions of other States.

This plan would insure that all States would meet their responsibility to protect the right to vote, and I must say that in my judgment this right to vote and participate in the political process is a very fundamental right, and it ought to be fully protected, not just in some places but in every jurisdiction in the United States. Adoption of this change would guarantee a fuller degree of protection by the Federal Government.

I might say, Mr. Chairman, that in the hearings over on the House side, there was some discussion of this proposal. It was brought to the attention of the House Judiciary Committee by a young black attorney from my State, Wilbur Colom, who testified in support of it. I would like, in closing my remarks to the subcommittee, to quote part of his remarks.

> The enforcement procedures of the Voting Rights Act are not written on a sacred scroll. While the principles embodied in the act should be sacred to all of us, for it was through much suffering in my lifetime the gains were made, the mechanism for enforcement should be open for debate as Mississippi changes and as America changes. Innovative ideas on enforcement such as the Keady-Cochran proposal should be welcomed.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Senator Cochran.

[The prepared statement of Senator Cochran follows:]

PREPARED STATEMENT OF SENATOR THAD COCHRAN

Mr. Chairman and members of the subcommittee, I submit for your consideration a proposal to amend the Voting Rights Act of 1965. The purpose of this amendment is to assure the nationwide protection of voters' rights by making available a preclearance procedure in every state.

I am urging adoption of this change so the Government can act, when it needs to, to protect the right to vote of every citizen in this country, not just those who live primarily in the South. Rather than weakening enforceability, my amendment would enlarge upon the Government's ability to protect the voting rights of citizens wherever they may live.

I have introduced this proposal as S.1761 and have made six speeches on the Senate floor to indicate my firm interest in this idea and to explain the proposal. (Attached to my written statement are copies of my floor remarks for the record.)

My amendment relates only to section 5 of the Voting Rights Act. It creates a new preclearance procedure applicable to all fifty states. This idea has been carefully developed by William C. Keady, Chief Judge for the Northern District of Mississippi, and George C. Cochran, not a relative, who is on the faculty of the School of Law at the University of Mississippi. This suggestion of theirs is discussed in an article entitled "Section 5 of the Voting Rights Act: A Time for Revision," recently published in the Kentucky Law Journal, volume 69, No. 4, 1980-81. Professor Cochran has been

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invited to testify before this subcommittee at a later date about this proposal and his concerns about the Department of Justice preclearance procedures.

This proposal would require political units to apply for a declaratory judgment in local Federal district court for the preclearance of any change in election or voting laws. The complaint would name the United States as the defendant, and process would be served upon the Attorney General. The relief sought would be identical to that now provided in section 5, and the burden of proof would remain on the submitting political unit.

Appropriate notice would be given to all interested parties in two forms: publication in local newspapers for three consecutive weeks and actual service of the complaint upon interested persons or organizations who have placed their names in a registry with the court. Any person or group would be permitted to intervene as a matter of right within 60 days after notice of the action. The United States would also have 60 days to answer, the time period now permitted the Justice Department under the current administrative procedures for preclearance.

These declaratory judgment actions would be given a priority setting by the court, and decisions adverse to the United States or intervening parties would be automatically stayed upon notice of appeal. A provision for an expedited appeal has also been included.

I am convinced that our federal district courts will not be over burdened by the increased number of submissions for preclearance that this proposal requires. While statistics reveal a steady increase in submissions, there has also been a steady decrease over the years in the number of objections made by the Department. One can surmise that most submissions would be disposed of summarily by the court, with only a few requiring actual litigation.

Mr. Chairman, I would like to stress that this is a new proposal and has not been previously considered by either the Senate or the other body during previous discussions of the Voting Rights Act. What distinguishes this proposal from previous suggestions to extend application of the law nationwide is that this bill provides for a new preclearance procedure, vesting jurisdiction for administering that procedure in the federal district courts. At the same time, it does not take away from the Department of Justice the obligation and responsibility to review proposed changes in local election laws. Recognizing that there would be additional work required of the Department of Justice, this Senator has suggested the involvement of the federal courts so that submissions can be effectively and fairly handled.

Mr. Chairman, as you and your subcommittee are aware, electoral changes are now precleared by the Voting Section of the Department of Justice. But you may not be aware that this procedure is fraught with inadequacies. These have been documented in two reports, one

by the General Accounting Office in 1978 entitled Voting Rights Act - Enforcement Needs Strengthening and the other, Compromise Compliance: Implementation of the Voting Rights Act by H. Ball, D. Krane, and T. Lauth.

As an example, the Department employs paraprofessionals to review the preclearance submissions and make the determination whether or not the proposed change has a discriminatory purpose or effect. These paraprofessionals possess little or no legal training, demographic or statistical skills.

A second example has been described as a "dual track system." This dual track system -- the first track consisting of a review of the submission by the paraprofessional and the second track consisting of discussions between the supervising attorney at the department and officials from the submitting jurisdiction -- leads to informal approval of the submission without local minority participation.

Other problems include decisions on submissions made without all the data as required by the federal regulations, review periods extending well beyond the 60 days permitted, and requests for information made on the 60th day as a tactic for further delay. What was envisioned as a system for prompt preclearance has become a quagmire of voluminous submissions requiring the evaluation of complex political, social, and legal data with personnel too limited in number and skills to adequately and properly do so. My proposal would employ the expertise of our Federal Judiciary

in evaluating election changes for discriminatory purpose and effect.

Mr. Chairman, I believe the proposal I have made will bring the Voting Rights Act into the 1980's. It is a workable, expeditious alternative to the outdated administrative procedures available under the act that will maintain the Government's role in the protection of voting rights, and I urge this committee to review and consider it carefully. This plan will insure that all states meet their responsibility to protect the right to vote which is one of our most fundmental rights.

Wilbur Colom, a young, black attorney from my state of Mississippi addressed the House Judiciary subcommittee in support of this proposal when it held hearings on the Voting Rights Act last summer. Mr. Colom, who was active in the civil rights movement in the 1960's, supports the principles of the Voting Rights Act but is willing to consider ways to improve it. This view was reflected in his closing remarks to the subcommittee, to wit:

> The enforcement procedures of the Voting Rights Act are not written on a sacred scroll. While the principles embodied in the act should be sacred to all of us, for it was through much suffering in my lifetime the gains were made, the mechanism for enforcement should be open for debate as Mississippi changes and as America changes. Innovative ideas on enforcement such as the Keady/Cochran proposal should be welcomed.

Thank you.

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S. 1761—VOTING RIGHTS AMENDMENTS OF 1981

Mr. COCHRAN. Madam President, today, I am introducing a bill to amend the Voting Rights Act of 1965. The purpose of this amendment is to assure the nationwide protection of voters' rights by making available a preclearance procedure in every State.

I am aware that an immediate reaction to an amendment offered by a white, Republican Senator from Mississippi to the Voting Rights Act may be that this is obviously an effort to dilute the effect of current law or to make it unenforceable or to somehow sabotage the Federal Government's role in protecting minority participation in elections. If that is the reaction of any of my colleagues, I want to assure them that they are wrong.

I am urging adoption of this change so the Government can act, when it needs to, to protect the right to vote of every citizen in this country, not just those who live primarily in the South. Rather than weakening enforceability, my amendment would enlarge upon the Government's ability to protect the voting rights of citizens wherever they may live.

My amendment relates only to section 5 of the act. It creates, in effect, a new preclearance procedure. I should point out that this is not an idea that has originated with me, but one that has been carefully developed by William C. Keady, a Federal district judge for the northern district of Mississippi, and George C. Cochran, not a relative, who is on the faculty of the School of Law at the University of Mississippi. This suggestion of theirs is discussed in an article entitled "Section 5 of the Voting Rights Act: A Time for Revision," which will be published soon in the Kentucky Law Journal, volume 69, No. 4, 1980–81.

The essence of the proposal would be to require political units to apply for a declaratory judgment in local Federal district court for the preclearance of any change in election or voting laws. The complaint would name the United States as the defendant, and process would be served upon the Attorney General. The relief sought would be identical to that now provided in section 5, and the burden of proof would remain on the submitting political unit.

Appropriate notice would be given to all interested parties in two forms: Publication in local newspapers for 3 consecutive weeks and actual service of the complaint upon interested persons or organizations who have placed their names in a registry with the court. Any person or group would be permitted to intervene as a matter of right within 60 days after notice of the action. The United States would also have 60 days to answer, the time period now permitted the Justice Department under the current administrative procedures for preclearance.

These declaratory judgment actions would be given a priority setting by the court, and decisions adverse to the United States or intervening parties would be automatically stayed upon notice of appeal. A provision for an expedited appeal has been included.

I am convinced that a majority in the Senate would not protest the nationwide application of a preclearance procedure to protect the voting rights of all citizens so long as there is in place a workable procedure for processing submissions. Plenary jurisdiction over voting rights cases is now vested only in the U.S. District Court for the District of Columbia. Historically, the justification for the investment of jurisdiction in this court was to insure the uniformity of interpretation.

Experience under current law, however, does not support this rationale. During the past 15 years, only 23 suits have been filed in that court, and only 10 opinions have been published, hardly a basis for the uniformity argument. Some may worry that the burden of submissions will be too great upon the court system. While statistics reveal a steady rate of increase in submissions, there has also been a steady decrease over the years in the number of objections made by the Department. Therefore, it is reasonable to assume most of the submissions can be disposed of summarily by the court, with only a few cases requiring actual litigation.

The 1980 statistics from the Justice Department indicate that of a total 7,340 submissions, only 51 objections were filed. If this is indicative of the changes that would be in dispute in the future, there would be only a minimal increase in caseload for the district courts. And assuming that voting law changes in the States not now covered by the preclearance requirements do not have as great a potential for discrimination, then one need not fear burdensome caseloads on that account either.

This new procedure, applying with equal force in every State, would make possible increased oversight by anyone interested in full minority participation in the political process. Also, the provisions for expedited appeal and automatic stay of the electoral change until approved by the appellate court would mean full protection against any adverse decision by what some may fear to be a "biased forum."

Finally, since there is no provision under the current administrative procedures to insure compliance with the preclearance requirement, it can be argued that the increased opportunity of minority voters to participate in the review of changes in the law, coupled with the familiarity of the court as the forum for resolving litigation with due process, would contribute to voluntary compliance by local political units.

I am submitting a workable, expeditious alternative to the outdated administrative procedures now available under the act that will maintain the Government's role in the protection of voting rights. This plan will insure that all States meet their responsibility to protect the right to vote which is one of our most fundamental rights.

The PRESIDING OFFICER. Under the previous order the Senator from Mississippi is recognized.

VOTING RIGHTS AMENDMENTS OF 1981

Mr. COCHRAN. Mr. President, last week, I introduced a bill, S. 1761, which would amend the Voting Rights Act which will be before this body for consideration within the next several months. The amendment that is suggested in the legislation I have introduced relates to section 5 of the act, the preclearance section. The amendment really creates a new preclearance procedure.

Today I am sending a letter to all Senate colleagues explaining in more detail than I will today how the new preclearance section would work if it is adopted by the Senate and pointing out some of the reasons why it is appropriate at this time to seek a revision in the Voting Rights Act and particularly the preclearance section to equip our Government to protect more fully the right to vote and the right of full participation in the political process.

There has been a suggestion by some that any effort to amend the Voting Rights Act would in fact be an effort to undermine it or to make it less enforceable, to sabotage it.

It should be noticed in reviewing the bill of this Senator, Mr. President, that never before has a new procedure, in effect, for clearing changes in local laws been incorporated in an amendment to make applicable in every State the present clearance requirement under the Voting Rights Act.

This is a new proposal. It has not been considered before by either body. And I am hoping that it will be carefully considered by the members of the Judiciary Committee and all Senators before an estimative decision is made to reject it because it is an effort to extend the application of this section nationwide.

The change that is suggested provides for a declaratory judgment proceeding in Federal district courts for review and clearance of election law changes at the local level.

What is different about this is that under current law the Department of Justice now has the sole responsibility for reviewing and approving such changes. This is undertaken in an office that has fewer than 20 paralegals and a handful of lawyers working to review changes in the nine States covered by this section of the act and portions of 14 other States.

Some may fear that the Federal court will not be an appropriate forum for the review of changes in local election laws. But I want to point out that the men and women who have served on the Federal bench in the last 30 years have played a very crucial role in developing the law in the area of civil rights and voting rights.

I would like to call attention particularly to a recently published book by Jack Bass entitled "Unlikely Heroes," in which he points out the dramatic changes in the law which have occurred as a result of decisions by Federal judges, particularly in the South, and in particular in the Fifth Circuit Court of Appeals.

He talks about the development of civil rights and voting rights laws. As a matter of fact, conclusions and decisions of these judges, he says, formed the basis for the Voting Rights Act.

Administration officials who testified before congressional committees pointed to these decisions and conclusion in support of the request for enactment of the Voting Rights Act.

When compared with the very few persons who are assigned by the Department of Justice the job of reviewing changes in local laws, the Federal judiciary obviously is not only better equipped from a manpower standpoint but also from the standpoint of its experience in dealing with such questions and in making the decisions based on the law and with allegiance to due process.

At the heart of this proposal is the involvement of the Department of Justice in the clearance procedure. The Department of Justice will not be shut out from its interest in reviewing changes in local laws. As a matter of fact, whenever a change is proposed in a local election or voting law, process will be served upon the Attorney General under this procedure. Notice also will be given to the general public, through publication in local newspapers of the fact that such changes are proposed. Interested persons who want to be notified specifically about any changes in the election laws will have their names placed in a registry with the court, and process will be served on them as well.

So instead of limiting, as the present law does, review of election law changes just to those few people in the Department of Justice, this change that is being suggested will involve many more people—minority voters, those representing the interests of minority voters, the general public—in addition to the Department of Justice in the clearance process.

It is interesting to me, Mr. President, when we talk about nationwide application of a preclearance procedure, that those who throw up their hands in holy horror first are those who have been in the forefront of the civil rights effort and the effort to guarantee, through Federal law, that the right to vote and fully participate in the electoral process is guaranteed by a law with teeth in it so that these voting rights can be protected fully.

This is not an effort to make less enforceable voting rights in this country of ours, but it is an effort to make uniform throughout the country a workable, effective procedure which will enlarge upon the power of the Federal Government to review and approve changes in election laws.

That would be just. That would be fair.

I do not know why we even argue that the right to vote in Alabama or Georgia is more important than the right to vote in Pennsylvania, Illinois, or in the State of Washington, Mr. President. In my judgment, the right to vote and participate fully in the political process ought to be guaranteed by our Federal law to every citizen, no matter where he lives. It is not just a right that ought to be protected in just a portion of these United States.

The protection that this change would afford would make this Federal law like all other Federal laws: applicable to everyone, applicable to every State, to every precinct.

Some say, "Well, you would have to have so many more people involved. You would have to increase the funding of the Department of Justice. More staff would be needed in the Federal courts."

In 1980, over 7,000 submissions were filed with the Department of Justice asking for approval of changes in local election laws. Only about 50 objections were made to those changes by the Department of Justice. What this indicates, in my judgment, is that we are seeing more and more voluntary compliance by local political units with the letter and the

spirit of the Voting Rights Act. This is encouraging. Those who say this would unduly burden our Federal court system, that we would have litigation in every courthouse across the country because of this change, I think are not looking at the fact that times are changing, and that is certainly an encouraging sign applauded by this Senator.

We do not want to turn the clock back, Mr. President, and go back to the devices that were used in some parts of the country to deny minority voters the right to vote and participate in the political process.

That is not the effort being made here. There are provisions in this law which are not touched by the amendment of the Senator from Mississippi which, in effect, abolish the poll tax and the other devices that were commonly used to deny full participation.

This is not an effort to do away with those changes. If my amendment is agreed to, those provisions of the law will remain in the law, and I support their remaining in the law.

It seems to me that if we have a Federal law making it illegal to evade the payment of lawfully due income taxes in one State, it ought to appl; in another State. Income tax laws are very interesting in that we do not have enough Federal employees or agents to review the preparation and filing of individual income taxes by all of our citizens. But it is applicable nationwide, nonetheless. It is applicable throughout the country and applies with equal force and effect in every State.

If it is against the law to commit a crime of extortion in New York, it is likewise against the law to commit the crime of extortion in California.

If one gerrymanders a political boundary in New York to deprive full participation in the political process by minorities, that ought to be against the Federal law, and if it is done in the State of Washington for a like purpose it should be against the law. Whatever the size of the minority, it is still wrong, and the Federal law ought to say so. There ought to be some provision in the law, to make that principle enforceable.

Mr. President, you may say there is no such discrimination, no activity like that at all in some of our States.

Well, what is the objection to providing that it is illegal to do it? What is wrong with having a procedure that will permit review of such changes, and, if there is any alleged discrimination, it can be brought to the attention of the court in an expedited proceeding? It would not be a long, drawnout case but one that is limited so that a decision is made within 60 days after the application for a declaratory judgment is filed. The Department of Justice has 60 days under the law now to review and approve changes in local election laws. What we are finding out, though, is that in some cases that time period drags out much longer.

In Jackson, Miss., for instance, a change was made in the boundaries of the city. There was an annexation of some areas near the city, to include them within the city limits. An application was made 5 years ago, Mr. President, for approval of that change under the Voting Rights Act and section 5 provisions on preclearance.

Just 2 months ago the Department of Justice finally said that annexation did not have the effect of depriving minority voters of the right to participate fully in the political process, and, in effect, the Department approved the change.

In the meantime, two city elections have been held, both under the cloud of failure of the Department of Justice to approve the annexation.

Those in the annexed areas did not know whether their votes would be counted in the election or not. The Department of Justice, at one time, sent out word that they would not be counted, then changed its mind. The point I am making by referring to that isolated incident is that if there had been in place a preclearance procedure such as that suggested in the amendment that this Senator is offering, a decision based on the law and the facts would have been made expeditiously. If someone might be aggrieved because of an adverse decision made by a local Federal judge, an expedited appeal to the court of appeals is provided in the bill so that there will not be any interminable delay, any long, drawn-out proceeding. A decision can be obtained promptly.

Mr. President, I hope that Members will review this proposal for change and not just conclude summarily that it is not workable, that it is an effort to turn the clock back or sabotage the Voting Rights Act, none of which it is.

It is an effort to improve the procedure under the act for review of changes in local election laws, to make applicable nationwide a uniform procedure, to give greater notice, to involve more participation on the part of minority voters in the preclearance process and to provide also that the Department of Justice continue to have an important role in the preclearance procedure.

Jurisdiction of these cases now is vested only in the District Court for the District of Columbia. There have been only 23 cases presented to that court in the last 15 years; only 10 written decisions have been rendered, indicating that this is not a forum that is being sought out for taking up any of the questions that are arising out of the Voting Rights Act.

Mr. President, it is my intention from time to time to come to the floor and discuss further this proposed change and the reasons for presenting it to the Senate. I look forward to the hearings that are going to be scheduled by the Senate Committee on the Judiciary and I plan to present these suggestions to that committee at that time as well.

Mr. President, I yield back the remainder of my time.

Senate

FRIDAY, NOVEMBER 6, 1981

(Legislative day of Monday, November 2, 1981)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the President pro tempore (Mr. THURMOND).

PRAYER

The Chaplain, the Reverend Richard C. Halverson, LL.D., D.D., offered the following prayer:

Gracious Father in Heaven, in this large Senate family where, so often, issues of great magnitude affect the destiny of millions, help us not to overlook the dedication of those who devote themselves to the minutiae and the mundane without which major matters would not be resolved. We recognize with gratitude the faithful service of office staffs, the efficient, tireless work of those in the cloakrooms, the Secretary of the Senate, the Sergeant at Arms and their staffs, the floormen, the doorkeepers and the pages. We thank Thee for all of the devoted services in the buildings and on the grounds; the maintenance people, the elevator operators, the police, and those who keep the place beautiful.

Help us never to take for granted loving, faithful support so essential to the effective work of the powerful, influential national leaders who occupy this Chamber. We thank Thee for the men and women of the press and pray that their dedicated efforts will accurately and adequately inform the people. And dear Lord, we pray for the families of all those we have mentioned. May Thy peace and love keep them safe and meet all their needs. We pray this in the name of the greatest of all friends. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

THE JOURNAL

Mr. COCHRAN. Mr. President, I ask unanimous consent that the Journal of the proceedings of the Senate be approved to date.

The PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. COCHRAN. Mr. President, under a previous order, I understand that there will be a period of time not to exceed 20 minutes for routine morning business. As part of the time allotted to the leader this morning, I wish to proceed at this time.

The PRESIDENT pro tempore. The Senator may proceed.

PRECLEARANCE PROCEDURE UNDER THE VOTING RIGHTS ACT

Mr. COCHRAN. Mr. President, I wish to call attention to legislation that was introduced 2 weeks ago relating to the Voting Rights Act of 1965. Last week and the week before as well, I described the legislation that was being introduced which would, in effect, create a new preclearance procedure under the Voting Rights Act. As Members realize, section 5 of the existing law provides for a procedure for approval of changes in local election laws submitted to the Department of Justice. Although the law specifies that a decision must be made within 60 days, experience has shown that, often, the period of time drags out much longer than that, and some local political subdivisions have waited up to 5 years or more before a decision has been made by the Department in response to a request for approval of a local change in election laws.

Mr. President, this legislation is designed to create a new procedure whereby local political subdivisions will submit proposed changes to the Federal district court. There will be provided an expedited procedure for consideration based on the rules for declaratory judgment. Under this procedure, all interested persons will be given notice. The Department of Justice will be served with process, and the same office that now exists for the review of changes will continue to exist to review the changes considered in this court proceeding. Another important difference is that whereas the existing section 5 preclearance requirements apply now only to a few States and parts of a few others, this new procedure would be applied with equal force and effect throughout the Nation in every jurisdiction.

I know that the reaction of some, as I have said before, will be that this may be an effort to undermine the act, to make it more difficult to enforce, and to impose a greater burden on the Department of Justice and our court system. I wish to point out that this is a proposal that has been carefully developed by a law professor and a Federal judge who have written an article that is being published in the Kentucky Law Review relating to the necessity for having a law for the 1980's and not one that relates to the problems and difficulties of the 1960's.

To indicate that this proposal has support from representatives in the minority community in the South, I call attention to the fact that during the hearings in the other body, before the Committee on the Judiciary, Wilbur Colom, who is a black lawyer from Columbus, Mississippi, active in the civil rights movement, active also in voter registration efforts, and a leading young Republican in the State of Mississippi, testified and gave a report on this new procedure.

At this point, Mr. President, I ask unanimous consent that his entire statement to the Judiciary Committee in the House be printed following my remarks in the RECORD.

The PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1.)

Mr. COCHRAN. I refer to some of the statements that Mr. Colom made. He points out that while there are some who advocate no change in the Voting Rights Act, particularly no change in the section 5 preclearance requirement, he says that the maintenance of a preclearance procedure is necessary to the two-party system and necessary for the protection of fundamental rights. Then he says:

> While we must acknowledge that voter intimidation, barriers to registration and even ballot box stuffing, the tools of the past, to a large extent, have disappeared, there still remains white block voting, subtle maneuvers to dilute black voting strength and blatant efforts to negate black electoral gains. Mississippi has changed. There is greater equality. Those who say they have seen no discrimination against blacks in Mississippi must be blind. Those who say that any change in the Voting Rights Act will turn back the clock of racial equality refuse to acknowledge the progress our State has made. Of course, we still have far to go.

He goes on and suggests that the Kendy-Cochran proposal, as he refers to it in his remarks, should be carefully considered and approved by the Congress.

Mr. President, I hope that Members of the Senate will review this suggestion and look at it not in terms of an effort to turn the clock back, to go back to the days of poll tax and other devices that were designed to prevent or undermine the full participation in the political process by minority citizens, but as an effort to move into the eighties with a modern enforcement procedure which would be based upon due process, an enforcement of the law that would prohibit any effort to deny voting rights in any place in this country. My suggestion, Mr. President, is that if it is important to protect with the full force of a preclearance procedure the voting rights in the State of Alabama, then who can argue that it is not important enough to have a procedure for protecting those rights in the State of Michigan or in the State of Illinois? If it is against the law to commit a crime in Pennsylvania, it is against the law to commit it in California. That is our Federal system. Federal laws apply nationwide. This act can

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

be given full force and effect nationwide under this new procedure.

Some say, well, they have heard about that in the House; they rejected it overwhelmingly. Nobody has really had this proposal before them, Mr. President. It is a new procedure and I hope the Senate will review it carefully during the hearings on the Voting Rights Act that will be undertaken, as I understand it, early next year by the Senate Judiciary Committee.

EXHIBIT 1

STATEMENT OF WILBUR O. COLOM

Mr. Chairman and Members of the Committee:

My name is Wilbur O. Colom. You have my resume before you and I will omit any reference to my background other than to point out that I was born and spent my entire life in Mississippi, except for a period of 10 years when I was away in school.

This is a most difficult presentation for me to make; not because of any doubt regarding the merits of the Keady/Cochran proposal, but because I find myself isolated from men and women who have been heroic figures in my life, some even my personal friends. Aaron Henry, Charles Evers and many others who testified before you have been persons who have fought critical battles that gave me the right to vote, gave me the opportunity to be a member of President Reagan's transition staff. They were out front when bombs were the greatest tool of the opponents of equal opportunity. But I, too, was active in the civil rights movement in the mid-60's and I, too, recall the gross inequalities.

Add my voice to theirs in saying that the voting rights act must be extended.

As an active Republican, I can say without hesitation that the voting rights act and section 5 of the act are essential to the maintenance of the two party system and necessary for the protection of fundamental rights. Indeed, my right and that of my child to participate in the electoral process is at stake.

While we must acknowledge that voter intimidation, barriers to registration and even ballot box stuffing, the tools of the past, to a large extent, have disappeared. There still remains white block voting, subtle maneuvers to dilute black voting strength and blatant efforts to negate black electoral gains.

Mississippi has changed. There is greater equality. Those who say they have seen no discrimination against blacks in Mississippi must be blind. Those who say that any change in the Voting Rights Act will turn back the clock of racial equality refuse to acknowledge the progress our State has made.

Of course, we still have far to go. Resistance is not so much among the populace as it is among the political forces now in power, for they correctly see that the influx of blacks into the electoral process will offer the potential for new coalitions and new political alignments that may not allow their continued political domination.

Nothing has done more to foster the development of the two party system in Mississippi than the Voting Rights Act. Now we find two parties competing for two large voting groups, with both parties being fundamentally strengthened in the process. It is critical to the Republican party in the State of Mississippi that the rights of black voters be protected in the broadest of forms. To do otherwise would invite a return to the one party dixiecrat days.

Now, to the specifics of the Keady/Cochran proposal. William Keady is the chief judge for the United States District Court for the Northern District of Mississippi. George Cochran is a professor of law at the University of Mississippi Law Center. Their proposal is outlined in their forthcoming article in the Kentucky Law Journal entitled "Section 5 of the Voting Rights Act: A Time for Revision." The Keady/Cochran article relies on, among other things, one document with which I am sure you are familiar, the GAO report on the voting rights section of the Justice Department and a book entitled "Compromise Compliance." Both lead to some unavoidable conclusions which serve as the empirical foundation for the Keady/Cochran proposal.

First, there is an extremely high submission rate by covered jurisdictions of proposed change, and this submission rate has an incapacitating effect on quality review by the voting rights sections. Second, there are real and justifiable suspicions that administrative preclearance has neglected those interests it was designed to serve. 1980 statistics show that of 7,940 submissions, only 51 objections were interposed. The chaotic and hurried review given by the Civil Rights Division tend to bear out the conclusion that effective full enforcement is not now and cannot be achieved in the Department of Justice now or in the future. Third, the Supreme Court in *Morris v. Gressett* held that there is no judicial review of a departmental decision not to object to a submission.

Such an unreviewable power is foreign to our process and has a potential for abuse. I prefer to vest the responsibility of protecting my rights to participate in the electoral process in the hands of a southern Federal judge, subject to the expedited review of the Fifth Circuit, then to vest that authority in the hands of a political appointee whose position may be based upon his or her role in a campaign, rather than his or her dedication to the law.

Finally, in 1975, Assistant Attorney General Pottinger stated that a mechanism would be in place which would insure that covered jurisdiction comply with the preclearance requirement. Recently, he acknowledged, after six years, that no such mechanism has been put in place. It is abundantly clear that no such technique is available in the Department.

It is mandatory, considering the foregoing, that this committee explore alternatives which will cure the existing deficiencies of administrative preclearance and would extend the protection currently offered by section 5 to all minorities of the United States, no matter where they may be located.

It is in this context that I now strongly urge that you support the Keady Cochran proposal as found in the forthcoming article in the Kentucky Law Review and, if I am correct, a draft copy of which has been distributed to each member of the committee.

In its broadest outline, their conclusion is that section 5 should be given nationwide application and that the political unit be required to bring a declaratory judgment in a local United States district court for proposed electoral alterations. The amended statute would contain the same requirements as now, with the United States being named the defendant. On filing, appropriate notice would be required to inform interested parties.

It would take two forms. First, publication in local newspapers for three consecutive weeks. Second, actual service of the complaint upon interested persons or organizations which have their names placed in a "permanent registry" maintained in the office of the district court clerk.

In light of the current inability of minorities to have definitive input to the preclearance process as well as the previously stated inability to secure judicial review of a decision not to object, this portion of the Keady Cochran proposal is critical.

The statutory right of intervention by individuals would, among other things, make irrevelant a departmental decision not to object. If the department fails to object and intervention does not occur, an uncontested judgment would then be entered.

The problem with an unusually biased judge would be cured by the provision for an automatic stay coupled with an expedited appeal procedure. I recently had an expedited appeal to the fifth circuit and we were at oral argument, all briefing completed, sixty days after notice of appeal was filed. Moreover, the availability of a statutory right for mandamus would assure that these actions would be heard expeditiously.

The bottom line is that the voting rights act can and should be strengthened to assure effective enforcement. This proposal achieves that goal while at the same time allowing for nationwide application and ending an inefficient administrative procedure. In a candid moment, my friends from Mississippi, many who have testified before you, will admit that the justice department is doing less than a grand job of enforcing the provisions of section 5 of the voting rights act.

They will acknowledge that it is difficult to find fault with the Keady/Cochran proposal. Yet, they fear that any tinkering with the act will result in it being gutted with republican amendments. I hope and I pray that the present administration and my fellow republicans will prove them wrong.

The enforcement procedures of the voting rights act are not written on a sacred scroll. While the principles embodied in the act should be sacred to all of us; for it was through much suffering in my lifetime the gains were made, the mechanism for enforcement should be open for debate as Mississippi changes and as America changes. Innovative ideas on enforcement such as the Keady/Cochran proposal should be welcomed.

Mr. COCHRAN. Mr. President, I know of no other request for leader time on this side of the aisle. I yield to the distinguished Senator from Michigan.

RECOGNITION OF SENATOR COCHRAN

The PRESIDENT pro tempore. Under the previous order, the Senator from Mississippi (Mr. COCHRAN) is recognized for not to exceed 15 minutes.

THE VOTING RIGHTS ACT

Mr. COCHRAN. Mr. President, 3 weeks ago I introduced S. 1761 to amend the Voting Rights Act of 1965 to establish a new preclearance procedure applicable to all 50 States.

Each week since then I have obtained time to discuss some of the provisions and ramifications of this proposal in hopes that Senators would review this suggestion carefully and be advised about the intent and motivation behind it.

It has been stressed that this is a new proposal and has not been previously considered by either the Senate or the other body during previous discussions of the Voting Rights Act.

What distinguishes this proposal from previous suggestions for change to extend application of the law nationwide is that this bill provides for a new procedure for preclearance and vests jurisdiction for administering that procedure in the Federal district courts.

At the same time it does not take away from the Department of Justice the obligation and responsibility to review proposed changes in local election laws. As a matter of fact, the procedure that is incorporated in this bill would require that process be served upon the Attorney General. The political unit, upon proposing to make a local change in an election law, would file an application in the Federal district court for a declaratory judgment. Not only would the Attorney General be made a party to this proceeding but any interested person or group through a representative would as a matter of right be able to intervene and participate in the preclearance procedure.

Sixty days would be provided to the Attorney General within which to consider and review the proposed change and to interpose in the Federal district court any objection to clearance of that change that it might have.

This is similar to the procedure that is now provided whereby the Department is given the sole responsibility for reviewing such changes and within 60 days making a decision to approve or disapprove the change.

Also included in the bill is a provision for expedited handling of these election law changes. If any party is aggrieved at the decision that is reached by the district court, an expedited appeal can be had to the court of appeals.

Some may say upon hearing about this suggestion that this is not anything that we have not considered before. Back in 1975 when this body was debating the Voting Rights Act there was an amendment offered by my State colleague Senator STENNIS that would extend the provisions of the voting rights law nationwide. But there was no provision in that amendment for a new procedure for handling preclearance. It simply presumed that the Department of Justice would be able to handle the increased volume of requests that would necessarily follow from approval of that amendment.

Recognizing that there would be additional work required of the Department and more personnel might be needed, this Senator has suggested that not only should we involve the Department of Justice but also all of the Federal district courts around the land so that we will be sure that whatever workload increase might result could be effectively and fairly handled so that the voting rights, the right of full participation in the political processes of this country, could be effectively protected.

Another difference in the proposal that I am making and the one I have referred to that was considered in 1975 is that there was an effort to repeal section 4 of the Voting Rights Act along with extending application nationwide. Section 4 of the act suspended the use of literacy tests. I am not in favor of going back to a situation where literacy tests or other devices are used to deprive certain citizens of voting rights in many cases simply because they were a minority or in a politically disadvantaged situation.

That section also in addition to suspending literacy tests prescribed a test by which it would be determined which political units and which States would

come under the section 5 preclearance requirements. That test was in effect: First, if there was a literacy test in use and, second, if less than 50 percent of the eligible voter population was not registered or did not vote in previous elections.

My amendment does not tamper with the present section 4 provisions of the Voting Rights Act which now not only suspend literacy tests but on a permanent basis do away with them and also extend coverage to jurisdictions with language minorities.

The bill that I am introducing relates only to section 5, the preclearance section, and extends the preclearance requirement to those States not already covered under the act.

There was another provision in the amendment offered by Senator STENNIS in 1975 which included authority for the Attorney General to establish criteria by which any State or political subdivision might be exempted from the provisions of section 5 and section 6.

There is nothing in the bill offered by this Senator which would provide any exemption whatsoever for any State or any political subdivision.

My proposal would amend section 5 to require all States and all political units to preclear election changes on a permanent basis.

There were some suggestions, Senators may recall, in the other body when the Voting Rights Act was up for consideration several weeks ago for change in the preclearance section. Congressman BUTLER of Virginia offered an amendment that would have vested in district courts jurisdiction to hear applications for a bailout. That was a nationwide change in that his suggestion was that the preclearance procedure should apply nationwide but there be given a right on the part of political units to petition the courts for a bailout. Again, that suggestion differs from the one now before the Senate in that this Senator is not suggesting that any such bailout provision is appropriate.

Another amendment was offered by Congressman HARTNETT. His suggestion was that before the House of Representatives and was rejected along with the Butler amendment attempted to extend nationwide the application of the preclearance requirements, but like the amendment that was before the Senate in 1975, it did not provide any new procedure for reviewing the numerous submissions from the 50 States nor did it suggest any willingness to provide additional appropriations or personnel for the Department of Justice to handle the increased volume of submissions that could be expected from nationwide extension of the law.

Again, then, I am attempting to demonstrate by these references to earlier amendments that neither the Senate nor the House of Representatives has ever fully considered the suggestion that is incorporated in S. 1761.

S. 1761, Mr. President, is clearly an effort to insure that the right of every citizen in every State to vote, to participate fully in the electoral processes of this land, is protected. A procedure for preclearance in Federal courts which have the capability, the expertise, the experience to make fair and just determinations under the rules of due process is suggested by this amendment.

It is my hope that the Senate Judiciary Committee during its hearings will consider this suggestion and, of course, I hope it is found to be a reasonable and workable improvement in the law, not an effort to undermine enforceability, not an effort to lessen the commitment that the Government has, and should have, to protect the voting rights of citizens in this great country of ours.

I noticed in reviewing some of the debate on the bill back in 1975 that Senator Abraham Ribicoff, whom everybody remembers as a champion of civil rights and on the frontlines of many of the early civil rights battles, said this:

> If we are going to solve the dissension in this country, one of the places to start is to make sure there is uniformity in the application of national laws in the 50 States.

This bill is consistent with the hope and challenge laid before this body by Senator Ribicoff. This bill will achieve uniformity under the Voting Rights Act for all 50 States, for all political units in the country, and insure that it does not matter whether a minority voter lives in Illinois or New York or California or Alabama. This right to fully participate in the political processes will be protected by a law that is fair and workable.

But some say, "Well, there is no evidence that there is discrimination, that there are any efforts to prevent that kind of full participation in some of these areas."

Well, if there is not then what is the objection to submitting to the Federal court for an expedited review of election law changes? If there is no discrimination the proceeding will be a summary proceeding. The court will review it. If no objection is made, nobody feels aggrieved by that change, and if it has no effect of depriving anyone of the right of full participation, then the court will approve that change. That is not such an onerous burden. It is a small price to pay, Mr. President, for uniformity in the law, making this law like every other Federal law.

If it is a crime to commit arson in the State of New York, it is likewise a crime to commit arson in the State of Texas. Cite me, if anyone can, any other Federal law that singles out specific political units in this great country of ours and says, "You are under these requirements, these obligations, but all other political units are exempted." I think it should be the goal and the effort of this body, when it goes about formulating our Federal laws, to make sure that they are applied fairly, evenhandedly, and with the same force and effect in one jurisdiction as they are in any other.

Our income tax laws apply evenly and fairly throughout every State and every county of this country even though we do not have a Federal Treasury large enough to pay for enough agents to review individually every income tax return that is filed in this country. But we have before us now a procedure for enforcement of the important provisions of the Voting Rights Act, Mr. President, which can be enacted by this body when it reviews the Voting Rights Act later this year or early next year.

I am hoping that Members will review this suggestion for change and improvement and agree with the Senator that it is time to have a law for the 1980's and not just a law that related to the problems of the 1960's.

I yield back the remainder of my time.

THE VOTING RIGHTS ACT

Mr. COCHRAN. Mr. President, once again, I come before this body to discuss S. 1761, legislation I have introduced to amend the Voting Rights Act of 1965. My bill provides a new preclearance procedure wherety a political subdivision would petition the local Federal district court for a declaratory judgment in order to preclear electoral changes. I have proposed that this procedure be applicable to all 50 States so that the voting rights of all citizens will be protected.

As my colleagues are aware, electoral changes are now precleared by the Voting Section of the Department of Justice. But many of you may not be aware of the mechanics of this procedure or of the many inadequacies with which it is fraught.

Historically, Congress intended that electoral change proposals would be precleared through the Federal District Court for the District of Columbia, which would issue a declaratory judgment if the change were not discriminatory in its purpose or effect. The administrative procedure was added, really as an afterthought, to provide a prompt process for preclearing simple electoral changes. No one anticipated that the administrative procedure would become the main avenue for preclearance. Little attention was given to delineating which changes should be submitted to the court and which to the Department or to the problems that would develop.

In 1977, the General Accounting Office conducted a study of the Voting Section and the preclearance procedure. Its findings were published in its report, "Voting Rights Act—Enforcement Needs Strengthening," in 1978. Additional analysis of the departmental procedure is contained in "Compromise Compliance: Implementation of the Voting Rights Act" by H. Ball, D. Krane, and T. Lauth. I am aware of no more recent or extensive study of the administrative procedure than these.

The Voting Section of the Department of Justice is composed of two units—the Submission and the Litigative Staff—which employed, at the time of the GAO study, 14 attorneys, 13 paraprofessionals, and 2 staff assistants. The Submission Unit, which is the unit responsible for the review of electoral change submissions, consists of one attorney, a paraprofessional director, and 11 paraprofessional positions filled with law students, college graduates qualified for GS 5–10 level jobs, and others. These paraprofessionals, possessing little or no legal training nor demographic or statistical skills, review the preclearance submissions and make the determination whether or not the proposed change has a discriminatory purpose or effect.

The paraprofessional is trained to spot such troublesome changes as at-large elections, redistricting, and changes in the location of polls. Often his investigation is accomplished by telephone calls to onsite persons. Additional information is gathered from minority groups or individuals. The determination by the paraprofessional is then reviewed by the supervising staff.

This procedure of review and determination by paraprofessionals prompted Justice Powell to state:

> No senior officer in the Justice Department—much less the Attorney General—could make a thoughtful, personal judgment on an average of twenty-five preclearance petitions per day. Thus, important decisions made on a democratic basis . . . are finally judged by unidentifiable employees of a federal bureaucracy, usually without anything resembling an evidentiary hearing. (440 U.S. 205 n. 17).

The procedure has also been described by Prof. Howard Ball as a "dual track" process. The first track consists of the review of the submissions and a determination by the paraprofessional, who consults interested persons and minority groups for information concerning the submission. The second track consists of the discussions between the supervising attorney and officials from the submitting jurisdiction. Local attorneys contact the Department of Justice prior to formal submission, which leads to informal approval without local minority participation.

Other problems in the procedure have been identified by the General Accounting Office. In its review, the GAO found that decisions on submissions were being made by the Department without all the data required by the Federal regulations.

Fifty-nine percent of the 271 submission files reviewed did not contain the required data. The GAO also reported that some submission files could not be located and that data inaccuracies limited the use of the Department's computer system.

The GAO was critical of the Department's procedures for soliciting the views of interest groups and individuals. The review of submission files revealed that only 55 percent contained comments by interested groups or persons and only 1 percent of those commenting were advised of the review decision. Interviews with black leaders indicated that 35 percent had no knowledge of the Department's preclearance procedures, 90 percent were not on the mailing list, and 80 percent had rarely or never been consulted by Department personnel.

The GAO cited the Department's difficulty in complying with the 60-day review period as another deficiency and recommended that procedures be developed to insure the prompt review of submissions. The GAO based its recommendations on its finding that, in 6.8 percent of the submissions reviewed, a department decision was not rendered until at least 100 days from the initial receipt of the submission. The GAO further found that over 50 percent of the requests for additional information were made on the 60th days after receipt. A request for additional information tolls the 60-day period. Upon receipt of the requested information, the 60-day period begins to run anew. Over 70 percent of the requests for additional information were made at least 55 days after receipt, and only 2 percent were made within 30 days.

Finally, the GAO was critical of the Department's failure to develop formal procedures for identifying jurisdictions not submitting voting changes, informing jurisdictions of their responsibilites to preclear, and determining whether jurisdictions are implementing election laws over the Department's objection.

Mr. President, certainly these problems and deficiencies in the administrative preclearance procedure that I have just cited justify the consideration by this body of an alternative mechanism for insuring the voting rights of our citizens. Complex legal determinations are being "processed" by paraprofessionals who lack legal or other special skills and many times, the factual data required by the regulations. Files have been lost and computer data is inaccurate. Minority participation is minimal and a "dual track" system seems to limit further the opportunity for minority groups or persons to have input into the preclearance procedure. Review of submissions extends well beyond the 60-day period permitted, and requests for information have become a tactic for further delay.

Mr. President, what was envisioned as a system for prompt preclearance of simple submissions has become a quagmire of voluminous submissions requiring the collection and evaluation of complex political, social, and legal data with personnel too limited in number and skills to adequately and properly do so. But additional personnel alone, I submit, cannot resolve the problems of administrative preclearance.

What is required is the expertise of our Federal court system, and I propose that we utilize it. My proposal would provide an expedited procedure in Federal district court for the review of preclearance submissions.

Federal judges, experienced in the review and evaluation of complex issues, would determine whether or not a proposed electoral change has a discriminatory purpose or effect. The Department of Justice, served with process as the defendant in the declaratory judgment action, would still have 60 days to review the submission and interpose an objection, or make a request for additional information. Interested persons or groups would be notified of the submission and permitted to intervene as a matter of right. While many of these provisions are the same as the current administrative practice, the difference is that they will be supervised by the court.

Mr. President, I urge my fellow Senators to give careful consideration to my proposal. If the Judiciary Committee holds hearings, I hope the Members will undertake a review of the current administrative procedures and the new procedure that I have offered.

RECOGNITION OF SENATOR COCHRAN

The PRESIDING OFFICER (Mr. ANDREWS). Under the previous order, the Senator from Mississippi (Mr. COCHRAN) is recognized for not to exceed 15 minutes.

THE VOTING RIGHTS ACT

Mr. COCHRAN. Mr. President, I have been addressing this body for several weeks now about legislation I have introduced, S. 1761, to amend the Voting Rights Act of 1965.

The purpose of this amendment is to assure the nationwide protection of voters' rights by making available a preclearance procedure in every State. Political subdivisions would be required to apply for a declaratory judgment in local Federal district court for the preclearance of any change in election or voting laws. The United States would be the named defendant, and process would be served upon the Attorney General. The Department of Justice would have the normal 60-day period to answer and interpose an objection if it believes the change is discriminatory. All interested persons or groups would be notified of the action. The bill also provides for an expedited proceeding, including a priority setting in district court and an automatic stay on appeal.

At the time I introduced this bill, I pointed out that the proposal was developed by William C. Keady, chief judge for the Northern District of Mississippi, and George C. Cochran, who is on the faculty of the School of Law at the University of Mississippi, in an article to be published soon in the Kentucky Law Journal, Volume 69, No. 4, 1980–81.

Mr. President, the Keady/Cochran article, entitled "Section 5 of the Voting Rights Act: A Time for Revision," provides an extensive historical background of the development of the act and, in particular, section 5. It discusses the operation and impact of section 5, well-documented with statistical data. Finally, it develops the new preclearance proposal, introduced now as S. 1761.

Mr. President, I ask unanimous consent that excerpts from this article, with footnotes and exhibits being omitted, be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

SECTION 5 OF THE VOTING RIGHTS ACT:
A TIME FOR REVISION
(By William Colbert Keady)

The Voting Rights Act of 1965 represents significant legislation which, notwithstanding certain limitations, has given life to the fifteenth amendment. Experience under the Act, and in particular Section 5, shows that despite the assault upon our federalism, affected jurisdictions have not suffered from its enactment but have in fact been strengthened politically on account of greater electoral participation on the part of minority voters. Furthermore, there is every reason to believe that the beneficial effects of this legislation would insure to the advantage of all jurisdictions to which it would be applied. The time has come to lay aside arguments concerning which region of our country has the worst record of excluding minorities from the political process. The Republic, given its historical pursuit of equality, can have no greater source of strength in the future than that deriving from the nationwide eradication of discrimination in matters of franchise.

The purpose of this article is not to laud the Voting Rights Act as ingeniously conceived legislation for preventing disenfranchisement of minorities; nor is it to condemn Congress for enacting and maintaining this regional legislation based in large measure upon findings made in 1966. It is also not the authors' intent to become ensnared in the ongoing dialogue concerning matters such as substantive interpretations given Section 5 by the courts and the Attorney General. Furthermore, it is not the authors' wish that this discussion have the taint of past efforts which utilized the rhetoric of "nationwide application" as a vehicle to rid Section 5 of its vitality. Rather, we believe there is much to be learned from the past sixteen years and that this experience, if correctly evaluated, clearly justifies the continuance of Section 5's preclearance requirement, a requirement, however, which should be administered by the judicial system created under Article III of our Constitution.

Thus, this article is designed to proffer two explicit propositions: (1) Congress should amend Section 5 to provide for nationwide application; and (2) Section 5's procedural mechanisms should be revised to discard both a seldom used judicial remedy and a cumbersome administrative procedure and to replace them with a judicial remedy in the United States District Courts under conditions guaranteeing expeditious resolution of Section 5 preclearance requirements.

I. THE OPERATION AND IMPACT OF SECTION 5

As originally enacted, Section 5 prohibited certain states and their political subdivisions from enacting or seeking to administer "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" without advance federal approval. The Act was amended in 1970 to extend to political units which maintained a "test or device" with respect to voting and in which less than fifty percent of the eligible voting population registered or voted in the 1968 election. In 1975, the Act was further broadened to include jurisdictions with more than five percent language minorities which, as of November 1, 1972, had election materials printed in English only and in which less than fifty percent of the voting age population registered and voted in the 1972 presidential election.

With a legislative history indicating that the term "procedure" was considered "to be all-inclusive of any kind of practice" relating to voting, the United States Supreme Court has, beginning with *Allen v. State Board of Elections* in 1969, given the Section broad and wide-ranging scope. Since the Act was designed to preclude "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," Section 5 scrutiny is triggered if the change or modification has "a potential for discrimination." Thus, the purpose for enacting a change in

voting is irrelevant to a determination of whether the state or subdivision must comply with Section 5 and federal preclearance must be had even if the legislation or other change was enacted for the purpose of complying with the Act. Section 5 preclearance must be met whether the change is one in polling places, candidate qualifications, boundary alterations, reapportionment, redistricting considerations, changes from ward to at-large elections, alterations in procedures for casting write-in ballots, or even with respect to a requirement that public employees take unpaid leaves of absence when campaigning for elective office. Indeed, there would seem to be few state actions which relate to the electoral process that would not be subject to the proscriptions of Section 5.

Pursuant to Section 5, voting changes are not given effect until the political unit in question receives a declaratory judgment in the United States District Court for the District of Columbia "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Alternatively, the state or political subdivision may submit the proposed change to the Attorney General and enforce the new voting practice if no objection to the proposal is entered within sixty days after submission. If neither action is taken prior to implementation, private parties or the Attorney General may bring suit before a local three-judge district court to enjoin enforcement. In the latter instance, the sole issue to be addressed is whether the enactment is subject to Section 5; the district court is not empowered to determine whether the change has a discriminatory purpose or effect.

The Act itself, in conjunction with a Section 5 preclearance requirement which is both "unusual, and in some respects . . . severe," has produced startling results in the jurisdictions to which it applies. An analysis of black voter registration in the six states covered by Section 5 since its inception reveals . . . dramatic increases. . . .

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1978 data shows that the South fares not significantly worse, and in some instances better, than any area of the nation with regard to the difference between black and white voter registration. . . .

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Furthermore, preliminary information concerning 1980 registration indicates that while 8.4 percent fewer blacks than whites registered throughout the entire country, the registration difference was only 6.9 percent in the South.

The extent of black voting strength is perhaps best reflected in the numbers of black elected officials within the jurisdictions subject to Section 5. From 1974 to 1980, there was an increase of 63.5 percent in the number of black elected officials nationwide. In four of the six states that have been covered by Section 5 since 1965, however, the increases were much higher.

Indeed in 1980, Mississippi had the highest number of such officials of all states in the nation, and Louisiana was second. If the analysis is directed toward per capita black elected officials, i.e., ratio of black elected officials to black population, it is significant that three of the six affected states rank among the nation's ten highest in this regard. Finally, the positive impact of Section 5 is perhaps best demonstrated by the startling fact that a majority of white [congressional] representatives from the American South supported" extension of the Voting Rights Act in 1975.

The preclearance mechanism has undoubtedly served to effectuate the right of minority voters to participate in the electoral process by identifying and preventing both obvious and subtle attempts to prevent electoral participation solely on the basis of race. Moreover if preclearance were eliminated, it is probable that local and state governments would reinstate voting procedures which would irreparably harm black citizens and other minorities by impinging, directly or indirectly, upon their right of suffrage. The manner in which preclearance is currently implemented, however, should be cause for concern. The requirement should and must be extended to the remainder of the United States. In addition to retaining this requirement which has proved so effective in a limited portion of our country, such action would serve to insure that the proscription of disenfranchisement provided by the fifteenth amendment becomes a reality for minority voters nationwide.

II. PRECLEARANCE IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA: DESIRE FOR UNIFORMITY AND MISTRUST OF SOUTHERN JURISTS

The principal rationale offered for the original decision in 1965 to limit jurisdiction of Section 5 declaratory judgment actions to a three-judge district court in the District of Columbia was to insure uniformity of interpretation. Although not a single suit had been filed in the court seeking a declaratory judgment concerning the purpose or effect of a voting change, the uniformity justification was again relied upon five years later when Section 5 was renewed as originally enacted. Congressional critics, however, began to emphasize the weak underpinnings of the rationale. Senator Ervin, for example, unsuccessfully seeking to divest the court of plenary jurisdiction by means of amendment, argued:

There were many specious reasons given at the time of passage of this bill for denying all courts jurisdiction except the District Court of the District of Columbia. One was that we needed uniform interpretation. That was a specious reason, because we have 10 separate and district U.S. courts of appeals sitting in the 10 circuits handing down, in some cases, different interpretations of the law and those interpretations are ultimately made uniform by appeals to the Supreme Court of the United States.

By the end of 1974 only five suits had been filed, resulting in three publishde opinions. Despite meager judicial activity, proponents for retention of the District of Columbia court as the only viable judicial avenue for preclearance maintained that "the United States District Court for the District of Columbia [is an] expert in the area, ha[s] developed familiarity with the impact of discriminatory voting systems," and "has built up a degree of expertise on the Voting Rights Act that is invaluable." The response of legislators to suggestions that Section 5 jurisdiction be expanded to all United States District Courts because of minimal utilization of the District of Columbia forum, however, revealed an assumption implicit in the Act as expressed by Senator Tunney of California:

"I might say, in all honesty . . . I think that in the area of civil rights there is a great deal of peer pressure on judges in the South. . . . I think there is a lot of peer pressure, and I would only have to point to the fact that recently the Supreme Court unanimously reversed a three-judge court in Mississippi that had approved a reapportionment measure . . ."

The response by Senator Morgan of North Carolina to Senator Tunney's implicit attack upon the competence and integrity of Southern jurists was direct and emotional:

"For the Senator from California . . . to stand here and say that the judges—to indict the Federal judiciary in the South, is beyond my imagination.

"And for the Senator to say that just because the Supreme Court reversed a decision of a three-judge panel in Mississippi is an indictment of the Federal judiciary in the South which, again is beyond my comprehension, and I resent it. I resent it."

During the House debates, Representative Kindness introduced an amendment to divest the District of Columbia court of sole jurisdiction. His argument that there was "no particular expertise built up" by that court was successfully countered by responses citing the "need for uniformity" and remarks making reference to the Supreme Court reversal of the three-judge court in Mississippi. There was, however, yet another justification proffered which, until that time, remained undisclosed. As articulated by a major advocate of retaining Section 5 without amendment:

"[T]he Department of Justice desires to centralize all litigation about this matter right here in the District of Columbia. . . . The Department of Justice in this and other areas of national importance feels that they should build up a body of jurisprudence right in the District of Columbia and it is they, more than the civil rights group, that really want to locate this here, rather than the regional aspects."

An examination of the relevant statistical data evinces the speciousness of this explanation and those that preceded it. During the years 1975 through 1980, only eighteen suits for declaratory relief were initiated, resulting in seven published opinions. Thus, after fifteen years of experience with the Act, only twenty-three suits have been filed, ten of which resulted in published opinions. It is therefore apparent that the quest for "uniformity" has never been realized, and the resulting "expertise" justification with respect to adjudicating "purpose or effect" transgressions can only be considered a myth.

More important, the pattern established by covered jurisdictions of avoidingg the District of Columbia court during this sixteen-year period demonstrates that there is not, in fact, a functional judicial remedy for those situations where these jurisdictions have either refused or been unable to submit to the preclearance process of the Department of Justice. Such factors as time, distance, expense and other logistical burdens, or a notion of the futility of invoking such a judicial remedy may, collectively or individually, compel affected jurisdictions to refrain from utilizingg an isolated segment of the judicial system. Practically speaking, therefore, judicial review is not presently a feasible alternative. Consequently, the legislative processes of over 7,000 political subdivisions are now subject to the virtually unreviewable decision-making process within the Office of the Attorney General of the United States. As we shall see, the history and current status of this administrative process demonstrates the compelling need for its elimination.

III. ADMINISTRATIVE PRECLEARANCE: THE BIRTH AND EVOLUTION OF A CONGRESSIONAL AFTERTHOUGHT

As originally proposed, preclearance was to be limited to declaratory relief before a three-judge court in the District of Columbia. In the wake of headings before a House Subcommittee, however, several legislators expressed concern over the probability of delays if this procedure were to be the sole avenue of relief for jurisdictions subject to Section 5. Since validly enacted laws would be suspended pending declaratory relief, the consensus of opinion was that if such "drastic effects must be visited" on covered states, "resolution of this class of cases should be handled expeditiously [sic]."

Testifying before the Senate Judiciary Committee, Attorney General Katzenbach recognized the tensions which result from state laws being held in such a lengthy

state of suspended procedure and ordered a remedy in the following 5 steps:

"Senator EVIN. It seems to me that is a drastic power which can hardly be reconciled with the federal system of government. . . ."

"Attorney General KATZENBACH. I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

"Now, there may be better ways of accomplishing this. I do not know. If there are. There are some here I can imagine. A good many provisions of State law, that could be changed that would not in any way abridge or deny the right. . . . except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens."

Attorney General Katzenbach's suggestion of vesting the Attorney General with such discretion apparently impressed Congress for the committee bill incorporated the 60-day administrative preclearance provision which—without further debate on the issue—became a permanent and the most important segment of the Voting Rights Act. Its function may be best described as an "afterthought. . . . a practical way to avoid the onerous task of preparing and filing a lawsuit in the District of Columbia." It soon became apparent, however, that such administrative preclearance was fraught with difficulties which were not and could not have been anticipated in 1965.

The 1970 congressional renewal hearings provided a forum for discussion of problems encountered during the first five years of the Section's operation. The major criticisms centered around administrative burdens resulting from the unexpected number of submissions to the Department of Justice and the potentiality that political considerations might enter into the Department's decision-making process. With regard to the former, Assistant Attorney General David Norman, one of Section 5's original drafters, expressed doubts as to the "effectiveness" of administrative preclearance because of the Attorney General's inability to apply purpose or effect criteria to current submissions, ever-increasing demands on limited personnel to make extensive, independent investigations of all submissions, and the deluge of inconsequential changes submitted pursuant to the expansive interpretation accorded the Act in Allen.

Prior to the Supreme Court's broad interpretation of Section 5 set forth in Allen, neither the Department of Justice nor the affected jurisdictions were certain of the parameters of the Section. The immediate impact of the ruling was therefore significant. In 1968, the year prior to the decision, there were only 110 submissions for preclearance to the Department; for 1970 that number had more than doubled to 255.

Ostensibly as a response to these administrative burdens, Attorney General Mitchell presented a Nixon Administration bill to amend Section 5 to abrogate preclearance, both administrative and judicial, and vest the Department of Justice with sole power to invoke the jurisdiction of local three-judge courts nationwide when there was "reason to believe" that a "standard, practice or procedure with respect to voting . . . has the purpose or effect of denying or abridging the right to vote" on the basis of race. Mitchell stressed the inefficiencies of administrative preclearance and contended that the Department not only was unjustifiably influenced in making informed judgments with respect to discriminatory effects but was also unable at that time, to monitor and secure submission of all changes.

Furthermore, the Attorney General argued that the need for conducting extensive investigations prior to making a determination hindered the Department in its effort to perform the tasks required of it under Section 5. Thus, Mitchell's testimony can be perceived as an attempt to establish two points: (1) the impropriety of vesting what is essentially a judicial function in an administrative body not accompanied by procedural or due process safeguards; and (2) the idea that no sensitive lawmaker "would . . . have [designed Section 5] as it [is] structured because . . . the process provided under which the Attorney General must make a decision are not adequate. They result in arbitrary decisions without sufficient information."

Congress found Mitchell's contentions unpersuasive, perhaps in large measure on account of suspicions of legislators that considerations of a purely political nature served as motivation for the Administration's proposal. The tenor of the Nixon Administration and its perceived hesitancy to enforce vigorously the Voting Rights Act served to bring to mind views expressed in 1965 in opposition to the Act:

"[W]e view with much concern the broad discretionary powers placed in the hands of the Attorney General. . . . Without suggesting any criticism of the present incumbent, we foresee a multitude of opportunities for political manipulation by an Attorney General who is inclined to do so. This is especially true since in recent times several Attorneys General, Republican and Democrat, have been closely tied to the political campaigns prior to their taking office. Of all the grants of authority to the Attorney General . . . including the ability to consent to the entry of declaratory judgments . . . , it does not require a great deal of imagination to see that the authority to approve or disapprove State laws stands out as the power most subject to abuse."

Such concerns surfaced in the disapproval of the Department's handling of Section 5 one year later when the House Civil Rights Oversight Subcommittee held hearings in response to complaints that "the Attorney General has failed . . . to carry out the intent of Congress, and has disregarded recent Supreme Court decisions protecting the right of all Americans to exercise their right to vote." At the outset, fears of political manipulation were voiced in light of the fact that no suits had been filed with the District of Columbia court, and it appeared more than possible to Subcommittee members that covered jurisdictions had reason to believe they would receive more "sympathetic consideration" from the Attorney General. David Norman, who one year earlier expressed concern as to Section 5's effectiveness, was again the Administration's chief spokesman.

Norman countered the legislators' suspicions by explaining that any maladministration resulted from the increased burdens upon the Department arising from the broad construction of Section 5 mandated by Allen and the fact that many submissions raised complex issues dealing with "reapportionment, redistricting and . . . annexation[s]" which would "best be treated in the courts." Responding to the latter point, Congressman Wiggins recalled that administrative preclearance "was intended to permit an expeditious, prompt response on behalf of a State submitting a relatively minor problems and thus avoid unnecessary court delays" while it was "contemplated that complicated issues . . . would be resolved in the District Court for the District of Columbia." Conceding that Wiggins' understanding "might have been discussed around the halls of Congress," Norman noted that "Congress didn't authorize the Attorney General to decide that this thing is tough and, therefore, it ought to go into court."

As a solution to the problem, he noted that the Department was considering proposing an amendment to Section 5 providing for an initial clearance of submissions before hearing examiners, with judicial review in a court of appeals under procedures authorized by the Administrative Procedure Act. Subsequently, however, a representative of the Civil Rights Commission expressed his disapproval of this proposal on the ground that it would "create a very time-consuming, very dragged-out administrative procedure."

At the close of the hearings, the House Subcommittee could arrive at only one solution—to force political subdivisions to engage in the "onerous task of preparing and filing a lawsuit in the District of Columbia." This proposal mirrored that of the Director of the Civil Rights Commission, who suggested that "when questions [of preclearance] get that complicated . . . the Attorney General should just interpose an objection and allow the [covered] jurisdiction to go to court in the District of Columbia and resolve it in [that court]."

Such an approach, however, presented the Subcommittee with a dilemma inasmuch as this procedure could be conducive to even greater delay and therefore contrary to the Act's purpose. This problem was resolved by the determination that the burden should be placed upon the submitting authority since "[c]overed jurisdictions [are] supposed to avail themselves of the faster route to preclearance only when the submitted changes [are] readily assessable as nondiscriminatory." Finally, the Report concluded that the Attorney General had failed to implement properly the preclearance procedure and that complaints of the Act's unenforceability would subside if the burden of proof were placed squarely on the shoulders of the submitting jurisdiction. The Attorney General's regulation placing the burden of proof upon affected jurisdictions utilizing the administrative preclearance procedure as in declaratory judgment suits in the District of Columbia court, was subsequently upheld by the Supreme Court in *Georgia v. United States*.

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Concern with the efficacy of administrative preclearance outlined above remain viable today. An examination of data from the past six years reveals a steady increase in the rate of submissions accompanied by a constant decrease in the percentage of objections.

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Indeed, the deluge of submissions provoked the following analysis by Justice Powell:

"[N]o senior officer in the Justice Department—much less the Attorney General—could make a thoughtful, personal judgment on an average of twenty-five preclearance petitions per day. Thus, important decisions made on a democratic basis . . . are finally judged by unidentifiable employees of a federal bureaucracy, usually without anything resembling an evidentiary hearing."

As noted earlier, the limited judicial review afforded covered jurisdictions has resulted in a restricted utilization of that alternative. Furthermore, administrative review of Section 5 submissions often takes place in the face of approaching elections whose occurrence is contingent upon the Department's determination. These realities combine to render crucially important the decisions made by these "unidentifiable em-

ployees" of the Justice Department. This process is equally critical to the interests of minorities in light of the plenary authority afforded the Attorney General's decision. Under the Supreme Court's decision in Morris v. Gressette, the decision of the Department is not subject to review. With respect to a decision not to object to a proposed electoral adjustment, "it matters not whether the Attorney General fails to object because he misunderstands his legal duty . . .; because he loves the submission, or because he seeks to subvert the Voting Rights Act" for, under all circumstances, the decision is unreviewable.

With the Department's decision-making process now virtually immune from judicial intervention, it is critical that the procedures employed by the Department in performing the preclearance function be closely evaluated. As a congressional "afterthought", this delegation of authority is practically without legislative history. It is nonetheless indisputable that present administrative practices are markedly divergent from those which could have been reasonably foreseen by Congress in 1965.

The Department has adopted the same standards for review as those employed by the District of Columbia District Court in declaratory judgment actions. As such, the administrative preclearance procedure now requires review of the multitude of political, social, economic and legal criteria employed by that court to determine whether the purpose/effect standard has been met. To amass pertinent information and evaluate its content, the Department maintains within its Voting Rights Section a "submission unit" which has primary responsibility for the preclearance process. This unit consists of one attorney, a paraprofessional director and eleven paraprofessionals, sometimes referred to as paralegal analysts, and is instructed to look for "suspicious type changes" which include "at-large elections, reductions in the number of polling places, changes in the location of polling places and redistricting." Among the staff's responsibilities is investigation of motive and impact, which in turn is largely accomplished by "telephone calls to on-site persons." Information independent of the submission is gathered from minority interest groups and other interested individuals within the submitting jurisdiction, and in turn assimilated in a decision-making process relying upon "the preparation and analysis of . . . demographic and legal information [which] is in the hands of paraprofessionals who possess neither demographic/statistical skills nor legal training." Thereafter, the paralegal assistants make the "initial (and normally upheld) determinations with respect to whether or not the proposed change has a discriminatory purpose or effect."

A recent review of the submission unit's performance by the Government Accounting Office (GAO) revealed that "58 percent of [sampled] changes . . . did not have all data required by Federal regulations." In addition, the inefficiency of the unit was found inasmuch as "some submission files could not be located and data inaccuracies . . . limited the use of the Department's computer system which maintains data on identified changes." Indeed, a GAO representative testified that staff members "have no way of managing the data they get in from the jurisdictions; who reported—who gave their objections, who submitted submissions, who made changes that they didn't submit."

Utilization of a "permanent registry" (a compilation of individuals and groups interested in submissions) and other techniques for obtaining relevant information from minority groups was likewise found inadequate. After noting that a review of 271 randomly selected submissions showed that only fifty-five percent contained comments by interested groups or persons, the Report commented upon the followup with respect to those groups or persons: "[T]he Department's [own] records showed that individuals or groups commenting were informed of the review decision in less than 1 percent of the cases sampled.

"Consequently, minority groups and individuals may not have adequate information to detect changes implemented despite the Department's objections." Similarly, responses from a sampling of minority interest groups as to their impressions of the effectiveness of Section 5 revealed the following: thirty-five percent had no knowledge of Department preclearance procedures; ninety percent were not on the mailing list, and over half were unaware of its existence; twenty-five percent knew of significant changes that had not been submitted; and eighty percent had rarely or never been consulted by Department representatives. Indeed, "[t]his sense of removal from the decision process was reinforced by the minority respondents' belief that [Department] approval of changes opposed by minority leaders was a more important problem than a covered jurisdiction's failure to submit.

Given the fact that an immense number of submissions are received by the Department and must be reviewed by a small number of personnel within only sixty days, each passing day becomes critical. Although in *Georgia v. United States* the Supreme Court agreed with the Department's argument that the 60-day period may be tolled by a request for additional information, the process has been described as "hectic, with letters usually being mailed at the last possible moment," and the request for additional information is often reserved as the Department's "trump card." The GAO Report made corroborative findings as follows:

"[I]n about 6.8 percent of the submissions reviewed, a Department decision was not rendered until at least 100 days from the initial receipt of the submission.

"Despite [the requirement that submissions be handled expeditiously] over 50 percent of . . . requests [for additional information] were made on the 60th day after receipt of the initial submissions, over 70 percent were made at least 55 days after receipt, and only 2 percent within 30 days.

"In over 50 percent of the cases reviewed, the Department did not notify jurisdictions of its decision until at least 56 days after it had complete information. Notification was given within 30 days for fewer than one out of every six changes."

In addition to the GAO Report, several reported decisions confirm the fact that the Department has encountered difficulties in complying with the time limitation. Not only have objections been imposed on the last day, but the Department has found it necessary to argue, unsuccessfully, that Georgia allows tolling periods for more than one request for additional information.

Although it has expended a great deal of professional energy in other areas, the Department remains plagued by the continuing serious problem of covered jurisdictions failing to preclear all voting changes. The GAO Report's conclusion on this issue is unmistakably clear:

"The Voting Rights Act has been in effect for over 12 years, yet there is little assurance that covered States and localities are complying with the act's preclearance provision. We found that the Department of Justice had limited formal procedures for determining that voting changes were submitted for review as required by the act or for determining whether jurisdictions implemented changes over the Department's objection."

The Report also reveals that the Federal Bureau of Investigation "identified 102 unsubmitted changes [on behalf of the Department] of which 60 were still unsubmitted as of October 1976. Moreover, although "[the] Attorney General objected to 257 of the reported 18,433 submissions . . . the Department has not initiated formal monitoring procedures for making sure that jurisdictions do not implement a voting change over the Department's objection." A study paralleling that of the GAO indicates that perhaps the GAO Report even understates the problem. Continuing activity in the lower courts dealing with unsubmitted changes and a compilation by former Texas Representative Barbara Jordon listing sixty counties and 170 Texas cities which have never submitted a change evince the fact that the problem of unprecleared changes is a significant one.

There is also a growing sense of frustration by those who perceive that the required adversarial and investigatory nature of the Department is becoming increasingly debilitated by "professional" relationships established between Department attorneys and local officials. Those who take this point of view perceive a negotiating process between "fraternal professionals" which, while conducive to Section 5 compliance, results in enforcement at a "suboptimal level." The problems posed by this relationship are indicated in this discussion of the process:

"[T]he almost unanimous selection by covered jurisdictions of the administrative procedure option . . . when they seek to comply with the preclearance requirement is indicative of their preference for the kinds of outcomes which are obtainable through the lawyer-bureaucrat bargaining process. These enforcement practices when coupled with the inability of the Department of Justice to detect many of the unsubmitted voting changes, or to follow up effectively to make certain that jurisdictions do not implement changes to which the Department had [sic] objected, suggest an enforcement pattern in which state and local governments retain a considerable amount of discretion over the manner in which they exercise their reserved power to conduct elections."

The Civil Rights Commission lends credence to this conclusion when it states that while it is "evident that minorities still need the protection of the Voting Rights Act," the unfortunate "lack of enforcement by the executive branch of Government" remains a problem.

The nationwide aspects of voter discrimination have also affected the Department's activities in the last five years. Responding to a portion of the critique by the GAO as to the manner in which it utilizes its professional resources, the Department pointed out that since "Section 5 does not reach all jurisdictions . . ., litigation is required to challenge *many* dilutive apportionment plans." It noted that four constitutional dilution suits had been filed since 1976, that sixteen were under "serious investigation" and that a study had been completed of "40 northern and western states to uncover dilution problems." As a result, an investigation of "three northern cities" was soon to be undertaken.

IV. THE PROPOSAL

The most salient conclusions to be derived from the foregoing examination are easily summarized. First, the present avenue of judicial preclearance is totally inadequate. Second, the administrative preclearance alternative has sufficiently served the interests of neither covered jurisdictions nor minority citizens. Third, both methodological weaknesses and political vulnerabilities of the administrative remedy render the decisions of the Attorney General highly suspect from the viewpoint of covered jurisdictions and minority citizens alike. Fourth, as statistics have shown, an ever-increasing rate of submissions for preclearance can be expected in the future. This burden will remain in-

surmountable if the Department continues in its role as the only viable avenue for preclearance, a state of affairs incompatible with the expeditious, considered treatment envisioned by the formulators of the remedy. Fifth, the problem of unsubmitted changes continues unabated and the Department appears unable to devise a monitoring mechanism capable of assuring compliance with the Act. Finally, the question whether covered jurisdictions implement electoral changes despite objection from the Attorney General remains unanswered.

The Department was surely correct when, in responding to the GAO Report, it argued that too much was being expected from the Voting Rights Section and that the Act, as presently structured, "relies to a considerable extent on voluntary action by the covered jurisdictions" as well as "private lawsuits [for] effective enforcement." Indeed, such conclusions merely restate in another form a critique made by a staff attorney nearly a decade ago who, after reviewing the judicial construction given Section 5, concluded that "the Attorney General [was] playing a role in [its] enforcement . . . far beyond that originally envisioned."

Despite the serious flaws evident in this procedure, however, they in no way detract from the fundamental proposition that the social benefits generated by the preclearance requirement clearly outweigh its present inadequacies. Indeed, the mere presence of preclearance has a deterring effect on public officials who, but for its existence, would be far less concerned with avoiding discriminatory actions resulting in impediments to the effective utilization of the franchise by minorities.

It is the authors' proposal that, with the exclusion of states or political subdivisions having a de minimis percentage of minorities, Section 5 be amended to provide for nationwide application and that political units be required to bring a declaratory judgment action in local United States District Courts for preclearance of electoral alterations. The amended statute would provide that any state or political subdivision desiring to implement a voting change having a "potential for discrimination," be required, prior to such implementation, to file a complaint naming the United States as a defendant in the United States District Court for the judicial district in which the submitting jurisdiction is located. The relief sought would be identical to that currently found in Section 5 proceedings, namely, a declaration that the proposed change does not "have the purpose and will not have the effect of denying the right to vote on the basis of race or color." The burden of proof would continue to fall upon the submitting political unit.

Upon filing the complaint, appropriate notice would be required to inform interested parties other than the United States that the political unit is propoaing a change within the scope of Section 5. This notice should take two forms: first, publication in local newspapers for three consecutive weeks; and second, actual service of the complaint upon interested persons or organizations who could have their names placed in a "permanent registry" to be kept in the office of each district court clerk. Any person residing within the political subdivision or any organization existing therein desiring to object to the proposed voting change would be allowed to intervene as a matter of right within sixty days after publication or receipt of the complaint.

Appended to the complaint should be that information now required by regulation issued by the Attorney General. The United States would be allowed sixty days to answer, with a tolling of the period occurring after one request for additional information. This tolling period would also apply to private parties, and any supplemental information provided to the Department would be served on those persons or organizations resolving the complaint. If the United States fails to answer, and if no person or organization intervenes within the specified period, the court would enter an uncontested judgment allowing the jurisdiction to implement the proposed change. The rendering of such judgment would not, however, preclude subsequent constitutional challenges. Obviously, the judgment could be set aside as provided in Federal Rule of Civil Procedure 60(b), in which event the action would be calendared for trial as though the allegations of the complaint had been controverted in the first instance.

Preclearance actions would be given a priority setting in the district court, with a statutory right of mandamus available to insure promptness, e.g., sixty days after the Section 5 issue is joined. Decisions adverse to the United States or intervening parties should be automatically stayed upon filing notice of appeal, with an expedited appeal granted as a matter of right. Expedited appeals should also be granted to submitting jurisdictions desiring review of adverse Section 5 decisions.

Moreover, if the defense should include constitutional counterclaims, the Section 5 portion would be separated from other issues which may be reserved for later determination. In any case, resolution of the Section 5 issue would be appealable by the aggrieved party on an expedited basis as an interlocutory order. Where the appellant or appellants are private parties, a cost-free transcript would be provided. Appellate courts should handle Section 5 appeals on a priority identical to that currently afforded criminal [illegible].

The authors are convinced that the proposal and suggested guidelines for its implementation would facilitate more expeditious and thoughtful resolution of the questions surrounding Section 5 changes in voting matters. In the first place, it is likely that many petitions filed under the revised procedure, absent any objection, can be disposed of summarily. In such cases, federal preclearance would be expeditously obtained, with the political unit free to implement the voting change upon reasonable notice to the public. The proposed amendments would also allow a local district court to determine all statutory and constitutional issues in one lawsuit, something that is now forbidden by Section 5. Moreover, if the latest Department of Justice compilations are empirically sound (51 objections out of 7,360 submissions in 1980), the minimal increase in caseload for the federal judicial system which this proposal would bring about is surely a small price to pay for a procedure which insures more meaningful participation by affected minorities in the electoral process.

Resolution of Section 5 conflicts would be further expedited under this proposal since the burdens heretofore placed upon the Department will be shared with those most affected by the Act, namely, minority voters. Given the broad provision for intervention of outside parties, the protection of minority interests will no longer hinge upon determinations made by "unidentifiable employees" within the office of the Attorney General. Moreover, with the United States retained as a defendant, the expertise and experience of those attorneys in the Voting Rights Section can be employed where they are most needed: in complex matters such as annexations, reapportionment and redistricting which "account for over two-thirds of . . . Section 5 objections." Finally, the provision of an automatic stay coupled with the right to an expedited appeal renders any decision adverse to the United States or intervening minority parties by a "biased forum" totally meaningless since no change can be implemented until it receives appellate approval.

An award of attorneys' fees is also critical to effective implementation of the proposal. Since "Congress depends heavily upon private citizens to enforce the fundamental rights involved," the 1975 amendments included an incentive for private parties to bring meritorious actions by allowing a court to assess a reasonable attorney's fee in such actions. This provision derives from the recognition that "[f]ee awards are a necessary means of enabling private citizens to vindicate these Federal rights." The Committee studying the proposed amendments found that "fee awards are essential if the Constitutional requirements and federal statutes . . . are to be enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance."

As the Second Circuit noted:

"Attorneys' fees are awarded to recompense those who by helping to protect basic rights are thought to have served the public interest. A principal purpose of the legislation is to encourage people to seek judicial redress of unlawful discrimination.

"In short, imposition of full attorneys' fees is a useful and needed tool of the court to fully protect plaintiffs' rights as American citizens and voters. . . ."

It must be noted, however, that the attorneys' fees provision is a two-edged sword inasmuch as fees may be imposed against a private party, or his attorney, if intervention is found to be "frivolous, vexatious or brought or maintained for harassment purposes." The attorney fee provision therefore operates to make certain that frivolous litigation will be minimal while at the same time encouraging the initiation by private parties of well-founded claims of discriminatory disenfranchisement.

Finally, this proposal contemplates that the problem of noncompliance with the Act be addressed in traditionally equitable terms, thus forcing political units to realize that such failures to obey the law inevitably pose threats of dire consequences both to the political unit and its citizens. Furthermore, it would seem that this problem will diminish because of two considerations. First, as noted earlier, there is presently minimal participation by minorities in the preclearance process as currently structured by the Department of Justice. Under the proposal, a substantial measure of participation by minorities in the process should result in a "brooding presence" ever ready to raise the noncompliance issue in a readily-accessable forum. Second, familiarity with the local district court as the forum in which all disputes may be resolved by traditional means as opposed to the current alien and distant administrative remedy should enhance participation in the preclearance process.

V. CONCLUSION

The federal judiciary has historically been the guardian of the constitutional rights of all citizens. In that capacity, no more important business concerns the courts than the vital function of shielding from unlawful state action every citizen's right of franchise. It is time—indeed long past time—to invoke the full authority of federal juages throughout the United States in an effort to realize the fundamental objectives of Section 5. The process of administrative preclearance represents an unfortunate failure on the part of the Congress to utilize that segment of government traditionally vested with the duty of preserving federal rights. The time for change is now.

Senator HATCH. Do you have any questions, Senator?

Senator KENNEDY. Oh, I just want to thank the Senator for giving thought to this issue. It's an extremely complicated one. Obviously, I imagine this would mean that there would be greater time and discovery, a more complicated procedure, I suppose, but I imagine you've had the opportunity to examine that and what the burden would be on the courts.

I think one of the advantages, although it might be seen differently in different parts of the country, is that there is timely resolution of the various proposals for the local jurisdictions, and whether this would weigh the courts down, particularly in certain regions of the country, would be something I'd like to hear from you on.

Senator COCHRAN. Yes, these are questions, I think, Senator, that aren't easily answered, inasmuch as this procedure has not been tested in practice.

Senator KENNEDY. Yes.

Senator COCHRAN. But we have seen the experience of the administrative handling of these applications, and on occasion those proceedings drag out interminably. There is an example in the city of Jackson, Miss., where an annexation occurred and application was made for approval of that under the preclearance procedure. As far as I know, I don't think that's been acted on yet, and two different citywide elections have been held since the annexation took place, and lawsuits have been filed, controversy has arisen over it, but the present preclearance procedure has not really put an end to that question that was raised several years ago. There are other examples around the country, I think.

One item, I think, that should be noticed is that arguments are made, "Well, in most jurisdictions, there aren't any efforts to deprive citizens of the right to vote or participate fully in the process," and so in those cases when changes are made, the court will act summarily. There won't be any full-scale litigation over a change. Most parties would agree that there wouldn't be any discriminatory effect. But it does provide an opportunity for a due process procedure, involvement of the Department of Justice, and a fuller opportunity to protect discriminatory acts by local political subdivisions.

I think you can see——

Senator KENNEDY. Let me ask you, how would the situation change, do you think, in your own State if this passed?

Senator COCHRAN. I don't think there would be any major change in those States that are now covered by the section 5 preclearance section. In my judgment, there would be an enlarged opportunity for greater participation by interested parties.

Now, as you know, there are probably a few people in each State that are consulted by those in the Department who are reviewing these suggested changes by local units to see whether or not they have an opinion about whether this would be discriminatory in effect or not, and now that participation is limited to those few people, but under this new procedure, anyone could ask to be listed in the registry of the court, notified about changes, and given an opportunity to be heard.

So we think because of the greater involvement of a larger number of people in States, we would in effect see closer scrutiny given to changes in local election laws, and I think that would be healthy.

That's one effect that it would have in Mississippi, I think, and in all other States.

Senator KENNEDY. Well, I want to thank you. We'll look forward to hearing from the others on this proposal, but obviously you've given it a good deal of thought, and it's a serious proposal and we appreciate your presentation.

Senator COCHRAN. I thank you very much, Senator Kennedy.

Senator HATCH. Thank you, Senator Cochran.

Senator COCHRAN. Thank you, Mr. Chairman.

Senator HATCH. We're always glad to have you in this committee.

Senator COCHRAN. Thank you.

Senator HATCH. Our next witness will be Mr. Laughlin McDonald, the director of the Southern Regional Office of the American Civil Liberties Union. He has actively participated in litigation involving the Voting Rights Act.

Mr. McDonald, glad to have you here.

Mr. MCDONALD. Thank you.

Senator HATCH. Mr. McDonald, the way this works, the green light starts when you start. It's 10 minutes. You have 1 minute when the yellow light comes on.

STATEMENT OF LAUGHLIN McDONALD, DIRECTOR, SOUTHERN REGIONAL OFFICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

Mr. MCDONALD. Good morning, Mr. Chairman and members of the subcommittee.

I'm Laughlin McDonald from Atlanta, Ga., and since 1972 I've been the director of the southern regional office of the ACLU. I appreciate the opportunity, as does the ACLU, to appear before the subcommittee.

I support S. 1992, as I did H.R. 3112, before the House Subcommittee on Civil and Constitutional Rights. The bill, as we all know, quite frankly, was a compromise bill, but I did support it then and I continue to do so in the interest of gaining bipartisan support for extension of the Voting Rights Act, and because, in my judgment, it is overall a fair and workable bill.

I have been preparing for the past several months—and I may say it's a task that took me infinitely longer to complete than I thought—a report of the litigation that the southern office has been involved in—the voting rights litigation; we do other things besides voting rights—for the past 10 years.

The report begins with *Sims* v. *Amos* which, as you know, was the implementation phase of *Reynolds* v. *Sims,* handled in large part in our office, and it concludes with, among other cases, *Lodge* v. *Buxton,* which is now *Rogers* v. *Lodge,* and will be argued in February in the Supreme Court, and *Canady* v. *Lumberton City School District,* which was the case in which the Supreme Court recently

entered an injunction against the use of annexations for a section 5 violation in Lumberton, N.C.

I have the final page proofs of the draft of the report—I hope to have a bound copy next week—and, if I may, I'd like to introduce this into the record.

Senator HATCH. Without objection, we'll insert it following your statement.

Mr. MCDONALD. The report will be self-explanatory, but to summarize, there's a section which is an essay on the history of voting discrimination and then the modern movement for enfranchisement, beginning with the Civil Rights Act of 1957 and so on, and on section on progress under the act.

The heart of the report, though, is a discussion of the litigation which we've had in our office. I prepared this document in part to demonstrate the need for a continuation of the Voting Rights Act, but I think that the House and this subcommittee and, indeed, the Senate as a whole, have gone far beyond the purposes that I had in mind, because I think there is a general consensus that we do need to continue the Voting Rights Act. The case for that has been made.

Senator HATCH. That is true.

Could you pull your microphone just a little bit closer? I think the people in the back are having trouble hearing, and it will help us on the committee also.

Mr. MCDONALD. I'm sorry.

As I say, I think that my report has been superseded by what's been done in the House and what I have heard expressed by Members of this subcommittee and what I know that the Members of the Senate have done in cosponsoring the Kennedy-Mathias bill, so I'd like to address myself to some specific concerns which it's obvious that this subcommittee has, based on what I heard when I was in the hearing room yesterday.

Senator HATCH. Well, don't be misled. I have concerns about section 2. That's basically the only issue, as far as I'm concerned.

Mr. MCDONALD. Yes.

Senator HATCH. I'd like to see a reasonable bailout, because I think it would be an incentive to implement effective changes. There may be others on the committee who have other concerns about the proposed bill.

Mr. MCDONALD. Certainly.

Senator HATCH. And I haven't talked about incidental concerns, but that's my principal concern.

Mr. MCDONALD. I see.

I think the most critical issue, indeed, is whether or not to amend section 2, as proposed in the Senate bill.

Section 5 has been very effective, as we all know, in blocking hundreds of discriminatory voting changes, and I'm certain that it had a deterrent effect, which is quite difficult to quantify.

But section 5 has at least one major limitation, and that is it does not reach voting practices which were adopted prior to November 1, 1964, which is the effective date of preclearance, even though those practices are clearly discriminatory in purpose and effect. And, unfortunately, it's been our experience that most of the discriminatory voting practices in use today are those which pre-

date the Voting Rights Act, and thus they are entirely beyond the reach of section 5.

The only way to challenge those practices is through traditional lawsuits in the local jurisdictions. Litigation has been effective in many instances, but it's also proven, as I'd like to say in some detail in my testimony, terribly burdensome and time-consuming.

The burden of showing vote dilution under section 2 and the Constitution prior to *City of Mobile* was incredibly difficult. In our office we've tried, really, I think, virtually every kind of civil rights lawsuit there is, school desegregation, jury desegregation, public accommodations and so on, and there's no question that a vote dilution suit is the most difficult, because it's all of those suits wrapped into one.

To have any hope of winning a dilution suit, the minority plaintiffs had to prove an aggregate of the so-called *Zimmer* factors—history of segregation in all of its aspects, discrimination in registering in voting, disproportionately low number of minorities elected to office, racial block voting, lack of responsiveness—it's a laundry list of things

The optimum dilution suit, quite frankly, was nothing less than a presentation of the complete racial history of the jurisdiction. I know and you know academics who have spent their lives writing about a single jurisdiction.

Lawyers who have a docket to maintain are simply under incredible pressure to come up with the kind of evidence which the courts have considered relevant. As a consequence, you can't try those sorts of suits in the normal way that lawyers try cases.

In writing the racial history of the jurisdiction, you must enlist the assistance of an historian and a political scientist. You need engineers, for example, to determine whether or not the water main that goes to the black part of town is the same size as the water main that goes to the white part of town and, if not, what the significance of that may be. You need statisticians to analyze election returns, and political geographers, for example, to do studies of variables in voting. And not only do you need the expert side of the case but you need lay people, a raft of witnesses to talk about the past and continuing segregation in public and private institutions, and hundreds and even, in some cases, thousands of attorney hours to examine voting records and school records and jury lists and to read minutes of the public housing authority, to look at the prison and jail logs, and the list goes on.

The trap of dilution litigation is that the more of these kinds of cases you do, the more things you see you can do. The presentation gets more complex, unfortunately, as you gain experience in them.

The Federal district judges were surveyed in 1980, and they gave voting cases a weight of 2.8. Now, an average case is weighted 1.0. Voting cases are exceeded in complexity by only 10 of the 55 categories listed in the survey—one of the 10 that stuck in my mind was antitrust litigation. But there's no question that voting cases have always been difficult, even under the *Zimmer* standard. And, of course, they are terribly expensive.

It is no surprise that very few dilution suits have been filed. I would go so far as to say that very few can be filed, because minor-

ity plaintiffs simply do not have the resources to bring these kinds of lawsuits, and organizations like the ACLU have finite resources.

In our office, which specializes, if you will, in voting rights litigation, I would say on the average that we have filed less than three vote dilution cases a year. I've heard it said that, "Well, that may have been the practice but if we amend section 2 as proposed, that would open a floodgate of dilution litigation." With all respect, that is not likely to happen.

"Well," it's said, "but the proposal would adopt a new and radical standard, making section 2 suits essentially a pushover for anyone who could make out a case based simply on statistics." And, again, with all respect, the proposed amendment to section 2, I think, would merely restore the law to what it was prior to *City of Mobile.* There would be no flood in my judgment.

In our office, I can tell you that at most there would be a resumption of the three-case-a-year trickle against the jurisdictions in which we felt we could establish an aggregate of the *Zimmer* factors.

I would like to make the point just as forcefully as I can that *City of Mobile,* with its requirement of proof of purpose, was a change in the law. Prior to Mobile, it was understood by lawyers trying these cases and by the judges who were hearing them that a violation of voting rights could be made out upon proof of a bad purpose or effect.

Let me just quote Judge John Minor Wisdom, who wrote the concurring opinion in *Nevett* v. *Sides,* which was a companion case to *City of Mobile*—I think most of us would agree that Judge Wisdom is the scholar on the Fifth Circuit Court of Appeals—and he makes the point that the fifth circuit had construed the Supreme Court's voting cases, "to mean that intent to discriminate need not be proved when a voting plan minimizes or cancels out minority voting strength." Judge Wisdom then cited approximately eight fifth circuit cases to that effect.

I think that Judge Wisdom was correct when he said that prior to *Washington* v. *Davis,* the Supreme Court had not required a showing of intent to make out a constitutional violation.

I don't want to belabor the point, but look at *Palmer* v. *Thompson,* for example, the case involving the closing of the swimming pools in Jackson, Miss. It was common knowledge that the pools were closed to avoid integration, and that was an argument made by the plaintiffs in favor of the unconstitutionality of the State action, but the Supreme Court noted that such proof of racial purpose was irrelevant, because the Court has never "held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it."

Now, the plaintiffs said, "Well, what about *Gomillion* v. *Lightfoot?*", and the Court distinguished that case and said that the *Tuskegee Gerrymander* case focused "on the actual effects of the enactments," rather than on motivation.

City of Mobile has had a dramatic effect on our cases. I'd like to give you just one example of the effect in practice of that change in the law.

On April 17, 1980, Judge Robert Chapman, then a district court judge—who was recently elevated to the Fourth Circuit Court of

Appeals by President Reagan, and was supported by Senator Thurmond—ruled in a case from Senator Thurmond's home county, as it turns out, Edgefield County, that the at-large method infringed upon "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights," and Judge Chapman found a number of the *Zimmer* factors, including low levels of black voter registration.

Edgefield has—and I think this is quite significant in all dilution cases, and it's a critical element of any effects standard—a long history of intentional discrimination in voting. Edgefield County gave to the State and, in a sense to the Nation, "Pitchfork" Ben Tillman, who was Governor during the late 1890's and was later a U.S. Senator, and it was Ben Tillman who really was responsible for the convening of the Disfranchising Convention of 1895 in South Carolina, which gave to that State the literacy test and the poll tax, and effectively excluded blacks from the franchise.

Blacks were totally disfranchised in Edgefield. For example, prior to the Voting Rights Act, there were only 650 blacks registered in all of Edgefield County.

Well, the district court found that there was vote dilution in Edgefield. Five days after the district court's opinion, the Supreme Court decided *City of Mobile* v. *Bolden*. The defendants promptly moved to vacate the judgment on the basis of *City of Mobile*, because plaintiffs had failed to prove intent, and that motion was granted.

Now, there have been other cases, which I talk about in our report, which have been dramatically affected by *City of Mobile*, and one of those is *Cross* v. *Baxter*. I don't have time to go into all the facts, but I've done so in this report. That case was in the district court on two occasions and in the court of appeals on two occasions.

During the first appeal, the fifth circuit said that there was "substantial evidence tending to show inequality of access by blacks," that plaintiffs "have demonstrated a history of pervasive discrimination" and "carried their burden of proving that past discrimination has present effects," and that plaintiffs "have demonstrated recent pervasive official unresponsiveness to minority needs."

The district court was reversed, the case was sent back, *Bolden* intervened, and the district court ruled against us once again. The case was appealed and it was heard along with *Lodge* v. *Buxton*, in which the fifth circuit laid down the rule that unresponsiveness was the sine qua non of vote dilution. The court of appeals concluded that we had not shown unresponsiveness, which, of course, was never a critical factor under the *Zimmer* test, and, as a consequence, all of our other evidence was simply irrelevant. The Court affirmed the dismissal of the complaint.

I cannot see that standard which would allow the egregious facts in a case like *Cross* v. *Baxter*, involving the City of Moultrie, to go unredressed serves any constitutional or other interest.

I have brought with me the brief of the appellees in *Rogers* v. *Lodge*, the case which was mentioned yesterday, and I would like to introduce this into evidence.

Senator HATCH. Without objection, we'll put it into evidence.

Mr. MCDONALD. Thank you. It's really in response, Senator Hatch, to your observation that it's quite easy and possible to win cases under the purpose standard of *City of Mobile.*

Senator HATCH. I did not say it was easy. I said it's a standard of proof that is utilized in almost all cases, except for some civil cases, in our society. It is not unusual for people to have to prove intent, especially for an experienced attorney who has tried a lot of cases.

Please don't misconstrue this statement, Mr. McDonald, I don't think it should ever be easy to prove that a person is guilty of a criminal or of a quasi-criminal action.

Mr. MCDONALD. I've done a lot of criminal work, too.

Senator HATCH. Sure.

Mr. MCDONALD. I don't believe that there is a prosecutor in this country who would not howl bitterly about the test for proving intent that was laid down by the Supreme Court in *City of Mobile.*

Senator HATCH. Oh, I think that's probably true.

Mr. MCDONALD. Let me finish. I think it would be unworkable in the criminal context.

City of Mobile is a radical decision, it seems to me, for two wholly independent reasons. It introduced the intent standard, which was unknown, as Judge Wisdom said, to the law prior to that time, and I believe him to be correct when he makes that statement.

But, No. 2, it not only said that you had to prove intent, but it said that circumstantial evidence, the *Zimmer* factors, were not proof of intent. If those things are not proof of intent, then, quite frankly, I submit to you that nothing short of a body buried in a shallow grave will meet the *City of Mobile* test.

Now, *Lodge* v. *Buxton* was a case in which the fifth circuit found for the plaintiffs, but the Supreme Court, as you know, has noted probable jurisdiction in that case and is going to hear it on appeal. And not only that, but the Supreme Court took the extraordinary step of staying the lower court's judgment. That indicates to me that there are members of the Supreme Court who have considerable doubts about the propriety of this case.

The argument being made by the defendants is that *Lodge* v. *Buxton* is warmed-over *Zimmer.* The court of appeals said the *Zimmer* factors were some evidence of purpose and that they may create an inference of purpose. Then you look at the totality of circumstances to determine whether or not the inference ripens into proof of intent.

Now, if the Supreme Court concludes that that limited use of *Zimmer* is unlawful, then I submit to you, it will not simply be incredibly difficult to make out a case, it will be impossible, short of having the smoking pistol, the body buried in the shallow grave.

I submit this brief for the additional reason that in a sense I am disturbed about this case, even if we win it. This was a case in which the facts were absolutely incredible, No. 1, and, No. 2, in which the district court found for the plaintiffs on every single one of the *Zimmer* primary factors, and every single one of the enhancing factors.

If that is what it takes—and, quite frankly, I'm being just as candid with you as I possibly can be—if that is what it takes to win a case under this new standard, then there will not be very many

cases won. What will happen is that we will lose the cases like *Cross* v. *Baxter,* where the facts are absolutely egregious. I don't know whether we'll win cases such as in *Edgefield;* I think we can put on a case. But the burden it places on the plaintiffs is one that is well nigh impossible to overcome.

To say that you can always look into intent I think sends you right into a cul de sac. As you know, many of the persons responsible for setting up these systems have long since died. Not only that, but legislators are entitled to claim legislative privilege—that's something specifically noted in *Arlington Heights.*

I know the courts will have to flesh out precisely the extent of that legislative privilege, but I was involved in a case in the fourth circuit involving whether or not the law suit was a catalyst for what the State legislature had done. We brought a suit attacking an absentee balloting process in the State, which was a crazy quilt, so we contended, because it denied absentee ballots to certain classes of individuals and granted them to others.

In any event, at some point during the litigation, the State legislature met and in essence granted us the relief we sought legislatively. We moved to dismiss our case, and subsequently applied for attorney's fees on the theory that we had been a catalyst. Judge Widener, writing the opinion for the court of appeals denying us fees, suggested that we were absolutely foreclosed from inquiring into legislative motive, and he cited *Arlington Heights,* because that was an interference, he said, by the judiciary with the legislative sphere.

So on the one hand, if you say circumstantial evidence, the *Zimmer* factors, is not enough—and that is what the Court said in *City of Mobile*—and if on the other hand you say you can't inquire of the legislators as to their motive, then, quite frankly, I think that places an intolerable burden on the plaintiffs ever to win any of these cases.

Let me make just one final point, and that's about proportional representation.

I think that the clear test which all of us were laboring under prior to *City of Mobile* was an effects test, and I would challenge you, if I may, respectfully——

Senator HATCH. Fine.

Mr. MCDONALD [continuing]. To read those cases which Judge Wisdom cites in his concurring opinion in *Nevett* v. *Sides* and see whether there was any requirement of proportional representation and, more importantly, to see what happened in those cases in which the plaintiffs won, and whether or not proportional representation was the result.

I cannot—and I've searched my recollection diligently—think of a single case in which we have won, in which we have settled, in which the courts have ruled for us under the Constitution or under section 2—and we've won some under both—which have resulted in proportional representation. I can think of——

Senator HATCH. That's precisely what the *Mobile* case was about. Had you won that, the result would have been implementation of proportional representation.

Mr. MCDONALD. Well, I respectfully disagree. What those cases do is establish equality of access.

And that's more than just rhetoric. The only people who can determine who their representatives will be, who will represent them proportionately or otherwise, are the voters. There is no way that the court in those cases can insure proportional representation. All the court can do is establish a system of access. As a practical matter, that is true.

As an actual matter, we have never gotten proportional representation. I can think of Thomson, Ga., for example, which we settled about 3 years ago under section 2 and under the 14th and 15th amendments. There were two voting districts created in that case. One district elects two people, and that's majority black, and one district elects three, and that's majority white. Unless another black has been elected in the last couple of months from that northern district, there has never been more than one representative elected from that district. I mean, blacks vote for whites and put them into office.

That's true in all of the cases that we've had. There are two districts for the county commission in McDuffie County, for example, and based on the 1970 census, one of those districts is majority black, but there has never been a black returned from that district. The same thing is true in Lee and Dorchester Counties, S.C.; there are majority black districts there which have consistently returned whites to office.

There's nothing in the cases that requires proportional representation—I don't see how a remedial decree can do that. And there's nothing in the actual practice that has resulted in proportional representation.

Whites aren't hurt when blacks are allowed political access. The society as a whole is improved. You know, what causes intense division in these jurisdictions is the exclusion of blacks from office. That's why the level of frustration is so high, the disaffection and the rest of it. Blacks only want to participate on some basis of equality.

In Terrell County, Ga., for example, which is a majority black jurisidiction, our plaintiffs disavowed a system which would have created a majority of majority-black districts, for the simple reason that they wanted to participate but not to dominate the political situation in Terrell County.

So I quite honestly will have to tell you that in my own experience, proportional representation is neither what the folks want or what the cases have required or what the continuation of the *Zimmer* standard would entail.

[The prepared statement of Laughlin McDonald follows:]

PREPARED STATEMENT OF LAUGHLIN MCDONALD

Goodmorning Mr. Chairman and Members of the Subcommittee. I am Laughlin McDonald from Atlanta, Georgia, Director of the Southern Regional Office of the American Civil Liberties Union Foundation, Inc. I deeply appreciate as does the ACLU, the opportunity to appear before you today to discuss extension of the Voting Rights Act of 1965 and the need to continue protection of blacks and language minority voting rights.

Prior to becoming director of the Southern Office of the ACLU in 1972, I was in the private practice of law in Columbia, South Carolina. Prior to that I did graduate work and taught at the law school of the University of North Carolina at Chapel Hill. Before that I was a staff attorney for the ACLU and finally before that, corporate attorney for the Sea Pines Plantation Company at Hilton Head, South Carolina. I've spent much of my life in the South, with the exception of four (4) years of college in New York and two (2) years in the army. Based upon that experience and more particularly my experience litigating voting rights cases over the last fourteen (14) years, I am convinced of the need for continuing the protection of the Voting Rights Act and amending of Section 2 to reach pre-Voting Rights Act practices which continue the effects of past intentional discrimination.

I support S. 1992, as I did H.R. 3112 before the House Subcommittee on Civil and Constitutional Rights. The bill is quite frankly, a compromise bill in that it contains a liberalized bail out. Nonetheless, I support it in the interests of gaining bi-partisan support for extension of the Voting Rights Act and because over all it is a fair, workable bill.

I have with me a report which I have prepared over the past several months especially for the legislative hearings on the Voting Rights Act. Actually, I have the final page proofs -- due to factors beyond my control, the final bound copy will not be available until next week -- I hope next week. At any rate, I hope you will accept this copy and allow me to substitute a bound copy when it is available.

The report is a summary of the litigation and administrative proceedings brought by the Southern Regional Office of the American Civil Liberties Union over the past ten years to combat racial discrimination in voting in the South. It assesses the impact of the Voting Rights Act of 1965 and the need for extending its special provisions beyond their effective expiration date in August 1982.

Modern Enfranchisement describes the slow steps, recently taken, toward securing equal voting rights for minorities, steps which culminated in the Voting Rights Act of 1965.

Progress Under the Voting Rights Act shows how the act has increased black voter registration and the number of minorities elected to office.

Continuing Barriers to Equal Political Participation, the heart of the report, proves through the accumulated evidence of ACLU lawsuits that voting discrimination has not disappeared. The problem remains widespread and persistent. The part on Section 5 Noncompliance shows how many local governments have repeatedly ignored the requirements of the Voting Rights Act and instituted new voting procedures that are discriminatory and illegal. The Use of Discriminatory Voting Practices Adopted Prior to the Voting Rights Act presents the even more difficult problem of existing voting practices that are clearly discriminatory but that cannot be reached effectively by the Voting Rights Act as currently interpreted.

Conclusions and Recommendations states the inescapable: the Voting Rights Act must be extended and its provisions strengthened. To improve enforcement of the Act, the U.S. Attorney General should actively monitor changes in voting procedures, and victims of voting discrimination should be able to collect damages from local officials.

The ACLU's Southern Regional Office opened in 1965 to assist in the struggle for equal rights in the South. Our program, then and now, consists primarily of litigation. In the beginning, the Southern office concentrated on jury and prison desegregation, and handled such cases as Whitus v.

Georgia (1967), invalidating discriminatory jury selection procedures in Georgia, and Lee v. Washington (1968), declaring racial segregation unconstitutional in prisons and jails in Alabama. We did voting rights cases as well, including Reynolds v. Sims (1964), which applied the one person-one vote principle to state legislative reapportionment.

Beginning in the early 1970's, however, our emphasis centered on voting rights. That was so, not because of any pre-conceived plan to concentrate on that kind of litigation, but for the reason that the predominant civil rights complaints we received from the black community were of continuing discrimination in the elective process. More often than not, the complaints were about the inability of blacks to elect candidates of their choice to office.

But the complaints also acknowledged that equal voting rights involve more than paved streets and jobs, important as they are. There is an intrinsic value to effective political participation, including office holding, that transcends the provision of services. As Reconstruction and its aftermath of black disfranchisement demonstrate, equal voting rights are nothing less than an essential condition for racial equality itself.

In a sense, and I'm quite happy to say this, the House and the Subcommittee and the Senate, have gone far beyond my purpose in writing this report. That is, it is no longer necessary to argue for the continued need for the Voting Rights Act. I think we are all agreed that there is such a need. For that reason, I Will address myself to some of the issues which most obviously trouble some members of the Subcommittee.

Beyond any doubt, I think the most critical issue before the Senate (assuming that there is agreement about extension of Section 5) is whether to amend Section 2 as proposed in S. 1992.

Section 5 pre-clearance has been effective in blocking hundreds of discriminatory voting changes, and undoubtedly, Section 5 has acted as a deterrent to enactment of many others.

Section 5 does, however, have a significant limitation. It does not affect voting practices adopted prior to November 1, 1964, even though they may be clearly discriminatory in purpose and effect.

Unfortunately, most of the discriminatory voting practices in use today are those which pre-date the Voting Rights Act, and are thus entirely beyond the reach of Section 5. The only way to challenge these practices is through traditional lawsuits in the local jurisdictions. Litigation has been effective in many instances, but it has also proven to be burdensome and time consuming, and results, quite frankly, have often been inconsistent and erratic.

The burden of showing vote dilution under Section 2 and the Constitution prior to City of Mobile was always heavy. To have any hope of prevailing, minority plaintiffs had to prove an aggregate of many of these factors: a history of segregation; discrimination in registering and voting; disproportionately low number of minorities elected to office; racial bloc voting; lack of responsiveness; a depressed socio-economic status; lack of access to the political process; a tenuous policy favoring the system under challenge; plus so-called enhancing factors, such as majority vote requirements, anti-single shot laws and large district size.

The optimum dilution suit was voting less than the complete racial history of the jurisdiction in question. To unite that history for the court, plaintiffs needed the assistance of political scientists, historians, engineers, media experts, geographers, statisticians, not to mention lay people to testify about past and continuing segregation in clubs and organizations, political parties, public accomodations, and hundreds or even thousands of lawyers to examine voting records, school records, jury lists, prison and jail logs, and the list goes on. Unfortunately, the more dilution litigation you do, the more complex the presentation of the plaintiffs' case becomes.

Federal district court judges in a 1980 survey, not surprising, gave voting cases a weight of 2.8. An average

case is weighted 1.0. Voting cases are exceeded in complexity by only ten (10) of the fifty-five (55) categories listed in the survey.

Voting Cases are horrendously expensive. Not surprisingly, very few dilution suits are filed. I should say very few dilution suits can be filed, since private plaintiffs can rarely afford them, and organizations such as the ACLU have finite resources. In our office, for example, we have filed on the average less than three (3) vote dilution cases a year.

I've heard it said that amending Section 2 would open a flood gate of dilution litigation. With all respect, that is not likely to happen.

But, it is said, S. 1992 contains a new, radical standard making Section 2 suits a push over for those who can make out a case based simply on statistics. Again, with all respect, proposed amendment to Section 2 would merely restore law to what it was prior to City of Mobile. There would be no flood. In our office, there would be at most a resumption of the three (3) case a year trickle against the jurisdictions in which we felt we could establish an agregate of the Zimmer factors.

I would like to make the point as forcefully as I can that City of Mobile, with its requirement of proof of purpose, was a dramatic change in the law. Prior to Mobile, it was understood that a violation of voting rights could be made upon proof of bad purpose or effect.

For example, in his concurring opinion in Nevett v. Sides, which was the companion case to City of Mobile, Judge Wisdom, acknowledged by virtually everyone to be the scholar on the Fifth Circuit Court of Appeals, made the point that the Circuit had construed the Supreme Court's voting cases "to mean that intent to discriminate need not be proved when a voting plan minimizes or cancels our minority voting strength." 571 F.2d at 232. Judge Wisdom then cited eight Fifth Circuit cases to that effect.

And I think, moreover, that Judge Wisdom was correct when he said that prior to Washington v. Davis, the Supreme Court had never had a requirement of showing intent to make out a constitutional violation. Without belaboring the point, let me refer you to Palmer v. Thompson.

Palmer v. Thompson, 403 U.S. 217 (1971) a Jackson, Mississippi case in which a city ordinance closed a publicly operated swimming pools a few days after a court ordered the pools desegregated. It was common knowledge that the city closed the pools solely to avoid integration. The Supreme Court, however, noted that such proof of racial purpose was irrelevant because the Court has never "held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it." The Court distinguished Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Tuskegee gerrymander case, on the grounds that its focus "was on actual effects of the enactments" rather than on motivation.

I do not see any purpose to our debating the issue of what the legislative history shows was the intent of Congress when it passed Section 2 in 1965. It is clear to me that there was no purpose requirement; presumably it is clear to you, as it seems to be to the Attorney General, that Congress did have a purpose requirement in mind. Rather than going into that issue, which is essentially one of looking at the published legislative materials, I would simply like to offer for the record two amicus briefs filed in the case of Lodge v. Buxton, the case which has been much mentioned here. One was filed in the Supreme Court recently by a group of amici curiae, and one was filed in the Fifth Circuit by the United States of America. These briefs both make the argument that Congress did not intend to require proof of intent when it adopted Section 2. They make the argument quite well, and I would like to commend them to you to read rather than taking up the time of the Committee to discuss this issue in detail.

Discovering an unconstitutional legislative motive, he said, was using a dowser, or a diving rod. "To require the plaintiffs

to prove an unconstitutional legislative motive is to burden the plaintiffs with the necessity of finding the authoritative meaning of a oracle that is Delphic only to the court."

Let me say also, and I do not wish to sound all-knowing, but I have been trying voting cases from 1967 through the present, and it is simply not accurate to say there was ever any general understanding that purpose was required. In fact, just the opposite was true. The lawyers and judges in those cases of whom we have any evidence assumed that proof of purpose was not required, and I base that statement on my own recollection, on the recollections of people I have talked to who also tried these cases during those years, and on the arguments that I remember encountering.

Indeed, the sentence discussed yesterday, quoting from the plurality in Mobile about the Zimmer case does prove that point, as Senator Kennedy suggested. The sentence read:

> "That case, [Zimmer v. McKeithen] coming before Washington v. Davis, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause--that proof of a discriminatory effect is sufficient."

That comment indeed referred to the Fifth Circuit's decision in Zimmer rather than a decision of the Supreme Court. But while that is true, it has no relevance here, because the point is not what the Supreme Court says is the rule or should have been the rule, but what was the rule followed in fact by the lower courts.

Why is that the point? Because the rule followed by the courts during that period--essentially the late 1960's to the late 1970's--including the Supreme Court in White v. Regester, is the rule that amended Section 2 adopts. That rule did not require proof of discriminatory purpose--remember the Supreme Court in Bolden said it did not-- and yet I cannot find anything that says those cases required, involved or in any way led to a quota system or proportional representation.

We have had the experience of cases that operated under the principle of not requiring proof of discriminatory purpose,

and yet those cases did not in the slightest involve any thing remotely resembling a proportional representation or quota system. No one looking at those cases objectively can find in them a requirement of proportional representation.

The relevant question is whether the "results" standard contained in amended Section 2 is an ascertainable standard that has meaning and limits, or whether it is to be read to mean a requirement of proportional representation.

I submit that the answer to the question is not in the realm of conjecture or hypothesis, but may found in real life experience. That experience shows that an effect standard has never required, or indeed in my experience achieved, proportional representation.

Let me give you a dramatic example of the way in which City of Mobile changed the law as it was understood and applied by the lower courts.

On April 17, 1980, Judge Robert Chapman, then district court judge and now judge of the Fourth Circuit Court of Appeals, ruled that at-large elections for the Edgefield County, South Carolina, County Council constitutionally infringed upon "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights." The Court based its ruling upon the effect standard of Zimmer. Further elections were enjoined until a new and constitutional method of electing the County Council was adopted under state law. Some of the court's finds were:

*"Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been neglible."

*"Blacks were historically excluded from jury service in Edgefield County."

*"Blacks have been excluded from employment. . .it was only when trial was about to begin that the county suddenly began hiring blacks in any numbers. . .in addition, blacks are heavily concentrated at the lower wage levels."

*"Blacks have been excluded by the county council in appointments to county boards and commissions."

*"There is bloc voting by the whites on a scale that this court has never before observed. . .whites absolutely refuse to vote for a black."

The evidence showed that Edgefield has strong traditions of discrimination in voting. Edgefield, as you recall, was the home of "Pitchfork" Ben Tillman who lead the fight for black disfranchisement after Reconstruction and was the man who, as a U.S. Senator, was the moving force behind the Disfranchising Convention of 1895. It was that convention which gave the state the poll tax and literacy test for voting which effectively removed blacks from the electorate.

The legacy of that past intentional discrimination in voting remains dominant in Edgefield. For example, prior to enactment of the Voting Rights Act, only 650 blacks were registered in Edgefield County, 17% of the eligible population. By contrast, nearly 100% of eligible whites were registered.

Five days after the district court's opinion, the Supreme Court decided City of Mobile v. Bolden. The Edgefield defendants moved the court to vacate the judgement on the basis of City of Mobile, i.e. that the plaintiffs had failed to prove intent, and the motion was granted.

The Edgefield case was not the only casuality of the dramatic change in the law brought about by City of Mobile. Take the case of Cross v. Baxter, decided the same day as Lodge v. Buxton, a case mentioned by the chairman yesterday.

Cross v. Baxter arises in the town of Moultrie, Georgia. Like Edgefield, its history of racial discrimination is long and grisly. For example, John Cross, the owner of a black cab company, attempted to register during the days of the all-white primary in 1941-42, and again in 1943. On each occasion he was denied registration. "On one occasion they told three of us that it was too late in the day. You know it was about four o'clock and they just closed the window." On another occasion in 1942, "they told us. . .we had to pay poll tax. . . .I was unable to pay." Cross finally registered in 1946 after a federal court declared unconstitutional Georgia's all-white primaries.

Even, then, Cross and every other black voter in the City of Moultrie eligible to participate in the Democratic

primary were challenged in 1946 for not having proper voter registration qualifications. No whites were challenged.

It was not until the Voting Rights Act of 1965 that any significant number of blacks registered in Moultrie.

Although the Democratic all-white primary has been abolished, the legacy of party discrimination persists. As of 1976, no black had ever served as an officer of the party, and only one black had ever served on the twelve-member county executive committee.

City elections were traditionally run on a racially segregated basis. White voting booths were located "next to the City Hall, and . . .the Negro polling place in a booth. . . in the fire department." Voter registration lists were also maintained on a racially segregated basis. Neither segregated voting nor segregated registration ended in Moultrie "until the integration issue came up," during the mid-1960's.

Not only have elections been conducted on a racially segregated basis, but municipal elections were managed by the Moultrie Lions Club, an organization which excludes blacks from its membership. Blacks were occasionally allowed to assist with operating voting machines but the Lions Club never permitted any blacks to certify voters or hold managerial positions. The Lions Club still manages city elections, although at the elections held in 1980, a black women's club was allowed to assist the Lions.

Moultrie also has an aggravated history of violating Section 5, including use of an uncleared majority vote requirement which has excluded at least one plurality winning black from office.

Discrimination and inequality based upon race have characterized virtually every aspect of public and private life in Moultrie. Penal facilities were racially segregated until the late 1960's. Law enforcement was racially segregated--the first black policeman was not hired until the mid-1960's, and even then was not allowed to arrest whites. Juries were racially exclusive. Housing for blacks is typically substandard and segregated. Employment opportunities for blacks are de-

pressed. For example, in January, 1972, there were no blacks employed in the city hall and only one "in a building adjacent to City Hall." The majority of blacks presently employed by the council work as either garbage collectors or laborers. Clubs and churches remain for all practical purposes as rigidly segregated now as they were a hundred years ago. Schools were not desegregated until 1970, and then only after bitter, local resistance. Blacks are substantially under-represented on boards and commissions over which the city council has exercised its appointment power.

Black citizens asked the mayor and council in 1975 to adopt a single-member district plan for elections to provide an opportunity for black political participation. As John Cross explained it: "as the present at-large system works in Moultrie, the white majority controls the outcome of every single election. . . . People get elected who are naturally more responsive to the needs of whites than they are to blacks." The city council, however, responded that "the present system. . . had worked properly for the entire history of the city" and declined to make any change.

Cross and other blacks filed a lawsuit in which they claimed that the at-large system of elections was unconstitutional. The district court held on October 26, 1977, there were no barriers to present registration and the at-large system did not preclude "effective participation" by blacks in politics.

On appeal, the Fifth Circuit reversed. It held there was "substantial evidence tending to show inequality of access;" that plaintiffs "have demonstrated a history of pervasive discrimination and. . .have carried their burden of proving that past discrimination has present effects;" and, that "plaintiffs have demonstrated recent pervasive official unresponsiveness to minority needs." The case was sent back to the district court.

A second hearing was held on January 25, 1980. A major element of the city's case was the election of a black man, Wesley Ball, to city council on May 22, 1979. Ball was a 68-year-old retired former waiter at the Colquitt Hotel in Moultrie. He had a seventh grade education, had never run

for office, nor had he ever been involved in any political campaign. He ran against another black, as well as a white man named Cook.

According to Cook, "most businessmen around. . .white businessmen" had supported Ball or Wilson, the other black, because if they were defeated by a white opponent, "the ward system would be more effective to come in" and the city might lose its lawsuit. "They wanted. . .a black post, and they didn't. . .want me on there for that reason. . .said, let them two have it out. . . .Ball and Wilson."

After Ball won the election, someone put a sign on Cook's place of business: "got beat by a black man--business for sale--leaving town." Ball himself said that race has always been critical in city politics. He testified that "the primary thing" that had caused black candidates to lose in elections for the City Council was race: "It's been on racial lines."

In addition to evidence of "cuing" by whites to give the appearance of racial fairness to city elections, the plaintiffs showed that: the Lions Club continues officially to participate in management of city elections; as recently as the 1979 elections, black voters were turned away from the polls by members of the Lions Club; city officials continue to ignore Section 5 of the Voting Rights Act of 1965--an uncleared literacy test was implemented in 1979 for new poll workers (presumably black) who responded to a newspaper ad and volunteered to assist the Lions Club in conducting city elections; and, the city council voted in 1979 strictly along racial lines to retain at-large elections without citing any non-racial reasons supporting the majority's vote.

Following the rehearing, the district court ruled once again against the plaintiffs, concluding that the at-large system in Moultrie was not discriminatory. The plaintiffs appealed. The Fifth Circuit, relying upon City of Mobile, held that plaintiffs must prove unresponsiveness in order to establish vote dilution, and because the district court had found responsiveness by the Moultrie City Council, a finding

not permitted to be reversed on the appellate level unless "clearly erroneous, " the plaintiffs were absolutely foreclosed from obtaining any relief. None of the evidence of direct discrimination was discussed or even mentioned. It was simply deemed irrelevant.

It is clear to me, and I think to the court of appeals prior to City of Mobile, that blacks have little or no access to the political system in Moultrie, Georgia. But because of the change in the law brought about by the court, suddenly the constitutional violation -- and any hope of equal political participation -- have evaporated.

Cases such as Cross v. Baxter and McCain v. Lybrand illustrate the inordinate difficulty -- and I think unfairness -- in requiring proof of purpose.

It bears repeating that City of Mobile said not merely that proof of purpose was required, but more importantly that the Zimmer factors -- the history of past intentional discrimination, continuing effects, and all the rest -- while "some evidence" of purpose, most assuredly do not make out a constitutional violation. Quite frankly, if the circumstantial evidence in Zimmer does not make out proof of purpose, I honestly do not know what does, short of a body burried in a shallow grave.

Proof problems are complicated and the fact that those who established the procedure under attack may have long since died; or may have been clever enough to diguise their racial tracks, or may be entitled to claim legislative immunity in the event they were subpoened to testify (Arlington Heights; Bly v. McLeod).

Many erroneous ideas have been expressed about amended Section 2. It has been erroneously described as an election results test, as if the results of an election would be dispositive of the validity of the election system. It has also been erroneously described as being identical to the test in Section 5. It has also been erroneously described as involving a requirement of "maximization" of minority

political strength. Finally, a number of examples have been given of cities whose districts were constituted in certain ways, with the erroneous implication that the way those districts were constituted would invalidate them. See, for example, Rep. Butler's example on page 71 of his dissenting views in the House Report.

These are all reflections of the recurring erroneous idea that amended Section 2 will guarantee election of minorities rather than simply giving them an opportunity to participate fully in the political process. Amended Section 2 does not involve a test of "election results" but rather of the overall results of the system, as viewed in light of all the complex factors I have described. Amended Section 2 will return, as I have said, to the test that was used in fact before Mobile and was involved in White v. Regester and Zimmer v. McKeithen. It was only the application of that test that allowed minority voters in certain towns and counties where they were essentially excluded from political participation -- to have an opportunity to participate for the first time. Without the ability to challenge those exclusionary election systems, minority voters would be and continue to be denied opportunity, and it is, frankly, quite fanciful, to think that these cases involve any notion of proportional representation.

That was confirmed in White v. Regester, where the Court said:

> "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." [412 US 766]

The sentence that was added to amended Section 2 is simply an incorporation of this sentence from White v. Regester. I do not see how amended Section 2 could be any plainer in rejecting the quota fear that has been raised here, and if there could be any doubt, I do not see how the added sentence could be any clearer in reiterating the rejection of quotas. Finally I do not see how the House Report could be any clearer in rejecting quotas and proportional representation.

Yesterday the Chairman paraphrased a sentence from the House Report. That sentence, which I found clear in context, came in a paragraph that both began and ended with disclaimers that leave no room for doubt:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.

From the beginning of these debates, some people have expressed fears about whether the amendment to Section 2 might go beyond insuring an opportunity for minority voters. Many of us have worked hard to make it clear that the meaning of this critical amendment is not unlimited. I believe we have been successful in making this clear to those who were open to reason. I urge all those who are truly interested in fair voting laws to examine S. 1992 carefully, and I am confident that when they do they will promptly give it their wholehearted support and secure its passage so that we can tell people of this Nation that we believe in the fair right to vote and that will enforce that belief with all the vigor at our command.

Addendum to the Prepared Statement of Laughlin McDonald

Many people have been concerned about the fact that voting litigation by the Department of Justice has come to a virtual standstill. I would like to refer to three cases in which I have been involved in which the Department has been conspicuous by its absence.

(1) Lodge v. Buxton. You have pointed to this case as the critical post-Mobile case that will show a smoking gun is not required to prove purpose. The fifth circuit struck down the at-large elections in Burke County, and the United States had filed an amicus brief in the court of appeals. But the Supreme Court took the appeal of Burke County, and took the unusual step of staying the judgment pending appeal, even though the two lower courts had turned down the request for a stay. I would have expected to see an amicus brief for the United States of America in the Supreme Court, urging the Court to affirm the judgment and thus hold that a smoking gun is not required in order to find this type of egregious system invalid. Yet the Department did not file a brief, and I am curious why.

(2) Canady v. Lumberton City Board of Education. This was a case we filed to enforce a section 5 objection by the Attorney General. Here again I would have thought the United States would file an amicus brief backing up efforts to enforce its own objection, but no brief was forthcoming.

(3) McCain v. Lybrand. This was another phase of the case involving the Edgefield County Council. Here too we were suing to enforce a section 5 objection entered by the Attorney General. Again, the Department failed to file a brief, and here we know a bit more about the process.I would like to show the Subcommittee a news clipping indicating that the Justice Department had already prepared an amicus brief and actually sent it to the United States Attorney in Columbia for filing. Then, after receiving some contacts, the Department called the U.S. Attorney to retrieve the brief; it was never filed.

The Assistant Attorney General is quoted as having said he decided not to file the brief because he received information indicating that the voters' position would be adequately represented. While this may be complimentary, I also find it quite simply unbelievable. I have frankly never heard of a brief that was already prepared and ready to file being pulled for a reason like that.

These are serious examples. They cause me great concern because the Attorney General plays such a major role in the enforcement ofthe Voting Rights Act. It is no exaggeration to say that the rights of minority voters under the Voting Rights Act depend upon the efforts of the Attorney General, which in several major ways are not subject to review by minority voters (although they are subject to review by the covered jurisdictions). I am speaking eppecially about the holding that if the Attorney General fails to object to a section 5 submission the voters have no review (while the covered jurisdictions do have a can get a review of the objection in the District of Columbia court). I am also speaking of the Attorney General's power to reconsider and withdraw objections. This provision should ordinarily function well as a safety valve but there has been increasing concern over the Attorney General's application of the provision, including one situation in which an objection was withdrawn on a reconsideration request filed five years after the objection (during which it had been ignored by the covered jurisdiction-Jackson, Miss.).

I am not sure we can afford to let the Attorney General continue to have unreviewable discretion in these vital areas.

This is also true of the basic submission mechanism. It depends on voluntary compliance, but we have been learning just how little of that there is, and how little the Attorney General does to insure compliance. Right now, there is virtually no incentive on covered jurisdictions to submit section 5 changes voluntarily, except for the possibility that

they might be sued and, if they lose, they will simply have to do at that time what they should have done before.

That is one reason why one of the important bail-out conditions is that a jurisdiction not have enforced unprecleared submissions during the previous ten years. This provision will be important in bringing about greater compliance, but I believe we may need even stronger measures, at least if enforcement efforts of the Department of Justice are not stepped up.

Senator HATCH. I haven't been very good at enforcing the 10-minute rule, but we understand.

Mr. MCDONALD. I know you haven't, and I appreciate it.

Senator HATCH. Congressman Hyde is here, and because of his schedule, I would like to take his testimony now while he is available. Let's interrupt your testimony for the time being, and we'll resume the questioning phase of your testimony as soon as Congressman Hyde is through.

Senator KENNEDY. Well, we have a number of responsibilities here. Since we had at least one round of questioning, I didn't know whether we could at least have one—I don't want to discommode Congressman Hyde, but I have made a special effort to hear this witness.

Senator HATCH. Well, we'll be happy to do that. We'll be happy to have more than one round of questions with any witness, as far as I'm concerned, but let's have Congressman Hyde.

We're limiting to 10 minutes, Congressman Hyde.

Senator KENNEDY. Well, does Congressman Hyde mind waiting for 10 minutes?

Mr. HYDE. I don't mind waiting.

Senator HATCH. I want you to know it took about 2 hours per witness yesterday. I hope you don't mind waiting that long.

Senator KENNEDY. Not on our side, it didn't.

Senator HATCH. I thought it took a lot of your time yesterday, Senator.

Mr. HYDE. Are we limiting the statement to 10 minutes?

Senator HATCH. Well, we haven't been very successful in that effort during this first statement, but we would like to during the remainder of this hearing.

Mr. HYDE. So I will have 10 minutes?

Senator HATCH. You have more if you need it. I've generally accommodated Members of Congress.

Senator KENNEDY. I would hope that the Congressman would. He's one of the very active Members on this whole issue in the House, and I think he's got a lot to say. I want to see these hearings comprehensive, and I want to see the Senate take action, but I do think when we have experts like we have in these areas here this committee ought to benefit from them.

Senator HATCH. Well, fine.

I'm going to rule that you come and give your testimony now, Congressman Hyde, and then we'll have time with Mr. McDonald afterward.

Any questions for you that we will have I don't think will take as long as they will with Mr. McDonald.

That way you won't have to sit here all day.

Mr. HYDE. All right, fine.

Senator HATCH. Unless you would like to. If you'd like to sit here all day, that's certainly fine with me.

Mr. HYDE. I think that's an offer I can refuse.

Senator KENNEDY. That really isn't the option. What I was only——

Senator HATCH. Let's go ahead with your testimony.

[Pause.]

Senator HATCH. Go ahead, Congressman Hyde. I'm sorry.

Mr. HYDE. Thank you.

STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HYDE. Thank you, Mr. Chairman and distinguished Senators.

I come before you this morning as an advocate for the Voting Rights Act of 1965, and as a supporter of the amendments adopted by the House, with certain reservations.

Coming from Chicago, I am indeed sensitive to the frustrations voting discrimination can sow. I voted for the 1975 amendments to the act, following my first year in the House, and I've consistently supported them ever since.

Initially, I opposed the continuation of preclearance as a denial of equal treatment to sovereign States and their political subdivision. Moreover, I felt that 17 years of this extraordinary remedy had served its purpose. Our subcommittee's hearings changed my mind, however, and though I feel great progress has been made in granting minorities access to the political process in the covered jurisdictions, it's clear that more needs to be accomplished.

Preclearance, then, still has its usefulness.

I also speak from the perspective of one who cherishes federalism. I believe resolutely that it is the people who govern, and the power of the Government here in Washington is limited both by the 10th amendment and by the degree to which the people themselves are willing to assign their obligations and responsibilities to our care. But in order to participate in the process, one must be able to vote. Practices which limit access to the ballot simultaneously suppress the integrity of government and disenfranchise those who participation is essential, if we are to fulfill the promise of a representative democracy.

The adoption of the 15th amendment represented a constitutional commitment to the sanctity of the vote. We all share in the shame that it's principle was not acknowledged everywhere for 95 years. In its place flourished practices such as poll taxes, moral character tests, white primaries, and literacy tests, devices which in themselves or in their application were designed for the purpose of effectively separating minorities, particularly those whose skin was black, from the participating electorate.

The enactment of the Voting Rights Act in 1965 began a change toward realizing the mandate of the 15th amendment. Often for the first time, blacks could freely register and vote. Poll taxes were outlawed. Literacy tests were suspended, then later prohibited. Grandfather clauses, property qualifications, racially-motivated gerrymandering practices and white primaries fell victim to Supreme Court ruling.

Black registration, a mere 6.7 percent of the voting age population in Mississippi in 1964, rose to 63.2 percent in 1972, and to 72.2 percent in November 1980. In contrast, black voter registration in States not wholly covered by the act, such as New York and New Jersey, remained woefully low, even in 1980, at 46.4 percent and 48.9 percent, respectively. Even the District of Columbia, which has a 70-percent black population and in which blacks are represented in virtually all major political positions, could boast that only 43 percent of those of voting age bothered to come to the polls in 1980.

In 1965, authoritative sources suggested that only 72 blacks served as elected officials in all 11 Southern States, including those not subsequently covered by the act. By July 1980, that figure had risen to 2,042 in the covered jurisdictions alone.

The inevitable conclusion is that the act has been extraordinarily effective. Its task is not yet complete, and the promise of the 15th amendment notwithstanding, the uncommon exercise of congressional power which this Voting Rights Act represents has not been fulfilled.

Now, during the hearings in the House, admittedly weighted in favor of extension, I heard witnesses describe voting systems in which black participants are required to fill out their ballots in front of white poll-watchers where there are no curtains and no privacy. I heard tales of limited registration hours in rural counties where facilities are often not open in the evening, during the weekend, or at noontime.

I'm also apprehensive about re-registration requirements unevenly aimed at predominantly black counties, which can have the effect of intimidating further participation by resurrecting ghosts of the past.

It's quite possible that some of what I've described merely reflects the distressing insensitivity of some election officials. It's equally plausible that it reflects instead the progeny of a cultural indifference and the vestige of a racially prejudiced past.

Now, I believe that the act should continue in effect, yet the record demonstrates significant progress worthy of effective legislative recognition. As Judiciary Chairman Peter Rodino admitted on the House floor during general debate, and I quote: "[I]t became clear that fairness dictate[s] that an avenue to escape the preclearance requirement should be afforded those jurisdictions which have had a history of complying with the law."

It's also noteworthy that Chairman Rodino admitted, "[E]scape is virtually impossible under the current law."

The House bill, H.R. 3112, reported by the House by an overwhelming margin of 389 to 24, including my vote, is not without serious flaws. It is a very complex piece of legislation which has been merchandised in extraordinarily simplistic terms.

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By the time it reached the floor, suggestions that alternate views should be considered were quickly met with harsh charges that any deviation whatsoever from what was pushed through the full Judiciary Committee merely reflected "code word(s) for not extending the (a)ct."

This intimidating style of lobbying had the ironic effect, though clearly intended, of limiting serious debate and creating a wave of apprehension among those who might have sincerely questioned some of the bill's language.

No one wishes to be the target of racist characterization, and the final vote reflected more of an an overwhelming statement of support for the principle represented by the act than it did concurrence with each and every sentence or concept it contains.

I hope, however, that though you may differ on the merits, what I say in the balance of my statement will strike you and the sponsors of S. 1992 as both responsible and fair.

What is a reasonable bailout? I favor the bailout mechanism contained in the House bill, but I disagree with some of its provisions.

I have essentially two categories of objections. The first includes those which were added to my original draft hours, literally hours, before the full Judiciary Committee approved the measure and sent it to the floor. In my opinion, much of what was added then was unnecessary and is designed principally to frustrate bailout and remove the incentive to change electoral practices, which I had originally sought.

The second category contains provisions on which reasonable persons can differ, such as the requirement that all jurisdictions within wholly covered counties or States must become eligible for bailout before any part thereof can become eligible, or whether the bailout petition should be filed in three-judge courts in the circuit nearest the covered jurisdiction or, as now, only in the U.S. Circuit Court for the District of Columbia.

To understand my concerns, I think it's necessary to review how the House bailout mechanism operates.

Under existing law—existing law, now—any covered jurisdiction, and that includes whole States in many cases, may escape the requirements of administrative preclearance only if they are able to convince a three-judge court right here in the District of Columbia that no test or device has been used for the purpose or with the effect of discriminating against protected minorities for a period of 17 years.

Now, since the 17-year period dates back to a point before the act was originally passed in 1965, this test cannot be met, unless August 6, 1982 passes without legislative action, as confirmed by Chairman Rodino's statement on the floor of the House.

Under the House bill, ostensibly designed to permit a more realistic means by which covered jurisdictions can earn their freedom from administrative preclearance, the new test as passed by the House is almost as difficult to meet as the old.

In order to become eligible for bailout under H.R. 3112, a covered State, and all jurisdictions within it, whether or not independently guilty of voting rights abuse, must demonstrate that for 10 years prior to filing a petition for bailout, and during the pendency of that petition:

One, it has not used a test or device with discriminatory purpose or effect, as under present law.

Two, no final judgment has been issued by a Federal court which determines that voting rights have been violated.

Three, no consent agreement has been entered into resulting in a change of voting practice.

Four, no Federal examiners have been assigned to the petitioning jurisdiction.

Five, the petitioning jurisdiction, and all jurisdictions within it, whether subject to State control or not, have complied with the preclearance provisions of section 5.

Six, no objections have been raised to changes submitted for preclearance by or on behalf of the covered jurisdictions, and

Seven, covered States and all governmental units within their territory have eliminated voting procedures and election methods which inhibit or dilute minority participation, have made constructive efforts to eliminate harassment at the polls, have provided minorities with convenient registration, and have appointed minority representatives as election officials throughout the jurisdiction and at all stages of the election and registration process.

Parenthetically, I should state that Congressman Jenkins of Georgia represents a district which he says has many counties with no minorities living within their boundaries. How they're going to appoint minority representatives as election officials boggles my mind.

I don't quarrel with all of these preconditions, but some are troubling to me.

No. 1, consent decrees.

Senator KENNEDY. Mr. Congressman, Mr. Chairman, could you yield for just a moment.

Senator HATCH. Sure.

Senator KENNEDY. We are having a joint meeting of the Congress in just a short time, and Members of the Senate so desire assembling in that time, and I understand the intention of the chairman is to continue during the course of that meeting.

I had some questions for Mr. McDonald, which is why I wanted to inquire of him. I don't know what his program is, but I don't think that we'll be able to get back until earlier in the afternoon. Now, I will be glad to submit some. There are probably about three or four that I would like to have as a part of this record, and if I could have my staff ask those three or four questions at a time convenient, that will be all right.

Senator HATCH. We'll be happy to accommodate you, Senator.

Senator KENNEDY. Mr. Chairman, at an appropriate time, since the President was asked last evening about his position on the Voting Rights Act in an interview with Mr. Rather, and this was an issue which was brought up yesterday during the course of the hearing, I'd like at an appropriate place—not to interrupt the Congressman's testimony—to include the exchange between Mr. Rather and President Reagan on the House-passed bill, in which he did indicate that he could sign that legislation, and I think just at an appropriate place in the record, maybe at the outset of these hearings, we could include in the record that exchange.

Senator HATCH. Yes, that will be fine.

Might I inquire, do you have both exchanges on this issue? Because there was one and then he came back with a clarification that——

Senator KENNEDY. It would just take a minute.

Mr. RATHER. Just very quickly, if the House version of the Voting Rights Act is passed, will you veto it?

President REAGAN. No, I wouldn't. Well, I don't exactly—now you've trapped me into something. I usually don't like to say whether I'll veto or not veto until it's on my desk, because sometimes an orange becomes an apple before it gets there. I'm for the expansion of the Voting Rights Act for 10 years. It has never been extended for that long. I believe that I can support what is the House version. I don't know what's going to happen in the Senate.

Mr. RATHER. I understand. But if the current House version gets through, you would not veto that?

President REAGAN. I don't know of anything that is in it that would make me veto it.

And Mr. Rather, during a break in the interview requested by Mr. Reagan, agreed in advance, two White House officials suggested the President should say more about his answer on the Voting Rights Act. So after the break, we come back to that subject.

Mr. RATHER. I thought there were some exceptions that you wanted made in the House version of the bill. Now, first of all, you're willing for it to have a 10-year extension.

President REAGAN. Yes, I guess I did misspeak there. I am willing—I would be willing to take the bill—I mean, the program as it exists and simply extend it for 10 years, or the House version.

This is after the break, or the House version.

But I should have added there are a couple of points in the House version as it exists now that we would like to see modified or changed.

Mr. RATHER. And they are?

President REAGAN. Well, one of them has to do with the bailout provision and the other one has to do with what's called an effects test, rather than an intent test, that we believe could cause confusion and perhaps unfairness in the program.

Mr. RATHER. But, Mr. President, doesn't this run a high risk of aggravating the problem you already have with the perception of black people that, yes, you say, "Listen, I care about you. Nothing in my background, not a bone in my body that is bigoted," but then when it comes to something like voting rights, yes, you'll extend it, but there are exceptions? If I read the black Americans correctly, which is hard for anyone to do, this is exactly the kind of thing that scares them about you.

President REAGAN. Well, now, wait a minute. Let me clarify. The Voting Rights Bill as it exists and has existed performed a fine service and worked well. It was a good piece of legislation. I have said I'd be willing to extend that 10 years. It's never been extended that long before.

Mr. RATHER. True.

President REAGAN. I wanted to go forward with it, the House seeking to improve it. It has a couple of features in there that I don't think improve the present legislation, one that I think would make it harder to make it effective, which is change to the efffect of the bill as a means of imposing penalties, rather than the intent. In other words, as the bill exists, it is, if you can see a governmental body that is seeking, or any other group that is seeking to restrict the rights of the people to vote, you take action on this. The change that apparently is wanted is a change that would say, "Well, let's look at how many—what would the percentage of voting—we don't think enough percentage voted." Well, maybe enough percentage doesn't vote sometimes simply because they're not interested in the candidates, and to us that is not as big a guarantee of fairness as it is to, as we say, go by the intent and say, "Look, you're trying to keep these people from voting."

I'm not quite sure I understand that last answer, but I thought the indication of his willingness to sign either bill was a matter that the committee ought to have as it gives consideration to it.

I thank the chairman.

Senator HATCH. Thank you, and we'll put that in the record.

I have to admit that I appreciate my colleague who, unlike the President and the rest of us, is always precise and, of course, fluent in every one of his public pronouncements.

Senator KENNEDY. That's right.

Senator HATCH. There is never even the slightest hint of unclarity or ambiguity in his statements.

Senator KENNEDY. Not with regard to this bill, there isn't.

Senator HATCH. Well, I think it would be well for you to understand the bill. Maybe you would have some unclarity. The rest of us mere mortals, of course, unfortunately cannot always make that claim.

And I suspect that the President has many, many responsibilities——

Senator KENNEDY. Well, you don't think he was unclear when he said that he'd support the House bill, do you?

Senator HATCH. Well, I think this: I think that he would support a bill——

Senator KENNEDY. Was he unclear when he said, "I don't know of anything that is in it that would make me veto it"?

Senator HATCH. I think what the President is saying is that he wants to have the effects test out of this bill, and would like to have a reasonable bailout provision. I think that his representative, the Attorney General, who is trained and learned in this area, spoke very clearly for the President yesterday. I think it's kind of ridiculous to put that in as though by any interview for 30 seconds or a minute-and-a-half or 5 minutes, the President should be bound by every little word and jot and tittle that he says.

All I can say is that I do believe there have been times even on this august committee where every one of us, including even the distinguished Senator from Massachusetts, have said things that perhaps we wish we had not said because we really didn't mean them quite the way they came out. I suspect that is the nature of politics, and I hope we'll have some degree of compassion, at least, for those who sit in these positions.

Go ahead.

Senator KENNEDY. May I just say finally, I think the President's words speak for himself, rather than for how we interpret them, and I'm glad to have them in the record.

I thank the Congressman for yielding.

Senator HATCH. Let me just say this, Mr. Congressman: I think the President is committed to the Voting Rights Act, as am I. The point which should not be obscured by any colloquy is that this is an important issue, and section 2 is an important issue. You are raising some important issues about the House bill, for which you voted.

Mr. HYDE. Right.

Senator HATCH. And we can't obscure it merely because of politics or anything else, for that matter.

Go ahead.

Mr. HYDE. Thank you, Mr. Chairman.

Let's talk about consent decrees. For example, consent decrees have been traditionally encouraged by our judicial system. They are supposed to further the public interest and represent a rather

substantial percentage of civil terminations within the Department of Justice.

They permit the Department to operate at considerably less expense than would be the case if all cases were tried, and they permit a defendant to avoid the immense cost associated with fighting the resources of the Federal Government through the courts.

H.R. 3112 would automatically preclude eligibility for bailout if any covered jurisdiction had come to a consent agreement with the Government within 10 years of the bailout petition. Moreover, this penalty would attach after the fact.

The inevitable result is to offer covered jurisdictions only two alternatives, neither of which is ultimately beneficial to covered minorities.

First, petitioning jurisdictions can fight the cases involved through the courts to acquire judgments, expending funds which could otherwise be used for electoral improvements, and simultaneously delaying the implementation of electoral changes designed to satisfy the other conditions of bailout and improve access to the vote for minorities.

Second, they can withdraw their bailout petition altogether and content themselves with the status quo, a condition which witnesses before you will doubtless condemn as unacceptable.

What purpose, then, is the consent bar designed to serve? In my view, it can have no effect but to reduce, perhaps fatally, the incentive for improved electoral conditions offered by a realistic bailout mechanism.

A better resolution would be for the trial court to examine the totality of the consent degree and determine if the practices corrected were so insubstantial that they could not constitute or they should not constitute a bar to bailout.

Two, Federal examiners. Federal examiners are provided for in section 6 of the act and may be dispatched at the will of the sitting Attorney General. Under the terms of subsection (b), the Attorney General may order examiners to a covered jurisdiction, and thereby frustrate bailout for a period of 10 years, if he is willing to certify that he has received written complaints from more than 20 residents of a covered jurisdiction, which could be an entire State, and that he believes such complaints to be meritorious or, in the alternative, he alone determines that the appointment of examiners is otherwise necessary.

No review of the merit of the complaint is necessary, nor must the examiners find irregularities once they arrive on the scene. The bar is complete if they are merely sent, even if the motivation of the Attorney General in sending them is political, rather than substantive.

Once again, the purpose to be served can only eliminate the incentive for change.

Three, objections. The bar to eligibility created by the requirement that there must not be any objections to any submission made "by or on behalf of" the covered jurisdiction raises some interesting possibilities. Technical objections, resulting from lack of experience with the act or from executive incompetence, create no less a bar than does a purposeful electoral change specifically designed to disenfranchise minorities.

In addition, if elected Representatives sponsor and vote for a redistricting plan which is later subject to an objection, have they acted "by or on behalf of" their constituents for purposes of the 10-year bar? What if their motive was to politically embarrass executives in their home jurisdiction, who might well be members of another political party? In either event, the objection which they receive from the Department of Justice will be a complete bar to eligibility for bailout for a full decade.

Four, parole period. If bailout is ever issued, and the 10-year parole period is ever begun, the bill requires the reviewing court to reopen the case, and thus relitigate the issues, if any aggrieved person so much as alleges that misconduct has taken place during the period which, had it taken place during the 10-year eligibility term, would have prohibited bailout.

Once again, no merit is demanded of the aggrieved party's allegations, and no discretion is presented to the reviewing court. The covered jurisdiction will once more be forced to litigate even admittedly trivial accusations and endure considerable costs in the process.

This makes no sense at all. The insistence on this provision by the proponents of the bailout as presently constituted raises questions of good faith to my mind, if not of reasonableness.

There are additional issues in the House-passed bailout which fall in the second category. They pertain to policy questions, about which reasonable people can disagree. Examples include the requirement in the House bill that all counties—all counties—within covered States must meet the eligibility standards, as well as the State legislature itself, before the latter can effect bailout.

I believe a two-thirds threshold is preferable. Even a three-fourths threshold would be preferable. But to require complete bailout by every political entity within a State before a State can get out, I think is just unreasonable.

I think these malfeasing jurisdictions, these areas that do not bail out and cannot bail out, could be isolated and public attention be focused on them, rather than to hold the entire State in because of one or two recalcitrant jurisdictions.

Now, I believe fervently that the exclusive use of the three-judge court in the District of Columbia is an affront to circuit courts elsewhere in the country.

The fifth circuit, for example, holds one of the strongest civil rights records in this country, though it is situated principally within the covered jurisdiction. An amendment was offered in the House which would have permitted local circuits to be used so long as two of the three judges were circuit judges—that's U.S. Court of Appeals judges—and none were from the jurisdiction petitioning for bailout.

I think you would all admit that, while you may differ as to policy, this is a reasonable proposal. It was neverthless labeled a crippling amendment and summarily rejected.

Now, we know the civil rights establishment is here in Washington and has easy access to its courts. By using courts in a more appropriate venue, with these guarantees against hometown justice, local officials and witnesses will also enjoy equal access to the courts, which seems to me an essential element of justice.

Finally, I do not think the condition for bailout which requires the elimination of "voting procedures and methods of election which inhibit or dilute" minority access should be interpreted to mandate the elimination of at large electoral systems where they have not been found to have been created or to be operated for a discriminatory process.

I'll treat this issue more fully in the next part of my statement, but at-large electoral systems often serve a number of legitimate political purposes. Since each of you, Senators, is elected at-large, I'm sure you're sensitive to the degree to which such systems often require candidates to moderate their views in order to pull from the mainstream of the electorate, permit minority block voting to influence the whole of the election, rather than just one ward or district, and tend to break down the special interest representation generally associated with small and occasionally rather extreme political constituencies.

I would encourage jurisdictions to alter their electoral practices in order to integrate minorities into government. That was the thrust of my original draft. I prefer, however, that the "constructive efforts" of the jurisdiction in question be taken as a whole in determining whether or not to grant bailout.

Different facts dictate different actions on the part of the petitioning jurisdiction. Presenting each requirement as a complete bar, as H.R. 3112 does, seems to me, again, both unreasonable and, in the long term, counterproductive.

What does section 2 really mean? If section 2 of H.R. 3112 ever becomes law, it may well be the most far-reaching legislation ever adopted by Congress. It purports to be a clarifying measure, designed to return the law to what it was prior to the Supreme Court's ruling in *Mobile* v. *Bolden*. It is also marketed as a replacement for an "impossible" burden of proof established by *Mobile*, with a disclaimer tacked onto the end of the House amendment, which is reassuringly alleged to erase any fears of quota requirements.

All of these claims are erroneous. The House devoted just 1 day to the merits of the new language and presented as witnesses three attorneys supporting the changes, including the attorney for the losing side in *Mobile*.

Senator HATCH. Could I interrupt you, Congressman Hyde?

Mr. HYDE. Sure.

Senator HATCH. How many total days did the House hold hearings?

Mr. HYDE. We had 100 witnesses, but I'm not sure how many days, but they were extensive hearings.

Nineteen days, I'm just informed.

Senator HATCH. Nineteen days. I see. And they only gave 1 day for the discussion of this problem?

Mr. HYDE. That's right.

Senator HATCH. Go ahead.

Mr. HYDE. Before accepting the arguments of the House at face value, I encourage you——

Senator HATCH. Excuse me, again. Could I interrupt you again?

Mr. HYDE. Sure.

Senator HATCH. I'm sorry, Henry, to interrupt you again, but, as you know, to me, section 2 is the problem. Now, would you disagree that, section 2 creates the potential for a monumental problem?

Mr. HYDE. Senator, I think section 2 is a major key to what we're doing. I agree, and I confess to not paying sufficient attention to this issue in the House. I personally got wrapped up in trying to work an acceptable compromise on bailout out with all of the interested parties and my focus was not on this issue, hoping instead that in a compromise we could reach a satisfactory package.

We weren't able to do that, but following the dismemberment of my bailout a few hours before the Judiciary Committee's hearing, I was able to pay more attention to this, and, frankly, though I had expressed concern, I now view this as before, perhaps more important, really, than the bailout, and I hope that you'll devote the attention to it that we did.

Senator HATCH. Well, I haven't meant to find fault, but I concluded early in my research on this issue that it is going to be very difficult to ever get a reasonable bailout provision, because there is more heat than light in this matter. There's an unwillingness on the part of many members of Congress to really address that issue, even though it deserves it, as you're doing right now.

I just cannot overlook the section 2 problem, because it's——

Mr. HYDE. Senator, the tradeoff in the House, as I envisioned it and tried to fashion it, was not a 10-year extension for preclearance but a permanent extension. And I keep hearing television commentators and others talk about a 10-year extension.

Senator HATCH. Oh, it's permanent.

Mr. HYDE. That's not before you.

Senator HATCH. That's right. It's permanent.

Mr. HYDE. The way Peter Rodino originally introduced it was to maintain the status quo for 10 years but add an effects test to section 2.

You have a House bill before you that contains permanent preclearance. The tradeoff was a decent, workable bailout, and we ended up with permanent preclearance, and a virtually impossible bailout, so, sadly, what passed may, in part, be unconstitutional.

Senator HATCH. I think it is impossible. I don't think there is any way that anybody is ever going to bail out under the requirements prescribed by the proposed legislation. I personally understand why these jurisdictions that have made real efforts in this area—some of which have been pretty successful—feel very bitter about it.

Mr. HYDE. Well, Senator, I think you could work a decent bailout.

Senator HATCH. Oh, I think we can, too. I don't think this is it, however.

Mr. HYDE. No. I agree, but I won't repeat my criticism.

Senator HATCH. Senator Biden?

Senator BIDEN. Mr. Chairman, I apologize for interrupting you. I'm not even a member of this subcommittee, and I know all you Republicans are going to want to follow me over to the hundredth year commemoration ceremony.

Senator HATCH. I wish I could go. I really do. I would like to go.

Senator BIDEN. I not only wish, I must.

But I'd like to just raise one point, Congressman, and maybe you can clarify it a little bit, with regard to how much attention you paid to section 2 or not. Obviously, I guess you'd have to say that's the single most contentious element of this whole debate, and during your hearings, in an exchange with Professor Walburt—I believe that's the correct pronunciation—you said:

Mr. Hyde, if I could just jump in, we have preempted so much time, and you have been very generous. I have been most interested in the discussion. If you could come up with some suggested language that would allay the fear that proportional representation might be mandated, that would go a long way toward resolving some of the concerns some of us have. This is new language that hasn't been interpreted by the courts, and they're just not predictable. Well, they just aren't.

And then Professor Walburt said, "Bolden would confirm that." And the response by Congressman Hyde is,

So your point is that you wouldn't be disturbed by that. That's helpful, politically helpful, to get something like that in the words.

And then on the next page, you say,

Sure, it's something that should be looked at and, in effect, as long as we're talking about it, I'd like to look at the totality of the situation, because I can conceive, as you can, of situations where there is a submergency or a dilution of minority voting strength, but the need for it outweighs the unhappy consequences. You know, like amputation is a terrible thing, but it may save the body. Under any effects test that we can crank in, I would hope that the Court and the Justice Department could review the totality of the circumstances in evaluating whether this in fact is a voting rights abuse. I think we understand each other on that, do we not? Would you agree?

Professor Walburt: One hundred percent.

The reason I bother to bring it up, it sounds to me like you pretty well knew what you were talking about. What in the interim has changed—I mean, you're obviously not——

Mr. HYDE. I ratified my statements there. I think what I'm trying to say, and I think what can be done, is a codification of the *Washington* v. *Davis* case, which is a fairly recent case, in which the Court said the totality of the circumstances should be studied to see whether or not invidious discrimination exists.

But the "disclaimer" in the bill highlights simply one factor, one circumstance, which I interpret as are numbers, results. That means numbers, and if there——

Senator BIDEN. But I thought you talked about effects.

Mr. HYDE. Yes, that's an effect. A result is an effect. The effect of this law is to preclude minorities from being elected. How do you show that? Well, they just aren't being elected? There are none elected, therefore, it's invidious.

Rather than to leap from A to B like that, I would like the totality of the circumstances looked at, as in *Mobile* v. *Bolden,* where you had more than just the mere failure of the election of three blacks, but you had them losing in the black districts as well. You had limited campaigning. They couldn't even carry majority black districts. So if you simply said, "Look, they weren't elected. The effects must be discriminatory," I think the totality of the circumstances ought to be looked at.

And I think the test as set down in *Washington* v. *Davis,* which is on page 21 of my statement, would be the way to do it. If that could be codified in this section 2 or some appropriate place, I think we could avoid the problem we seem to be moving toward,

because proportional representation is a very dangerous concept, in my judgment. Justices Marshall and Brennan thought it was appropriate in *Mobile*, so you've got two Supreme Court Justices opting for proportional representation.

Senator BIDEN. But I didn't think that's what either Mathias or Kennedy attempted to do with section 2. I mean, that's not my understanding.

Mr. HYDE. Let's say it, then, and not leave it to some court to interpret. That's my point. If we're all agreed on what we want to do, let's avoid ambiguities in the language and let's say that proportional representation is not the sole determining factor, not what we're looking for; we're looking at the totality of the circumstances. That's all. And I think that's what the Supreme Court has held, especially in *Washington* v. *Davis*.

Senator BIDEN. Well, I have some concerns about section 2, but I keep coming back to that I thought that that's exactly what the bill now says is what you're suggesting that it says.

Mr. HYDE. You're talking about section 2, now?

Senator BIDEN. Section 2. Yes, just section 2.

Mr. HYDE. Well, Section 2 in H.R. 3112 highlights only one factor, and that is proportional representation.

Senator BIDEN. I appreciate your allowing me to interrupt, but we're going to be talking about this——

I don't want to cut you off, but I'm now beginning to upstage a subcommittee I'm not even on.

Senator HATCH. We always respect the Senator from Delaware.

Senator BIDEN. I appreciate it. I'm sure we're going to talk a lot more about this. I know I plan on listening to all the testimony.

Mr. HYDE. If we agree we don't want an effects test to mandate proportional representation—I think that's what you said Senator Kennedy and Mathias wants—let's say that in an unambiguous——

Senator HATCH. This section simply says that——

Mr. HYDE. Yes. Let's say that, and then we're fine.

Senator HATCH. Good.

Senator BIDEN. Thank you very much, Congressman.

Senator HATCH. Let me just say this to you, Congressman, as a followup to the other point that I made. We are really trying to make these hearings well balanced during the 9 days of hearings that we're having. I think we're calling some of the best people on both sides that we can get, but unfortunately we can't get everybody, and there are some appalling reasons for that. That's all I can say.

Let me ask you this: You had 100 witnesses. Did you feel that those hearings in the House were balanced, with only one day devoted to section 2 issue, which I believe is the most important issue to be addressed in any discussion of the proposed bill.

Mr. HYDE. Well, Senator, in all candor, let me say this: No witness whom we wanted to call was denied an opportunity to be heard. I found a reluctance, sadly, among people who ought to come forward to oppose some of these notions, a reluctance to testify. We were not inundated by requests from attorneys general and others to come forward and testify on section 2 or other parts of the bill.

Now, we asked an awful lot of pecple to come forward. Perhaps—and I shouldn't speculate—but I sense that some of them felt that our forum was not objective. We had one witness, a black lawyer from Mississippi, who was going to testify not in accordance with the zeit geist, with the establishment, on this and he was harassed.

Senator HATCH. Harassed by whom?

Mr. HYDE. Well, by political figures in his state. Even members of his family called him and said, in effect "You're not going to go up there and testify against the Voting Rights Act," and this man is a very well-known black civil rights lawyer who was a very interesting witness. He did testify, but I was very disturbed by what I personally evaluate as harassment.

So there may well have been that feeling among others that there wasn't much point to coming up here. Now, I don't share that feeling. I think if someone has something to say, he ought to come forward and say it.

And I do not charge Chairman Edwards or the majority staff—I think they clearly had a point of view they wanted to further. We just weren't inundated by people who wanted to testify on possible changes.

Senator HATCH. Well, I know of several instances on this side where people we have asked to testify, have been unable to testify, due to the harassment to which they were being subjected as a result of the invitation to testify. I am appalled by this situation, to be honest with you.

I personally don't think that one day is adequate to address this issue. I'm not trying to assess any blame or responsibility, but I think it an unfortunate oversight. We're trying to address it here on both sides.

I have to admit that to me it's one of the most important constitutional issues ever addressed by this body, and the section 2 question really transcends many of the other problems in this matter.

Mr. HYDE. Senator, I'll take some responsibility for that. We couldn't find anybody, and we did look. Now, I have one staff person for the three of us. The majority has how many staff?

Mr. BOYD. They have five.

Mr. HYDE. They have five, and we had one, and Mr. Boyd did a great job. But they would have heard someone if we could have come up with them, and we had trouble, frankly.

Senator HATCH. Please forgive me for raising this.

Mr. HYDE. Surely.

Senator HATCH. I haven't wanted to find fault with anybody, but, as you know, this is hardly an inconsequential issue. This is a very important issue. It is, in my opinion, a major change in statutory law.

Mr. HYDE. It may radically restructure the electoral process if an effects test like that in H.R. 3112 becomes law, because every losing candidate then will have a cause of action.

Senator HATCH. That's right. We're going to have witnesses on both sides; I'm sure that point will be addressed from both perspectives, the one which you have just expressed, and that held by those who say the change will have no such impact at all.

Mr. HYDE. That's right.

Senator HATCH. It simply makes it easier to prove these cases.

Mr. HYDE. Well, then, let's spell it out. Let's spell it out, as Senator Biden said that Senator Kennedy and Senator Kennedy intend, that we don't mean proportional representation but totality of circumstances.

Senator HATCH. But, you can't do that. The proponents want the effects test knowing that if they can get it here, then they could have similar success in other areas of civil rights. With this type of revision in present housing legislation they could overrule land use planning and zoning ordinances on merely the basis that the effect of having an acreage or lot-size requirement effectively excludes black because in that area they can't afford to buy them, even though there was no intent to discriminate in establishing those laws to begin with.

This example clearly illustrates how much more involved this issue is in reality. It is not just the Voting Rights Act at issue here. This is just the beginning. And, frankly, fair housing was a beginning last year of trying to institutionalize the effects test so that it would be much easier to prove any discrimination case, regardless of intent.

Well, let's go back to your statement.

Mr. HYDE. If I may.

Before accepting the arguments of the House at face value, I encourage you carefully to read the Court's opinion in *Mobile* and review the oral arguments, if you can, of the advocates before the Supreme Court. Once you've done that, I suspect the simplistic positions which have been taken will assume an entirely different character.

To summarize, *Mobile* involved an at-large electoral system through which three members of the city's governing commission were elected by the populace. Created in 1911, it came under attack because in three attempts black candidates had been unable to overcome racially polarized voting and gain election to the commission.

This fact, combined with the 35-percent minority voting block which blacks represented in the city of Mobile, led the district court to decide against the city, reaching its decision on 14th and 15th amendment grounds, not, as has been claimed, on a private right of action under section 2 of the Voting Rights Act.

The Court of Appeals for the Fifth Circuit affirmed, but the Supreme Court reversed, holding that the effects test applied by the district court was incorrect, that discriminatory purpose must be established to prevail on a constitutional claim. That is a case brought under the 14th and 15th amendments.

One congressional critic has summarized *Mobile* as a decision which is all over the lot. Not so. Six Justices reversed the decision of the district and circuit courts, five of them agreeing that Justice Marshall's claim of a constitutional right to proportional representation was ill founded.

In the first place, the House language is not intended to return the law to what it was before *Mobile*, as claimed again and again by editorial writers and commentators.

The fifth circuit, while holding against the city of Mobile on constitutional grounds, nevertheless noted in passing that a statutory

claim under the Voting Rights Act "was at best problematic." It knew of no successful dilution claim expressly founded on section 2.

Indeed, *Mobile* was never a case under the Voting Rights Act. The argument that the act might be involved was made before each court, including the Supreme Court, but was dismissed there as it had been below. In fact, James U. Blacksher, attorney for the plaintiffs, confessed before the Court that "In its motion to dismiss early in the case, the district court held that we did not have a cause of action."

Furthermore, if it were true that intent—and I think this is important, and you hear this again and again; it was in the Washington Post this morning—if it's true that intent is as impossible to prove as has been predicted, we would have few criminal convictions in this country, for each is invariably based on some showing of intent, and many result from circumstantial evidence which does not involve a smoking gun.

Similarly, we would have no judicial findings of de facto educational segregation resulting in busing, for each is based on proof of intent under the equal protection clause of the 14th amendment, the same clause now applicable in voting dilution cases.

If intent were impossible to prove, a dilution case could not be successfully pursued. Let me repeat that. If you can't prove intent, then you'll never successfully pursue a dilution case, right? Wrong. In February of last year, the fifth circuit, following *Mobile*, held that an at-large electoral system in Escambia County, Fla., was purposefully discriminatory. Since *Mobile* is now being relitigated, its result may change as well.

Circumstantial evidence, then, can prove a case under section 2 of the present act, after all, just as it can in a criminal context.

The plurality in *Mobile* rejected the fifth circuit effects test articulated in *Zimmer* v. *McKeithen*, a 1973 case, *East Carroll Parish School Board* v. *Marshall*, a 1976 case, and held firm to its own decision in *Washington* v. *Davis*, a 1975 case, which followed *Zimmer*.

Now, the *Washington* standard seems to me quite reasonable, and clearly disproves charges that proof of intent is impossible. In defining discriminatory purpose, Justice White wrote—and this is in the *Washington* case, 1975—that intent need not "be expressed or appear on the face of the statute."

An invidious discriminatory purpose, he said, "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another * * *. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." I think that's key to this whole issue.

How can this test be fairly characterized as impossible?

In the *Escambia County* case, as in *Mobile*, there was no smoking gun available. Nevertheless, the fifth circuit, in reviewing the totality of the evidence surrounding the motives behind the selection of the at-large electoral system for the school board and city council races, and in tracing its decision to the guidelines set forth in Justice Stewart's plurality decision in *Mobile*, held the at-large system unconstitutional in both cases.

Contrary to propaganda asserting that the *Mobile* test is impossible, the fifth circuit inferred from the totality of the facts that the

electoral procedures in Escambia County were created and, indeed, were maintained—and that word is important; if you can't prove they were created with discriminatory intent, you can show that they're operated or maintained—for discriminatory purposes. The county and city of Pensacola chose not to appeal.

The fault in *Mobile*, if there is fault, lies not in the opinion of the Supreme Court, as some would suggest, but rather in the imperfect record presented to the Court by the plaintiffs.

In the first place, the district court in *Mobile* rested its holding—I'm talking about the district court—"primarily on the fact that no Negro had ever been elected to the city commission." It was unable to find that the at-large system, created back in 1911, was originally designed to serve a discriminatory purpose.

But the inference it took to reach its decision was contradicted by its own findings. Specifically, the only three black candidates ever to seek election to the city commission did so in 1973 and were adjudged by the district court to be "young" and "inexperience," a fact not lost on the Supreme Court. They didn't campaign at large. They failed to carry even black wards. It is at least reasonable, therefore, that factors other than race could have resulted in the failure of these candidates to achieve success.

The district court also attempted to correlate the failure of qualified black candidates to gain election to the county school board, also determined at-large with the failure of the three black candidates in the city commissioners race. County boundaries, however, were not identical to those of the city and, though they overlapped to a degree, the constituencies were considerably different.

The Supreme Court also noted the district court's findings that blacks "register and vote in Mobile" without hinderance "and that there are no official obstacles in the way of blacks who wish to become candidates for election to the commission." The mere fact that they had not yet been elected was insufficient to "work a constitutional deprivation."

Thus, having failed to establish satisfactorily that the at-large system in Mobile was created in order to discriminate against blacks or that the black candidates for the Mobile City Commission lost because of their race, the district court was left with one rather tenuous presumption: that the failure of the Alabama legislature to take affirmative steps to remedy disproportionate representation was, and I quote, "as effective as * * * intentional State action," and therefore "sufficient to support a finding of unconstitutionality." This conclusion was upheld by the fifth circuit, but this holding was dismissed by the clear majority of the Supreme Court, not just the plurality of the Supreme Court.

In short, *Mobile* was not a good test case and probably should never have been chosen as one. It was, as I have said, never a voting case under section 2 of the Voting Rights Act. It was a case brought under the 14th and 15th amendments from the beginning.

So what is it that the House language is attempting to accomplish, if not proportional representation? Cries that legislative history will clarify the congressional intent that quotas are not required mean little if, as a matter of constitutional construction, such history is not "permitted to control the customary meaning of the words . . . ," *United States* v. *Dickerson.*

If we look at the words alone, we find that disproportionate representation, "in and of itself," is not supposed to constitute a violation of section 2. It is a "high relevant" factor, however, according to our House report. Since no other "highly relevant" factor is listed in the statute, I would argue that "highly relevant" translates into a presumption and that statistical imbalance, with little more than a scintilla of additional evidence, would indeed constitute a violation of the House amendment. In other words, a claim of voting discrimination under section 2, as amended by the House, will survive so long as the record is not "wholly barren of evidence."

Very simply, then, what we are talking about here is quota representation based on race, a principal which, though camouflaged by the rhetoric of effects or results, nevertheless demands some rather dismal assumptions. It suggests the worst kind of racism, a policy which concludes that prejudice is infinite, that blacks cannot be represented by whites and, with equal logic, whites cannot be represented by blacks.

Justice Marshall's protest that what he referred to as an "inequitable distribution of political influence" was not synonymous with a constitutional right to representation was unpersuasive to a clear majority of the Supreme Court. They felt that proportional representation was precisely the issue. So do I.

I would not object to the codification of the holding in *Washington* in order to clearly articulate that the totality of the circumstances are, and should be, properly considered in proving intent in a constitutional case. The political issue here, though, is proportional representation, just as it was in *Mobile*. Only the personalities have changed. No one has yet proposed the codification of *Washington*, but I suggest to this committee respectfully that it consider this middle position.

Experience has shown us that the effects test now in section 5 of the act is very broad in its application. Proponents of the House amendments to section 2 wish to extend that breadth nationwide. Since the section 5 requirements are based on a congressional finding in 1965 that reprehensible State action had occurred in jurisdictions now so covered, I do not believe a case has been made which demonstrates that the same onerous test should be applied at all levels of elective government nationwide. It will be too strong an antibiotic to the body politic of this country, resulting in an affirmative action plan for minority public officials.

The litigation from disappointed candidates which such a radically new electoral process would generate can only overwhelm our court system for generations.

While I'm sympathetic to the frustrations which must prevail in *Mobile*—the hearings I attended in nearby Montgomery opened my eyes immeasurably—it's important not to lose sight of the fact that the failure of the litigants in *Mobile* was not caused by an aberration of constitutional interpretation. Rather, the fault lies at the feet of those whose burden it was to make the case for change.

The challenge was met in *Escambia County*; it was not met in *Mobile*.

I surely thank you for your patience throughout this long presentation. I would be happy to answer any questions that you might have.

Senator HATCH. Well, thank you, Congressman Hyde. We appreciate the extensive efforts that you have gone to to present us with your analysis of the House bill and, of course, the present state of affairs.

I don't have any questions. Senator Thurmond?

Senator THURMOND. It's a great pleasure to have you here, Congressman Hyde, and thank you very much.

Mr. HYDE. Thank you, sir. It's a great pleasure to be here.

Senator HATCH. Senator East?

Senator EAST. I would, again, just like to thank the distinguished Congressman for coming here and being a part of this discussion, and we greatly appreciate the work that he's done on the House Judiciary Committee on this vital matter.

I appreciate your indulgence, Mr. Chairman.

I would like to make sure, now, that I understand, Congressman, your fundamental conclusion. As you see this House bill, one, we in effect institute a system of preclearance.

Mr. HYDE. Only in exchange for a workable, fair, practical bailout. I'm not troubled by preclearance in perpetuity, if you can realistically qualify for escape.

Senator EAST. Right. But your point is, we have, as you put it—and I want to make sure I understand your position—we have the worst of both worlds?

Mr. HYDE. Now, we do, yes.

Senator EAST. Because we have permanent preclearance, and we have, as a practical matter, impossible bailout, and, as I understand it, that is your position. I think it's perceptive. I personally agree with it, and coming from one of those States that has been vitally affected by this statute, I think it needs fundamental and major overhauling.

Right now in my State, we cannot even hold primaries for the House of the Representatives because of the incredible turmoil, having nothing to do with racial discrimination, currently being practiced in the State. And I hope that in the course of these hearings—and thanks to your great spade work and your insightful comments, I think at least we can open up a serious dialog on what we're doing here, because I sense we're getting a little bit of a rush from many quarters just to move this through, and we're dealing with some very fundamental, long-term constitutional matters.

You put your finger on this question of proportional representation. If what you're trying to do is to guarantee in the statute the right of individuals to register and vote, irrespective of race, that's one thing, but where a statute is designed to guarantee specific results, be it white representation, be it black representation, Mexican-American or whatever, proportional representation, that's a wholly new concept in the American democratic electoral process.

And I would like to end on this note—because I don't want to overindulge the courtesy of the chairman here—if we accept this, we go down a very new and strange world in the electoral process in this country, which is not predicated upon the idea of proportional representation, but is predicated upon the idea that the indi-

vidual, irrespective of race, ought to be able to register and to vote and to participate. It's that fundamental point that troubles me.

And the thing that troubles me the most in the treatment of this in the public arena is the implication that if you have any question about it, you are some way or other tainted with racism. And I would remind the critics that not everything done in the name of fighting poverty helps fight poverty, and not everything done in the name of anticommunism is anti-Communist, and not everything done in the name of national defense is national defense, and not everything done in terms of improving the electoral process in this country necessarily does so.

And I think this Voting Rights Act as it's currently proposed, with the limitations that you have noted and the deficiencies you have noted points up the need to hit this thing head on, and to engage in serious public discussion and dialog on it, because if we don't, as our distinguished chairman has indicated, we are going to saddle this country, and certain sections of this country, with unworkable, impractical legislation, and legislation that is contrary to the fundamental essentials of the electoral process, democratic process in the United States.

Senator HATCH. I might add, Senator East, this issue is certainly more involved than that. If this section 2 is adopted, it would apply to every jurisdiction in this country, and that's what the people in this country better start learning, because if it is applied to every jurisdiction in this country, two-thirds of which are at-large voting districts, you're talking about an upheaval in this land that will be second to none, politically.

Mr. HYDE. Senator, may I just say something?

Senator HATCH. Yes.

Mr. HYDE. First of all, on this section 2, which we all agree is crucial, the language that I personally prefer would state that intent can be inferred from the totality of the circumstances. If one factor is to be highlighted, as it is in the House language, then a list of other "highly relevant" factors should be included as well, but I prefer what is the law today, that the totality of the circumstances be studied.

Senator HATCH. That is the law today.

Mr. HYDE. That's correct, that is the law today.

Senator HATCH. It was under *Mobile.*

Mr. HYDE. Having said that, let me talk about two other things. Chief Justice Burger is reported in the press as expressing great concern about the tidal wave of litigation that's inundating the present Federal court system. I suggest if we have a nationwide effects test such as is in H.R. 3112, our court system may not be able to support the litigation that——

Senator HATCH. But, Henry, the court's ability to handle the case load is not a consideration in passing the type of law if the law were right. In other words, if the courts couldn't handle it, we would have to get more courts, because we've got to work against discrimination. I know you believe the same way I do on that. But the problem here is that the solution offered by this particular legislation is not right. That's the problem.

Mr. HYDE. Well, Senator, I agree with you, but the real world has to be considered by people who want perfection.

Senator HATCH. Sure.

Mr. HYDE. And the price of perfect justice, as we know, sometimes can't be paid. Society can't pay it.

Senator HATCH. But my contention is that this bill would not get us to perfect justice.

Mr. HYDE. Well, Senator, if we have an impossible bailout, combined with permanent preclearance, that may be the best of all worlds for the civil rights establishment, but I suggest it's like having the fist in the bottle. There are serious constitutional problems in that. The constitutional justification for preclearance, which was held to be an extraordinary remedy in 1966 was—the underpinning for that was the extraordinary conditions that existed pre-1965.

Senator HATCH. That's right.

Mr. HYDE. We're now in 1982, and those same extraordinary conditions are absent. Methods are more sophisticated, so, instead of terminating the extraordinary remedy because the extraordinary conditions aren't there, we're making it perpetual, but with the virtual impossibility of bailing out. That, I suggest, is probably unconstitutional.

And in the zeal to get the toughest bill, I suggest the civil rights community may get no bill.

So I'm just talking about the bailout and the permanent continuation of preclearance, but on section 2, I just hope that you're not going to be stampeded, as the House was. Every amendment, no matter how reasonable, was labeled crippling.

Moreover, having to bring the cases up here, where witnesses from these little rural counties have to get on an Amtrak, if they can find one, or a bus and get up here, it's great for the civil rights establishment. The media are here, their offices are here, but the action, the witnesses, the violations, are out there, and we have a Federal court system, and if they're afraid of hometown justice, then let's use two U.S. court of appeals, and let's get a third judge who isn't from that district.

The fifth circuit is every bit as sensitive, if not more so, than the District. And these amendments are reasonable even though they are labeled as crippling.

Senator GRASSLEY. Mr. Chairman?

Senator HATCH. Senator Grassley?

Senator GRASSLEY. It's now 6 months since you said that the act passed, and prior to the passage, you didn't have adequate time to reflect upon section 2 because of your concern over bailout. Now, after that, and kind of in summary of what you said, but to direct it with a rifle, what's your druthers? Would you think that the effects test should not be in there? Or, as you suggested, possibly language should be written in from the *Washington* case, or that we ought to just spell out more than the House did, that the effect case could not in any way be read to apply to proportional representation?

Mr. HYDE. Well, my druthers, Senator, would be that the language in section 2 would state clearly that intent can be inferred from the totality of the circumstances, which, in my judgment, is the holding of the Supreme Court in the *Washington* v. *Davis* case. I think if that's spelled out, then you do not have simply a num-

bers game where you've got *x* number of blacks who are registered to vote, you have the candidates, the blacks didn't win, therefore we're in court.

Senator GRASSLEY. But you would not strike out the effects case totally?

Mr. HYDE. No. An effects test means you just judge simply by the effects. Discriminatory purpose has nothing to do with it. I want intent, which is a standard in every criminal case, and in busing cases. I want intent there, but I do not want to limit proof of intent to the probing of the brains and the motives and the subterranean——

Senator HATCH. Nobody makes that claim except those who are activists on the civil rights side.

Mr. HYDE. That's right. They claim intent requires a "smoking gun" and that's a justification for the effects test, and that simply isn't true; it's an unreasonable distortion of how you prove intent. The totality of the circumstances will help you prove intent, as in every criminal case.

Senator HATCH. Are there any further questions?

[No response.]

Senator HATCH. Thank you, Congressman Hyde. We appreciate your time and effort.

Mr. HYDE. Thanks for your great patience. I know what an endurance contest this is.

Senator HATCH. It has taken a lot of time.

Let's call Mr. McDonald back. We will turn to Burt Wides, Senator Kennedy's counsel, who has some questions from Senator Kennedy for you, Mr. McDonald.

Mr. WIDES. Thank you, Mr. Chairman.

Senator HATCH. Do you have any estimate as to how long it's going to take? I'm running out of time.

Mr. WIDES. No more than 15 minutes.

Senator HATCH. Let me just tell all witnesses that I don't think any Senator can sit here all day like we did yesterday. I just can't do that, so we're going to have to try and summarize.

Mr. WIDES. Yes, sir.

Senator HATCH. I'm not trying to shorten you, but I do want to have everybody cognizant of the time.

Go ahead, Mr. Wides.

Mr. WIDES. Mr. McDonald, these are the questions that Senator Kennedy had wanted to ask you, and I'm quoting from his questions.

I think the most important point you make is on the bottom of page 6 and top of page 7, Mr. McDonald. If I understand you, what you're saying is that based on your extensive experience, the legal standard that Senator Mathias and I have in our bill, the test of *White* v. *Regester,* was the law for many years until the *Bolden* case. Is that correct?

Mr. MCDONALD. I really think there is no doubt about that. Judge Wisdom fairly, I think, characterized what the law of the fifth circuit had been.

Mr. WIDES. Did you or other plaintiffs you are familiar with and plaintiffs' attorneys or defense attorneys in your briefs or the courts in their opinions indicate that there was an intent require-

ment or that the evidence you put in had to be used to show circumstantially that there was a discriminatory purpose before *Bolden?*

Mr. MCDONALD. We never argued that intent was required. We always took the position, which I think was the status of the law, that we could prevail if we showed either purpose or effect.

Mr. WIDES. My understanding is that that is also true to the extent they participated in such cases of the Justice Department. Is that your understanding of their position, as indicated in their filings?

Mr. MCDONALD. Yes; that's correct. And, as a matter of fact, the Department of Justice filed an amicus brief in the fifth circuit in *Lodge* v. *Buxton*—it's now, of course, *Rogers* v. *Lodge* in the Supreme Court—in which they made the precise argument that section 2 of the Voting Rights Act of 1965 dispensed with a requirement of showing invidious purpose, where, as in that case, at a minimum you had evidence of prior discrimination in voting and additional evidence of the existence of electoral schemes which perpetuated those past effects. Proof of adverse effect made out a violation.

Mr. Wides, if I may, I have a copy of an amicus brief which was prepared on behalf of about eight or nine organizations, including the NAACP, the Georgia Association of Black Elected Officials, by Tom Atkins and Margaret Ford of New York, and John Meyer of Atlanta, Ga., who was the lead attorney, by the way, in *White* v. *Dougherty County,* and it discusses, among other things, the section 2 issue. If I may, I'd like to introduce that into evidence.

Mr. MARKMAN. That's fine.

Mr. WIDES. Regardless, there was some testimony yesterday—I think the Attorney General emphasized that the *Bolden* case was the first case in which there was a clear-cut addressing by the Court of section 2, and I think there was other testimony that the *White* v. *Regester* case and the *Whitcomb* v. *Chavis* case, which are the two cases embodying the test that is in the bill of Senator Mathias and Senator Kennedy, were 14th amendment cases, but the point that is central, it seems, in your testimony is that whether they were 14th or 15th amendment cases or whether they were section 2 cases—I take it what you're saying is that we do have a track record when we look to the standard of what is in the Mathias-Kennedy bill. And the question is raised, "Is this a strange new animal that will unleash a Pandora's box where plaintiffs can knock down at-large elections left and right?" Are you saying that there is a track record under precisely that standard, and that in that track record there was no quota requirement or proportionality, the cases were hard to win, and they were arduous and not cases in which you could do what has been suggested could be done under that standard in our bill?

Mr. MCDONALD. That's an accurate summary of my position and testimony.

Mr. WIDES. And that's based on your wide experience with the litigation in voter dilution cases prior to *Bolden?*

Mr. MCDONALD. That's correct.

Mr. WIDES. OK. Now, with respect to those cases, are you familiar with the standard in section 5 preclearance under the Voting Rights Act?

Mr. MCDONALD. Yes; I am.

Mr. WILES. We heard yesterday a reference to several cases by Mr. Burns and others, which were section 5 cases, such as the *Williamsburg* case. Was the standard applied by the courts in *White* v. *Regester,* which is embodied in the Mathias-Kennedy bill, the same section 5 standard that was involved in the *Williamsburg* case?

Mr. MCDONALD. No.

Mr. WIDES. How did they differ?

Mr. MCDONALD. Well, section 5, as you know, contains a regression standard, so that voting changes which make minorities worse off are objectionable under section 5, but that's clearly not the standard for section 2.

Mr. WIDES. All right, let me turn to the second main question that was raised yesterday, and that is whether the *Bolden* case would have a devastating impact on civil rights enforcement. Two cases have been held up as the prime example that it would not, the *Escambia* case and *Lodge* v. *Buxton.* Can you comment on each of those again—you touched on them in your testimony just briefly—as to what they show, in your view, about whether *Bolden* is really not a big problem for civil rights enforcement?

Mr. MCDONALD. Well, I would respectfully take issue with Congressman Hyde, because *McMillan* v. *Escambia County* was a smoking gun case. Then Gov. Reuben Askew testified in that case that he was aware that one of the council members had voted to go from a district election system to at large after a black ran for office, because he wanted to avoid "a salt-and-pepper council." That's an explicit statement of racial purpose. If that's not a smoking gun, that will do until we find one.

Mr. WIDES. Would you say that that was an unusually fortuitous circumstance of the Governor coming in and being able to testify to that, or based on your experience would you say it would be fairly common or easy for you to come across evidence of that kind?

Mr. MCDONALD. Well, Mr. Wides, in all of the lawsuits that we have litigated, some 70 voting rights cases, we have never had a public official who would give such testimony. In point of fact, they invariably give precisely the opposite testimony.

Mr. WIDES. They deny racial motive?

Mr. MCDONALD. Absolutely.

Mr. WIDES. With respect to the kinds of procedures that are in effect and have been in effect since prior to 1965 but where there is a choice before the city or county whether they will continue—for example, a referendum—have there been situations where there have been referendums on whether to switch from at-large to other kinds of districting and that has been rejected?

Mr. MCDONALD. Yes, frequently.

Mr. WIDES. In those cases, what has the fifth circuit said now, with respect to those cases, about the ability of a plaintiff's lawyer under *Bolden* to try to use evidence, whether it's exit polls or statements or the editorial campaign or the political campaign waged as to whether the decision of the electorate in a referendum was a discriminatory purpose action?

Mr. MCDONALD. The fifth circuit recently, in the *Kirksey* case involving reapportionment of the city government in Jackson, has concluded that the motives of the electorate in referenda are immune from judicial inquiry, in the same way that the motives of public officials in choosing particular electoral devices have been suggested to be immune from judicial inquiry by the circuit courts and the Supreme Court itself.

Mr. WIDES. You anticipated my next question, but with respect to decisions taken by legislative bodies, whether they were city council, county supervisor or State legislature, would it be very easy for plaintiffs to inquire in a court proceeding under the controlling law as to the motives of those legislatures?

Mr. MCDONALD. In *Arlington Heights,* the Supreme Court indicated that a legislative privilege would normally be available, and in this fourth circuit case that we had, *Bly* v. *McLeod,* there's a very clear statement—I object to it, admittedly, but a clear statement that it wouldn't be permissible for the courts to inquire into legislative motives.

Mr. WIDES. Would it be true to say, to sum up, then, that in trying to meet the test of *Bolden,* you would be faced with at least three hurdles in the case of old laws of dead legislators, in the case of new laws passed by legislative bodies, legislators relatively immune from your inquiry as to their purpose, and with respect to the fairly common situation of referendums and measures retained in a decision by the electorate, immunity of the electorate from your inquiry as to their purposes?

Mr. MCDONALD. Absolutely.

Mr. WIDES. With respect to the question of whether it is unusual for a statute to require only effect and not intent in the civil rights area, what is the case law, the prevailing and controlling case law with respect to title VII cases under the Civil Rights Act, as to whether plaintiffs need to prove a discriminatory purpose?

Mr. MCDONALD. Well, the effects standard is very common to civil rights statutes, as you well know, Mr. Wides.

Mr. WIDES. What about title VII?

Mr. MCDONALD. Title VII has an effects standard.

Mr. WIDES. What about title VIII, fair housing under the case law?

Mr. MCDONALD. Effects standard as well, I believe.

Mr. WIDES. Those standards are continually upheld by the court, even after the *Washington* v. *Davis* and *Arlington Heights* cases as to what is required at the constitutional level, if you sue directly under the 14th amendment, is that correct?

Mr. MCDONALD. Precisely that point was made in the companion case to *City of Mobile,* that is, *City of Rome,* in which the Supreme Court——

Mr. WIDES. Now, with respect to the continuation of section 5 on a permanent basis, given a bailout that is not geared to 1992, as the original bill was, I think you were here when Congressman Hyde testified that based on the evidence he heard in the House hearing, there is still very ample record of the need for section 5 in the covered jurisdictions. Did you hear that?

Mr. MCDONALD. Yes.

Mr. WIDES Would you agree with his characterization of the House hearing testimony, if you're familiar with it?

Mr. MCDONALD. Absolutely.

Mr. WIDES. In the *Rome, Ga.* case, decided the same day as *Bolden*, the Supreme Court addressed the question of whether section 5 might not have continued constitutional validity because we had come so many years from the original evidence concerning 1965, is that correct?

Mr. MCDONALD. Correct.

Mr. WIDES. In an opinion, I believe, by Justice Marshall, the six Justices, including Justice Burger, Justice Blackmun, and Justice Stevens, Justice Marshall indicated that the continued constitutional validity of section 5 was satisfied by the fact that Congress in 1970 and 1975, when they renewed the act, had made renewed findings of the continued need for section 5. Is that right?

Mr. MCDONALD. That's correct.

Mr. WIDES. Would you say, based on your reading of the *Rome* case, that the comment that Congressman Hyde made—not his comment, but the evidence that he referred to—would satisfy the test laid down by the six Justices in *Rome*, as to the continued constitutional validity of section 5, even though it's many years since 1964?

Mr. MCDONALD. In my judgment, the record has been made and renewed, and, incidentally, there's an entire section of our report that's devoted precisely to that. It's not hyperbole to say the continuing record of noncompliance with section 5 is spectacular in the covered jurisdictions.

Mr. WIDES. I have just three more questions.

With regard to the bailout, Congressman Hyde raised questions about some of the details of differences between the bailout that he prefers and the bailout that was passed by the House of Representatives. With respect to settlements and consent decrees, although normally the law favors settlements, based on your experience in dealing with communities, would you say that they have been or are likely to settle a case that would require them—let me back up.

As you know, in the Mathias-Kennedy bill, as in the House bill, settlements are only counted as a bar where they result in the cessation of the practice that was challenged. Not all settlements count as a bar. Are counties and cities likely to settle a case requiring them to completely uproot and scramble their election system merely to avoid the inconvenience of a lawsuit, as they might if it was a $3,000 damage action, or are they likely only to do that if their hand was caught in the cookie jar and there's a strong case of a discriminatory system?

Mr. MCDONALD. The worst cases are the ones that are settled by consent decrees. The jurisdictions do so because of, really, the overwhelming evidence that the plaintiffs are able to bring forward. They only settle, I might add, after you do all the work, unfortunately.

Mr. WIDES. Second, with respect to the question of the units that must bail out, Congressman Hyde addressed the question of whether all of the units in the State should have to bail out before the State as a whole can bail out. Under the present bailout law, as

addressed in the *Rome* case, may a county or city that is covered by section 5 and has section 5 obligations, because it is in a State which is covered in its entirety, bail out or must it wait until the whole State bails out?

Mr. MCDONALD. It has to wait.

Senator HATCH. Let me interrupt for a second. On consent decrees, maybe you can clarify this for me. How many consent decree cases and bailout cases are made each year, do you know?

Mr. MCDONALD. Senator, we have had consent decrees involving some 14 jurisdictions. Now, we've had less cases than that, because in some instances we sued two or three jurisdictions in a case.

Senator HATCH. So how many would you say you average on an annual basis?

Mr. MCDONALD. Well, I think on the average we filed about three lawsuits, three dilution lawsuits a year, and the ones that have been settled by consent decrees normally have involved dilution.

Am I answering the question?

Senator HATCH. Yes, however, I missed the last part of your statement there. Would you mind repeating that section.

Mr. MCDONALD. The consent decrees that I spoke of, the 14 would have involved dilution claims.

Senator HATCH. So you're saying you file about three a year.

Mr. MCDONALD. That is roughly correct, yes. That's a rough approximation.

Senator HATCH. Is the annual rate always under five or is three an average of a greatly varying rate, one to five, made on the basis of your experience with this kind of case over the years.

Mr. MCDONALD. Some years, there might have been less, yes. Probably no years more than that.

Senator HATCH. OK, and in total, how many of these cases have been filed, if you know?

Mr. MCDONALD. How many have been filed, Senator?

Senator HATCH. Yes.

Mr. MCDONALD. Well, let's see, over the past 10 years, we have filed about 70 lawsuits. Not all of those were dilution. I suppose 20 to 25 have been dilution, probably 25 or 30 have been section 5 enforcement suits, and a few criminal defense cases. We've represented clients who were sued for voter fraud, for example, and there have been several of those. The other cases have really included everything else, challenges to felon disfranchisement provisions of State law, malapportionment claims. Georgia even had a law which prohibited a woman from having a residence different from that of her husband for purposes of being a registered voter. We represented a woman who attacked the law in *Cain* v. *Fortson*. There are lots of other kinds of cases that make up about a third of our docket.

Senator HATCH. Are you about through, Mr. Wides?

Mr. WIDES. I am. He was in the middle of one, and then I had just one more.

The question I started to ask you relating to—you mentioned that the bailout in the Mathias-Kennedy bill actually makes it easier than present law for individual counties to bailout, so they can't do that now if the whole State is under, but you heard Con-

gressman Hyde suggest that the whole State should not have to wait until each county was eligible to bailout before the State could bailout. Based on your experience with the relationship between the State and the counties in some of the covered jurisdictions, would you comment on that?

Mr. McDONALD. Well, based on my experience in States such as Georgia and South Carolina, the State legislature exercises direct and significant control over the local jurisdictions. For example, in most of our lawsuits in South Carolina, even those that have involved local apportionment plans, such as in Edgefield and Lee County, for example, the State attorney general—a State entity—represented the defendants. I also know that when the local jurisdictions have needed reapportionment plans they generally have gotten the State demographer to develop them. In addition, when the counties have needed legislation, it's the State that enacts it through a bill of local application.

So I think there is such involvement there that it seems entirely fair to require the States, as a condition for bailing out, to insure that the counties that are subject, I think, largely to their control have cleaned up their act.

Mr. WIDES. My last question, Mr. McDonald, for Senator Kennedy is this: Yesterday there was a lot of emphasis on what might be termed hypotheticals at one extreme; that is, whether this law would enforce 30 percent or 50 percent proportional representation, and I know you point out in your testimony, for example, that Congressman Butler's use of that hypothetical in his report simply would not have been found to be a violation of the standard under *White* v. *Regester* that is in the bill.

But Senator Kennedy's concern is what the *Bolden* test would do with respect to the other side of the coin, namely, those counties and towns that you've discussed where it is not a question of whether there will be exact proportional, but where there have been no blacks elected, or virtually no blacks elected, and they've been shutout of the process completely, such as the ones you describe in your testimony.

Now, today it's been suggested that under *Bolden* and the test in *Washington* v. *Davis* for the use of circumstantial evidence in a purpose test, there still would not be a problem. Could you address, as a practical matter, in light of the plurality's opinion in *Bolden* and what they said about circumstantial evidence there, how you interpret the *Bolden* case when you are challenging a situation of an extremely clear shutout of blacks or Hispanics from the electoral process?

Mr. McDONALD. We all say what we think *Bolden* means, but it may even be more to the point to consider what we do or what we have done in light of that decision. I am here to tell you and this subcommittee that as of April 22, 1980, which was the date of the *Bolden* decision, we have not filed a single dilution lawsuit. The reason we have not done so is that we quite frankly do not know what the law is.

No. 2, to the extent that we do think we know what *Bolden* means, and that is that circumstantial evidence or the *Zimmer* factors are not enough to win a case——

Senator HATCH. Could you repeat that, please? I missed that.

Mr. McDONALD. I say to the extent that a prudent person can guess what the Supreme Court really means in *Bolden*—and I say guess because it is one of those fragmented decisions with six separate opinions, there's a concurring opinion as to judgment, a concurring opinion as to result, and it goes on. It's difficult to know precisely what the Court is saying.

What the holding of that case is, though, is quite clear. The *Bolden* plaintiffs lose, and the reason they lost is because the *Zimmer* evidence, the circumstantial evidence, was not enough to make out a violation.

If black plaintiffs walk into my office, as they have done since that decision, from Taylor County, from Elbert County, or Hart County, for example, and they say, "We have run for office and have never been elected in the city and the county and we want to bring a lawsuit," I have told them, "I quite frankly do not know whether there is any chance for you to win unless you come up with this direct smoking gun thing."

Senator HATCH. Let me interrupt here for a second. My gosh, that's the kind of statement that any attorney would make to a potential client. If your circumstantial evidence doesn't rise to the dignity necessary to give an inference under the *Bolden* case of intent, sure you're not going to have a case. I've turned people away time and again for only having circumstantial evidence like that on which to base their case.

All the decision held in the *Mobile* case was that four of the Justices did not feel that the circumstantial evidence rose to the dignity of showing an inference of intent.

Justice White did. He felt that there probably was enough, but the others chose not to agree with him. However, Justice White agreed with them that the intent standard should be the standard in the 15th amendment voting rights cases, and that that was really what it already was.

Simply because a black runs for office and doesn't get elected, I don't think that's circumstantial evidence that everybody in his area is a racist or that there is an illicit, conspiratorial plan in operation to keep him from holding office. Now, there may be, I don't know, but I think you've got to have more than the statement that "I lost the election" on which to establish a case.

Please don't tell this committee, as an attorney, that because an individual comes to you and says, "I lost, therefore I want you to sue," that you would say, "Well, gee, under the *Mobile* v. *Bolden* case, that may not be enough circumstantial evidence to get you there." My gosh, I don't know anybody in this world who wouldn't agree that that statement wouldn't and shouldn't be enough circumstantial evidence on which to base a case.

But let's say that the individual comes in and says, "I lost, but they were stopping blacks from voting," or "they were intimidating blacks," or 101 other things. Then perhaps, it would become a matter that the courts could determine.

But standing alone, your assertion about that statement bothers me a great deal, as you are intending it to be interpreted.

Mr. McDONALD. Let me respond precisely to the two things that you've said.

Senator HATCH. Sure.

Mr. MCDONALD. The Supreme Court in *Bolden* said that the *Zimmer* factors were not enough, specifically said they were not enough to make out a violation of the Constitution, and the *Zimmer* factors included the laundry list of things, a history of discrimination, the lack of access, the continuing effects of discrimination and so on. The Court said that was not enough, and there is no way——

Senator HATCH. I agree with the Court's decision that *Zimmer* did not apply.

Mr. MCDONALD. And so when these plaintiffs come in from Elbert County, I tell them that the mere fact that they lose is obviously not enough to win a case, but that all the circumstantial evidence, the history, the things which had before been deemed relevant, are not enough for them to win.

Senator HATCH. The courts simply did not agree with you.

Mr. MCDONALD. Let me answer, please. No. 2——

Senator HATCH. Yes, but it didn't agree.

Mr. MCDONALD. Please, Senator, let me finish, because this is important.

Senator HATCH. Go ahead.

Mr. MCDONALD. I do not know of a single case—and I again respectfully challenge you to show me one—that says the mere absence of blacks from office is ever enough to violate either section 2 or the 14th or the 15th amendment. Not only are there no cases that have ever said that, but every case says precisely the opposite.

Mr. WIDES. Mr. McDonald, with regard to the point that Senator Hatch just raised, how would you answer the claim that *Lodge* v. *Buxton* shows that you can win under *Bolden*? That is, why wouldn't you be able to win under similar cases? Suppose you had similar cases with similar fact patterns. Doesn't *Lodge* v. *Buxton* show that you're likely to be able to win?

Mr. MCDONALD. Well, as I say, the Supreme Court, I fear, has reservations about *Lodge* v. *Buxton*, and not only has the Court agreed to review that case on appeal, but they have issued an injunction staying the implementation of the mandate of the lower court.

No. 2, I've never seen a case in which the plaintiffs prevailed on every single one of the primary *Zimmer* factors, every single one of the enhancing factors and, moreover, I have yet to read a case in which the Court was as almost intemperate in its characterization of the significance of race as in Burke County.

The Court of Appeals—and I don't think I've ever seen quite as explicit language—said that "the vestiges of racism"—and this is a quote—"encompass the totality of life in Burke County." I honestly, very pragmatically, wonder if plaintiffs in any other case would be able to meet that standard.

Mr. WIDES. Are there comparable cases you have lost since *Bolden*?

Mr. MCDONALD. I think *Cross* v. *Baxter*, to be quite frank, is indistinguishable.

Mr. WIDES. Thank you.

Senator HATCH. Senator Thurmond?

Senator THURMOND. Mr. McDonald, do you live in Atlanta?

Mr. MCDONALD. Yes, I do, Senator.

Senator THURMOND. I know the McDonald family in South Carolina.

Mr. MCDONALD. Yes, sir.

Senator THURMOND. They originally came from Winnsboro. Some moved to Chester, some to Greenwood, some to Columbia. Hayward McDonald is a State senator down there now.

Mr. MCDONALD. Yes, sir. He's my cousin, Your Honor.

Senator THURMOND. Who was your father?

Mr. MCDONALD. Tom McDonald from Winnsboro.

Senator THURMOND. Tom is your father?

Mr. MCDONALD. Yes, sir.

Senator THURMOND. Well, he was a good friend of mine.

Mr. MCDONALD. I know he was, Senator.

Senator THURMOND. We've tried cases together.

Mr. MCDONALD. Yes, sir.

Senator THURMOND. And I had the pleasure of appointing your mother to the State Hospital Board. She is a very lovely woman.

Mr. MCDONALD. And nothing has ever pleased her any more in her life, I might add, Senator, than that appointment. She speaks about it often to me. [Laughter.]

Senator THURMOND. I had just wondered if you were connected with the McDonalds there, because they are all very fine people, and friends of mine.

Mr. MCDONALD. Well, I appreciate that, Senator Thurmond.

Senator THURMOND. I have no questions. Thank you.

Senator HATCH. I knew Senator Thurmond was a legend in his own time, but I didn't realize he knew everybody in the South. [Laughter.]

Mr. MCDONALD. I think he just got my vote when I move back to South Carolina. [Laughter.]

Senator HATCH. Is Senator East here? I understand he has a question.

[No response.]

Senator HATCH. Maybe while we're waiting for Senator East, I might just say that in my opinion the intent standard is not a new standard created by the decision in *Mobile* or, for that matter, with *Washington* or *Arlington Heights,* and I don't believe that you can show me any 14th or 15th amendment case, or, for that matter any other case, prior to those cases which employed anything less than an intent standard to arrive at a decision.

Indeed, it seems to me that an intent standard was normally implicit, even in those cases, which did not state it expressly. It was only after some of the innovative and creative jurisprudential arguments of the 1970's that anyone ever considered the prospect that racial discrimination might not require some demonstration of intent. I believe that is illustrated by an examination of the cases which address this issue.

I would also say that an intent standard does not require direct proof or the necessity of entering the person's mind to prove intent. This has been stated explicitly in the *Arlington, Washington, Feeney* and *Mobile* cases. Simply because the *Zimmer* case did not agree with your evaluation of the value or the merits of a particular set circumstantial evidence does not mean that circumstantial evidence cannot be used to satisfy the test in any case. The fact is,

the Court just didn't find the circumstantial evidence in that particular case weighty enough to meet the standards of the intent test.

Now, admittedly, Justice White felt that it could have been sufficient, but the other Justices simply did not agree. The point that Justice White did make, however, was that intent has been the standard, still is the standard, and should continue to be the standard. This is certainly the interpretation I made in my reading of the case.

I don't find the intent standard to be an impossible standard to satisfy. Your desire to make it easier to prove ACLU cases in civil rights is something I think every trial lawyer desires. We all desire to win. We may do that for the most commendable of purposes, because we ourselves understand our clients' cases better than anybody else, and in that interest perhaps we wish there weren't stringent limitations of the evidentiary rules in evidence and in law; but that doesn't mean that the standard is not a good standard.

I think intent is and always has been the 14th and 15th amendment standard. I think the Court has ruled that. It certainly has been ruled to be the standard for the school busing cases. I might add that it's the standard that has been satisfied in cases subsequent to *Mobile*. I think you have to admit, this is true of both the *Escambia* and *Lodge* v. *Buxton* cases.

Now, those are the problems that I have with what you've been saying here today, at least some of the problems.

Is Senator East here?

[No response.]

Senator HATCH. Can you stay for a little while longer until Senator East gets here, Mr. McDonald, and answer a question or two?

Mr. MCDONALD. Yes, sir, certainly.

Senator HATCH. Why don't we defer any further questions from Mr. McDonald until Senator East gets here. We'll move on to our next witness while we are waiting.

Mr. MCDONALD. Fine.

Senator HATCH. If you can wait until then, we'll give him the opportunity of asking you any questions he desires.

Our next witness will be Professor Barry Gross of the City College of New York. Professor Gross is the author and editor of several recent works on the subject of racial discrimination in the United States.

Professor Gross, we're honored to have you here, as we are all witnesses, and we'll look forward to your testimony at this time.

Senator THURMOND. Mr. Chairman, could I just say a word to Professor Gross?

Professor GROSS. Senator?

Senator THURMOND. Professor Gross, I have an invitation to the White House for lunch in honor of the Roosevelt birthday.

Senator HATCH. I have one, too.

Senator THURMOND. And so I hope you'll excuse me, because I've promised to go, but I just want to say we're glad to have you here.

Professor GROSS. Thank you very much, Senator.

Senator THURMOND. I'll read your testimony with great interest.

Professor GROSS. Thank you, again.

STATEMENT OF PROF. BARRY R. GROSS, YORK COLLEGE, OF THE CITY UNIVERSITY OF NEW YORK

Professor GROSS. Mr. Chairman?

Senator HATCH. Professor Gross.

Professor GROSS. I greatly fear that I'm going to duplicate what Congressman Hyde said so eloquently, but I'll try to say it quickly.

I'd like to begin my testimony by quoting Mr. Justice Brandeis in a 1928 Fourth Amendment case. He wrote, "Men born to freedom are naturally alert to repel invasion of liberty by evil-minded rulers. The greatest danger to liberty lurks in the insidious encroachment of the men of zeal, well-meaning but without understanding."

All eligible of the citizens of the United States are entitled to vote in elections and to have their votes counted. Because that right was so long denied to black citizens, even after its guarantee by the 15th Amendment, special vigilance is now required and will continue to be required. That is the true premise upon which the Voting Rights Act rests.

The act is the central piece of legislation which, together with a congeries of other acts and events, including a rightly rising consciousness of the equality of all Americans, has resulted in a 1,000-percent increase in the number of registered voters in a State like Mississippi, and between 1964 and 1978, it has resulted in a remarkable 1,608-percent increase in the number of black elected officials nationwide.

Clearly, something has been going well. It must be continued. The right to vote, to an unhindered access to the ballot, is one of the fundamental rights guaranteed to all Americans. In view of their shameful treatment, that right was expressly granted to black Americans. But before the 1960's, the guarantee was far too often dishonored. The right continues now to need protection, and the protection must be continued. I think everyone in the debate is agreed on this.

But in the extension or amendment of certain provisions of this legislation, we do not face Armageddon. No matter how the extensions are written, there will be no going back to the bleak days before 1965. We must shake off the siege mentality that already surrounds the issue, and we must look with open eyes at what is the case and what we propose should be the case.

The right to vote needs continual protection, not only because eternal vigilance is the price of liberty, but because for black citizens that liberty is so newly won. The protection of that right must be continued within the bounds of reason, and it must be continued without violating the rights of others.

We face, therefore, what I see as a fundamental question: Is the purpose of the 1965 Voting Rights Act and its amendments uninhibited access to the ballot in an integrated election process, or is that purpose minority political power—seats in proportion to minority population?

The purpose of the act was precisely and only to increase the number of black registered voters. In the 1960's and earlier, to those who fought for it, equality meant equality of opportunity—in this case, the opportunity to vote. We do well to keep this in mind

as we contemplate the attempt, and I quote, "to clarify the standard of proof in section 2 voting discrimination cases. . . ."

The alleged clarification actually imports a new standard into the Act, though the committee report disclaims this in the new breath. That new standard is proportional representation, and I believe it's impermissible.

The very language of the amendment proposed for section 2 imports proportional representation into the act where it did not exist before. I quote:

> The fact that members of a minority group have not been elected in numbers equal to their proportion of the population shall not in and of itself constitute a violation of this section.

That language must mean, can only mean, that proportionality is the major factor in judging a violation, that lack of proportionality plus a scintilla of further evidence proves the violations.

The committee report itself bears this out in commentary. I quote:

> The number of minority elected officials is still a fraction of elected officials. Only five percent of elected officials in the Southern covered states are black in an area where 26 percent of the population is black.

Senator HATCH. Your point that the mere lack of proportionality plus one other scintilla proves the validity of a claim in a case seems to be very significant.

Professor GROSS. That is my point, Senator.

Senator HATCH. I don't think many people understand that.

Professor GROSS. But I believe the language can mean only that.

Senator HATCH. I don't see how anybody could deny that point.

Professor GROSS. Well, I think people don't wish to see it.

Senator HATCH. We've just had Mr. McDonald deny that. Or, at least, the way I interpreted what he had to say was that they are not really seeking after proportional representation in this language and in this bill.

Professor GROSS. Well, I believe he's wrong on that issue.

If the intent standard is eliminated in favor of mere result, then if the act is to be implemented, there must be a way to measure the results. What way could that be? We are not told, but language in the report already cited and cases cited by the report make it clear that the impermissible result is dilution of the potential numerical strength of a minority voting block, and the measure of that strength is the number of minority representatives it ought to elect. Either the intention behind some change in voting regulations or structure must be decisive, or lack of proportional result must be decisive. No other standard is offered, and indeed there is no other standard.

Intent is no novel doctrine in the law. The Senator has already made that point several times. For centuries it's been an element in the criminal and tort law of civilized nations. Courts have had little difficulty in handling it. Evidence is easily obtainable. You need not look into a man's head or stumble over a smoking gun. If you want to know whether a man intended to shoot another, you ask how long he had the gun, when he got the ammunition, whether he uttered threats, what the relations were between them, what sort of man he was, the attitudes of both men just before and at

the moment of shooting, whether it could reasonably be explained in any other way, who benefits, and the like. Surely, that's not a mystery.

A literature and the line of cases already mentioned has grown up about the issue of intent as a standard in equal protection and voting rights cases. The holdings are plain and unambiguous. They require no clarification. Congressman Hyde has already mentioned *Washington* v. *Davis*. I think that's an excellent standard.

In Mobile Mr. Justice Stewart wrote:

> The ultimate question remains whether a discriminatory intent is proved in a given case. Those features such as a majority vote requirement tend naturally to disadvantage any voting minority. They are far from proof of purposeful discrimination against anyone.

A court wishing to make such a determination will have to look at a large number of factors, among them the place of the minority in the jurisdiction, access of its members to the ballot, to schooling, to appointive and elective offices, to slating committees, to municipal services, the current status of minority/majority relations, the level of rhetoric versus the level of reality.

But here, as in other branches of the law, there is no mechanical jurisprudence. There's no legal rule of inference which automatically works. Common sense with a bit of wisdom should enable a court to distinguish a high school principal seating blacks and white separately because he claims it looks better, from a prison warden separating inmates by race during a tense period. Permissible purposes may have differential impact. If we can't suppose commonsense and a bit of wisdom, then our legal system is truly undone.

The House committee report claims that intent must be dropped as a standard because it embodies "highly subjective factors which create inconsistencies among court decisions and confusion about the law." It goes on to cite approvingly many commentators who have said it's difficult or impossible to determine legislative intent or motivation.

Without doubt, this is sometimes the case, but it is also sometimes the case in questions of individual criminal or tortious action as well. From this we can scarcely arrive at the conclusion that it is so in most cases, or that because of this intent must be dropped everywhere in the law.

Jurisdictions will know in advance that changes in voting regulations bear a heavy burden of justification. It is not likely they will cloak them in mystery.

An effects standard denies there are permissible and legitimate purposes for which an alleged minority voting block could be diluted. It also denies there are other reasons why minorities might not elect candidates. If the dilution of a minority potential voting strength or an alleged consequent failure to elect a particular proportion of minority officeholders triggers a violation, then no one could do any of the following:

No jurisdiction containing minority voters could move from single-member districts to at-large voting to break up corruption.

No jurisdiction could annex suburbs to broaden its tax base.

No jurisdiction could annex suburbs to break up restrictive zoning.

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No politician could engage in honest gerrymandering.

And, in the unlikely event that Boston decided to annex Brookline for the purposes of integrating its public schools, it would stand in violation.

The effects standard presupposes that the prime and perhaps the sole reason for failure to elect a determinate ratio of minority office holders is impermissible action on the part of the jurisdiction concerned. But Karnig and Welch, two social scientists who take minority proportional in electoral results as desirable, write that far and away the most critical variables affecting the election of black candidates were black resources. Almost without exception, this cluster accounted for the most variation in black candidacy and representation rates.

From the fact that every eligible citizen has the right to be free of hindrance in casting a vote, it does not by any imaginable logic follow that any citizen or group of citizens has the right to win an election or to special representation through the electoral process. This I understand to be the meaning of *Mobile*.

Proponents of the effects standard and proportional representation have conflated a correct understanding of a right which everyone has to unhindered access to the ballot, with a misunderstanding of a second right, to be free of hindrance in the attempt to form groups and launch candidates. From this they attempt to derive a third but nonexistent right: to be represented as groups in electoral results and numbers reflecting their voting strength. This they attempt to buttress by arguing that unless there is some such right, their votes have lost full value.

But this must be wrong. There is no constitutional right like this. The value of a vote is full when it is freely cast and accurately counted. There is no other right nor value. And I quote from John Hart Ely:

> * * * [There must be juries, but no one has a constitutional right to sit on one. Nor has any of us a constitutional right to have the boundaries of Tuskegee drawn to include his house. The point of *Gomillion* v. *Lightfoot* * * * was that * * * nonconstitutional right was distributed on an unconstitutional basis.

Senator HATCH. Professor Gross, if we could, your time is up. I wonder if we can put the rest of your statement in the record as though read?

Professor GROSS. With great pleasure, Senator.

Senator HATCH. We appreciate it. I'd like to have a little more time for questions.

On the point, concerning the *Gomillion* case, Mr. McDonald indicated that that case basically did not involve intent. But as I read that case, it appeared to me that they simply assumed that there was intent because of the outrageous 28-faceted instance of gerrymandering that existed. Am I incorrect in that interpretation?

Professor GROSS. No; I'm not a constitutional expert, Senator, but I believe that's true. That's my reading of the case, that intent was inferred.

Senator HATCH. Well, let me ask you this: You've indicated that should section 2 pass in its present form that it is going to be interpreted to impinge upon every major city in this country.

Professor GROSS. I believe that's true, yes.

Senator HATCH. Even if Boston brought in a nearby suburb for annexation for the purpose of upgrading its school system or something like that, it would be clearly objectionable in the eyes of proponents of the section 2 change.

Professor GROSS. I think it would have to be struck down under this standard, yes.

Senator HATCH. Why, then, would you think that a large number of individuals would support this type of a change? What possible objective could they hope to achieve through the passage of such a change.

Professor GROSS. I don't expect anyone's thought it through. I expect that people want results. Mr. McDonald is a lawyer, and evidently a very good one. He litigates cases. He likes to get good results. He's on the right side, and anything that will help him——

Senator HATCH. But I want to get good results, too. I don't want discrimination in this country, but it seems to me that if this section 2 becomes the law, then there will exist a propensity toward creating all black districts representing blacks, all white districts representing whites, all Hispanic districts—with each group having the right to come in and claim that they have a right to be represented in this manner.

Professor GROSS. Well, I think that's true, but there's another problem, of course, that——

Senator HATCH. Don't you find even the suggestion of implementing such a color conscious system reprehensible?

Professor GROSS. That is, I think, constitutionally impermissible. I believe it to be absolutely reprehensible. The Constitution, as I read it, speaks only of individuals and political subdivisions. I know of no provision that makes any room for proportional representation.

Senator HATCH. I made the point yesterday that politicians should be representing individuals, not blocks of special interests.

Professor GROSS. I believe that's true.

Senator HATCH. Doesn't this proposed bill move us toward representing blocks of special interest?

Professor GROSS. I believe that whites can represent blacks and blacks can represent whites, because we're all citizens.

Senator HATCH. I do, too. Would you describe for us, as specifically as possible, the relative merits and disadvantages of a system of representation based upon interest groups, as opposed to a system of representation in which the individual is the primary unit?

Professor GROSS. Oh, yes. You'll form factions much more easily, factions more liable to be unstable. I think you'll increase racial polarization. You'll have a serious problem, because you have a great many minorities, not just one. In New York, we have quite a few, you may have noticed. They don't all have the same interests. Not all members of one minority have the same interest.

I think that what you will do is to keep people apart, and I understood the purpose of the Voting Rights Act was to bring people together. I don't see how that can be done under a proportional representation standard, and I can't see any other interpretation of that language.

Senator HATCH. As you know, the amended version of section 2 in S. 1992 contains a disclaimer provision with respect to propor-

tional representation. In your opinion, what would be the effect of that disclaimer provision?

Professor GROSS. The effect of that disclaimer is to make it the most important thing to look for. That's how I would read it if I were a judge

Senator HATCH. When you summed it up and said that proof of at-large voting, plus any scintilla of any other evidence, would constitute a violation under the new bill——

Professor GROSS. Yes, and the other evidence would be clearly secondary. This would be the major factor.

Senator HATCH. The point I made yesterday in the hypotheticals I posed to Senator Kennedy and Senator Mathias was that the city would not even have to try to annex a suburb to have all kinds of difficulties under section 2. All they would have to do is recognize that there is a smaller percentage of blacks being represented, disproportionate to the percentage of blacks living within the city of Boston, to be found in violation under the new bill. Isn't that correct?

Professor GROSS. That's quite true. Or, if in one election, let's say 15 percent of the population is black, 5 percent of the representatives were black, and in the next election it went down to four. You might have a case.

Senator HATCH. I presume that would also be true about New York.

Professor GROSS. Well, it certainly seems to be, yes.

Senator HATCH. It would certainly be true about Cleveland, wouldn't it?

Professor GROSS. Well, it is true about New York. I can't think of a more sterile dispute than over the city council redistricting now going on in New York, where the representation rate has dropped from 19 percent to 18 percent.

Senator HATCH. Well, if this change in section 2, is passed, then it becomes a much bigger dispute than ever, doesn't it?

Professor GROSS. Yes; so then it becomes——

Senator HATCH. Cut and dried?

Professor GROSS. Cut and dried.

Senator HATCH. In other words, there is no dispute; there would simply have to be proportional representation in those areas?

Professor GROSS. That's exactly what they're asking.

Senator HATCH. It's the same thing in Cleveland, isn't it in Wilmington, Del.?

Professor GROSS. Yes.

Senator HATCH. In almost any city, correct?

Professor GROSS. Anyone who cares to bring a case will have a much easier case to bring.

Senator HATCH. You know, some Southern Senators might think that they should convey to the people, who live outside of the nine preclearance States, what they've had to endure over the last few years.

Professor GROSS. Well, I think they should, and I think that the debates ought to be widely publicized. I think that you ought to take a great deal of time over this issue.

Senator HATCH. Well, if I were a Southern Senator, the thing I would be concerned about is that this not only worsens the situa-

tion for the South, creating divisiveness all over the region, with a system where only blacks represent blacks, whites whites, and polarizing is encouraged, but that it will make the situation considerably worse throughout the entire country as well.

Professor GROSS. Oh, I would think that it would bring every jurisdiction in the country right under the Voting Rights Act. I don't see how anyone could escape.

Senator HATCH. Every jurisdiction will be under the effects test of the Voting Rights Act if this bill is passed.

Professor GROSS. I'm sorry, I did one of those misspeaks that you mentioned before. I meant under litigation.

Senator HATCH. I know what you meant. You meant that the section 2 change would constitute a new element that would automatically bring almost every jurisdiction in this country under its umbrella, with the chance of an overwhelming number of lawsuits once people realized the significance of the changes contained in this particular section.

Professor GROSS. No, I think that's absolutely true. I think it imports a completely new constitutional standard as to who deserves representation.

Senator HATCH. How is an "effective vote" defined in terms of group politics?

Professor GROSS. I would think the only way to define it is that your group has an effective vote if you vote in the proper percentage of people of your group's persuasion, whatever that happens to be. Whatever groups are protected by the act will then have a proportional right to representation.

Senator HATCH. Can it realistically mean anything short of proportional representation?

Professor GROSS. No one has told me yet what it would mean, no.

Senator HATCH. So you're quite positive that it can only mean proportional representation?

Professor GROSS. Yes. I think if you don't mean that, then that amendment ought to be struck out.

Senator HATCH. We've heard a lot of comment today from Mr. McDonald about dilution. Can you explain to me what voting dilution is?

Professor GROSS. I don't know what that means, Senator. I said in my remarks that a vote was full when it was freely cast and accurately counted. They don't dissolve in water. I can't think of anything you can do to dilute them.

Senator HATCH. Would you, for the benefit of this committee, show us what would be cut and dried; summarize if you please the New York City Council debate right now, of which you have been very critical here?

Professor GROSS. I'm sure there are others in the room who can do it better, but I'll try. We had a redistricting after the census. We got 43 council seats, instead of 42. No new minority districts were created. The districts were created in the usual manner. There are currently eight minority members on the city council. All of them voted for the redistricting, and the redistricting indeed preserved all of their seats on the council. That was to be expected.

They didn't apply for preclearance in time originally, because I believe the redistricting came too late and they couldn't get the in-

formation there in time. When they did apply for the preclearance, though it is odd that New York should have to preclear, the Justice Department denied it on the ground that the minority population had risen and minority representation had been diluted. I think they had—what was it—from 8 seats out of 42 to 8 seats out of 43. That went down from 19 to 18 percent or something like that.

The city then went back and tried to redistrict. The primarily election was at that time suspended. The city went back and tried to redistrict, and so far has not done so to the satisfaction of the Justice Department.

Senator HATCH. OK, thank you. Senator East?

Senator EAST. Mr. Chairman, I would like just to ask Professor Gross one question.

First of all, I'd like to thank him for his testimony and statement, which I think is very expertly done and very professionally handled.

On this matter of proportional representation, which you say section 2 would in effect ensconce—I just wanted to ask you if my thinking is clear on this—we tend in the discussion, of course, because it comes out of the concern for black voting rights, to assume that it would always be interpreted and applied as far as whether there is a proportional representation of minority strength or a dilution of it.

But in terms of the potential of this section 2, would it not also apply—I think this is now a problem down in the city of Richmond; I mean, it's going to cut both ways—if we ensconce the idea of proportional representation, then, of course, white voters might also claim the same thing; that is, if a black city council altered a district line or some way or other altered the electoral process to dilute the proportional voting strength of the white 50 percent, 51 or 52 percent, would that not be a violation of section also?

Professor GROSS. I would think it would have to be so interpreted, Senator, yes.

Senator EAST. Are we not here in effect ensconcing the status quo of proportional representation based upon certainly race and possibly even ethnic origin? Are we not into those troubled waters?

Professor GROSS. I would think that it would be open to a future Supreme Court to decide that those rights existed for other groups as well, yes.

Senator EAST. It seems to me it does great violence to two fundamental premises. One you've stressed heavily. The first is the purpose of the 15th amendment in the Constitution—and I think we accept that—is to, in any legislation reasonably drafted to that end, ensure the right of the individual to register and vote. That is what is critical as far as voting rights, to register and vote irrespective of race.

Professor GROSS. That's right.

Senator EAST. But when we move into the troubled waters of ensuring results, proportional representation, we add a whole new dimension to the concept of representative democracy in the United States.

Does it not, as a practical matter, mean the at-large concept in cities, for example, would be gone?

Professor GROSS. I would think so, unless you could demonstrate that——

Senator EAST. And then it brings up this very fascinating question that Professor Burns raised yesterday, the whole idea of consensus building, the Madisonian model, where one in a diverse population group—and Congressman Hyde alluded to this—attempts to bring that consensus together and to represent a whole, a composite, the melting pot, if you will. That's obliterated.

I mean, it has fascinating implications in terms of making American politics more parochial, more provincial, more intensified, and maybe that's what we want to do, I don't know. I think it raises enormously fascinating questions of democratic political theory, one, and, of course, as you have rightly said, very fundamental questions of constitutional law.

Because in effect we are saying that we will guarantee proportional representation in election based upon race, be it black, white, or whatever else it might be.

Do I exaggerate the problem? Maybe there's too much rhetorical flourish to it, but do I exaggerate the troubled water we're moving into?

Professor GROSS. Not to me, Senator. I think that that's exactly where we're headed if we make a standard like this.

Senator EAST. Thank you.

Senator HATCH. Senator Grassley?

Senator GRASSLEY. No, I have no questions.

Senator HATCH. Well, thank you, Professor Gross. I think it's important to re-emphasize some of the important points that you've made, and that is that the lack of proportional representation, plus one scintilla of evidence, constitutes a section 2 violation under this particular bill.

Professor GROSS. That's right.

Senator HATCH. And that it will apply to every jurisdiction of any real size in this country.

Professor GROSS. That's right.

Senator HATCH. That it could disrupt jurisdictions who have had no intention whatsoever to discriminate on the basis of race. Is that correct?

Professor GROSS. That's correct.

Senator HATCH. And that it isn't just limited to the South, where there may have been a pattern of discrimination through the years. I think almost every witness has come in and testified that the extraordinary reasons for the Voting Rights Act, to begin with, and the preclearance provisions have basically been satisfied by section 5 of this act, is that correct?

Professor GROSS. I think that's correct, yes, Senator.

Senator HATCH. And when we say lack of proportional representation plus a scintilla constitutes a section 2 violation, we can define "any scintilla" as being any number of bits of proof, such as at-large voting districts.

Professor GROSS. Yes, that would do it.

Senator HATCH. Just that alone could be a sufficient scintilla?

Professor GROSS. That would do it.

Senator HATCH. Reregistration?

Professor GROSS. That would do it.

Senator HATCH. Impediments to independent candidacies?

Professor GROSS. Yes.

Senator HATCH. Economic disparities relating to the registration process?

Professor GROSS. Yes.

Senator HATCH. Limits on single shot voting?

Professor GROSS. Yes.

Senator HATCH. Majority vote requirements?

Professor GROSS. There is almost nothing that you can think up that won't prove it.

Senator HATCH. Well, registration disparities? And there are going to be registration disparities in every city in this country, aren't there?

Professor GROSS. Yes. Mine, for example.

Senator HATCH. In other words, it's mind-boggling to consider the myriad of possible, if not probable, ramifications of these revisions. You can come up with almost any excuse to trigger section 2 against any jurisdiction in this country.

Professor GROSS. That's right.

Senator HATCH. And yet in the House they gave only 1 day to this matter, out of 19 days and 100 witnesses.

Professor GROSS. I believe you're determined to give several more.

Senator HATCH. Yes, I am determined to do that. And, if necessary, several more on the floor.

Professor GROSS. Good.

Senator HATCH. The fact of the matter is that people don't know what in the world is involved here. I don't believe the House Members knew what was involved here.

Professor GROSS. It didn't sound like it.

Senator HATCH. It most certainly did not. And I'm not being critical. I'm saying that this is a difficult, complex issue that you can't just throw aside on the basis of the old arguments claiming that you must be a racist, because you're not just flipping over and going with any suggestion that comes from the so-called civil rights community.

In the process, this change mandates a reverse problem that may turn out to amount to more segregation in the political ghettos.

Professor GROSS. Oh, I think that's exactly what it will do.

Senator HATCH. It has a reverse problem to pit black against white, Hispanic against black.

Professor GROSS. Oh, yes.

Senator HATCH. This is so profound to me, I can't understand why anybody would be for section 2.

Professor GROSS. Well, I can't either.

Senator HATCH. You cannot understand why anybody would be?

Professor GROSS. No, I cannot understand it, Senator, and I hope that you can get your message across.

Senator HATCH. Well, I listened to the two principal sponsors yesterday. I did not receive an awful lot of light from them yesterday on why section 2 is such a wonderful section the way it's written in this so-called Rodino-Kennedy-Mathias bill. I question whether anybody knows the full implications of how really bad this is.

Is there a good reason to do this?

Professor GROSS. I can't think of one.

Senator HATCH. Does this help blacks?

Professor GROSS. I can't think of one, no.

Senator HATCH. Do you think this is going to help end discrimination here? Give me one reason why it will.

Professor GROSS. No. I'm a friendly witness. [Laughter.]

Senator HATCH. Well, I'm glad I have one friend, that's all I can say.

I'll tell you, for the life of me—I'm as concerned about discrimination as anybody, I feel very deeply about it, but I'll tell you, I just don't understand how anybody can make the arguments that have been made on this bill to try and sustain it. I just don't. And I'm listening, I'm paying attention, and yet, I'll tell you, the case law doesn't back up what's been said.

Well, I appreciate your coming in. I'm sorry that I seem a little overly concerned about this.

Professor GROSS. I'm glad to see it.

Senator HATCH. I think this could turn America upside down. This country, every minority group and every individual in this country, stands to be hurt by the proposed legislation which is why it does concern me so.

I think your testimony has certainly been enlightening and extremely helpful on this matter. Perhaps we'll get others; however, who can show us why this is so important, and why this will result in less discrimination in our society, rather than more.

Professor GROSS. I'll be eager to hear it.

Senator HATCH. So will I. Well, thank you, Professor Gross.

Professor GROSS. Thank you.

[The prepared statement of Barry R. Gross follows:]

TESTIMONY OF BARRY R. GROSS

before

THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

January 28, 1982

> Men born to freedom are naturally alert to repel the invasion of liberty by evil-minded rulers. The greatest danger to liberty lurks in insidious encroachment by the men of zeal, well-meaning but without understanding.
>
> --Louis D. Brandeis--

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SUMMARY

All eligible citizens of the United States are entitled to vote in elections and to have their votes counted. Because that right was so long denied to black citizens even after its guarantee by the Fifteenth Ammendment, special vigilence is now required and will continue to be required. That is the true premise upon which the 1965 Voting Rights Act rests.

The language of H.R. 3112, Sec. 2 imports proportional representation into the bill in the very statement of denial. Such a requirement is neither mandated nor permitted by the Constitution. Indeed, it is offensive to it. No one has a right to slate a candidate, or to win an election, or to proportional representation. Every citizen has a Constitutional right to be free of let or hindrance in the attempt to do the first two of these. Those rights are not violated absent actions done with the intent to prevent citizens either from voting or from the attempt to slate candidates. Every eligible citizen has a right to vote. This right is exercised when that vote is freely cast and accurately counted. There is no possibility of a dilution either of the

right or the vote. Either the right is abridged and the vote is not freely cast or accurately counted, or it is exercised and the vote is both freely cast and accurately counted. There is no third possibility.

The right to attempt to form an effective political group is properly exercised when states, local jurisdictions, or citizens do no act whose motive is to block the attempt. Burden of proof lies on those who make the accusation that an act is so motivated. Evidence of such motivation can be found by examination of the actions, words, and relations of all parties in context and is no more difficult to produce here than in other branches of the law where motive and intent are also common currency. Upon exhibiting prima facie evidence of such motivation or intent, the burden shifts to defendants to show a substantial and permissible goal which is met at least as well by the action in dispute. Many such goals exist. Failure to discharge this burden convicts initiators of the action of the intent.

The Constitution neither provides for nor permits proportional representation for groups. Individuals alone are represented through political subdivisions.

1.

INTRODUCTION

The 1965 Voting Rights Act is the central piece of legislation which, together with a congeries of other acts and events, including a rightly rising consciousness of the equality of all Americans, has resulted in a thousand percent increase in the number of registered black voters in a state like Mississippi between 1964 and 1968.[1] There black registration had jumped from seven percent of the black population to 60 percent. And between 1964 and 1978 it has resulted in a remarkable 1608 percent increase in the number of black elected officials nationwide.[2] Clearly something has been going well. It must be continued. The right to vote, to an unhindered access to the ballot, is one of the fundamental rights guaranteed to all Americans. In view of their shameful treatment that right was expressly granted to black Americans. But, before the mid 1960's the guarantee was far too often dishonored. That right continues now to need protection. The protection must be continued.

All in the debate are, I hope, agreed on this. But in the extension of certain provisions of this legislation we do not face Armageddon. This is no case of all or nothing, of do or die. No matter how the extensions are written there will be no going back to the

bleak days before 1965 because the permanent non-expiring provisions of the Act will not permit that. We must shake off the siege mentality that already surrounds this issue. We must look with open eyes at what is the case and what we propose should be the case.

The right to vote needs continual protection not only because eternal vigilence is the price of liberty, but because for black citizens that liberty is so newly won. The protection of that right must be continued within the bounds of reason and it must be continued without violating the rights of others. We face, therefore, a fundamental question: is the purpose of the 1965 Voting Rights act uninhibited access to the ballot in an integrated election process, or is the purpose minority political power--seats in proportion to minority population?

2.

NEW LANGAUGE AND NEW STANDARDS

The purpose of the 1965 Voting Rights Act was precisely and only to increase the number of registered black voters. In the 1960's and earlier to those who fought for it, equality meant equality of opportunity--in this case the opportunity to vote. We do well to keep this in mind as we contemplate the attempt ". . .to clarify the standard of proof in Section 2 voting discrimination cases. . . ."[3] The alleged clarification actually imports a new standard into the act, though the committee report disclaims it in the same breath. That new standard is proportional representation. It is impermissible.

By the beginning of the 1970's in some circles the definition of equality had begun to be changed from equal opportunity to equal result. Opportunity in employment and elsewhere began to be measured by group parity, by proportional representation. This was not the intent of reformers prior to 1970, nor was it the intent of the 1965 Voting Rights Act. The legislative history of the act makes this abundantly clear. Yet the very language of the amendment proposed in 3112 for Sec. 2 imports proportional representation into the Act where it did not exist before. "The fact that members of a minority group have not been elected in numbers equal to their proportion of the population shall not, in and of itself, constitute a violation of this section."[4]

That language must mean, can only mean that proportionality is the major factor in judging a violation. That lack of proportionality plus a scintilla of further evidence proves violation. Thus does the

very denial of proportionality draw it in as a standard. The House Committee Report itself bears this out: "The number of minority elected officials is still a fraction of elected officials . . .[O]nly 5 percent of elected officials in the Southern covered states are black, in an area where 26 percent of the population is black."[5] Could anything be plainer?

Proponents of the amended language deny this. But their denials at best are ingenuous. If the intent standard is eliminated in favor of mere result, then if the act is to be implemented there must be a way to measure results. What way could this be? We are not told, but language in the Report already cited and cases cited by the Report[6] make it clear that the impermissible result is dilution of the potential numerical strength of a minority voting block. And the measure of that strength is the number of minority representatives it "ought" to elect. Either the intention behind some change in voting regulations or structure must be decisive in assessing a violation of the rights of minrity voters, or lack of proportional result must be decisive. No other standard is offered and, indeed, there is no other.

3.
PERMISSIBILITY

There are a great many ways in which one could increase the number of minority voters, or their power, or their participation in the electoral process, if that were the sole consideration at hand. For example, bilingual ballots in jurisdictions meeting certain requirements, but restricted to only five favored linguistic groups, are obviously insufficient to insure full participation of all minority citizens. This purpose could best be carried out my mandating first that electoral materials be printed in every language spoken by any citizen. Indeed, the limitation to election materials hinders. A legislature wishing full participation for non-English speakers would require that candidates and t.v. commentators speak and newspapers write in each such langauge as well.

It has been remarked that black candidacy is hindered in elections where candidates are party affiliated.[7] A legislature intending stronger minority participation would do well, then, to abolish the party system. Alternatively, a legislative body wishing to strengthen minority voting power could award minority group members with multiple votes, adopting J.S. Mill's suggestion that certain of the electorate should have more than one vote. Or, again, minority votes could be lumped together and cast for seats reserved for them. Perhaps minority voters could be compelled to vote, or fined for failing to vote, or, perhaps, the voting age could be lowered for minority voters.

Clearly, one hopes, none of these avenues is likely to be adopted because increasing minority voting power is not the sole goal of a fair democratic electoral system. There are other values and goals which one would hesitate to override. Thus must any change in the standard of proof of discrimination be within the bounds or reason and permissibility. To say it must be reasonable is to say that it must have a chance of passage, a chance of public aceeptance, and a chance of working. To say it must be permissible is to say it must not violate the rights of others nor the Constitution, itself.

4.

INTENT

Intent is no novel doctrine in the w. For centuries it has been an element in the criminal and tort law of civilized nations.[8] Courts have had little difficulty in handling the notion. Evidence is easily obtainable without it being required either to look into a defendant's head or to stumble over a smoking gun. To discover the indicia of intent one looks at the words and actions of a person in their context. If we wish to know whether one man intended to shoot another we ask such questions as how long he had the gun, when he got the ammunition, whether he uttered threats, what the relations were between them, what sort of a man he was, the attitudes of both men just before and at the moment of the shooting, whether it could reasonably be explained in any other way, and the like. Surely, here is no mystery?

> Certainly, motives often remain legally determined after the fact. The basic doctrines of intentional torts and crimes depend, by definition,, on after the fact assessments of motive. All individually enforceable civil rights laws, such as fair employment and fair housing statutes, make the respondant's motivation a determinative issue. In other areas of the law the fact that an act satisfies all formal requisites does not inevitably preclude judicial scrutiny of subjective aspects of the process that produced it. A court will invalidate a duly signed and wittnessed will or confession if it is proved that the author was incompetent or coerced. Judicial reversal of agency decisions that could have been reached properly but were made for improper reasons or pursuant to unlawful proceedures is a norm of administrative law. The principles underlying judicial review of unconstitutional motives are no less applicable to legislative enactments than to other official decisions.[8a]

A literature[9] and a line of cases[10] has grown up about the issue of intent as a standard in equal protection and voting rights cases. Holdings are plain and and unambiguous. They require no "clarification." Writing in Washington Mr, Justice White said[11]

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

> Almost 100 years ago, Strauder v. West Virginia , established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by the systematic exclusion of eligible jurymen of the prescribed race or by an unequal application of the law to such an extent as to show intentional discrimination." Akins v. Texas, 325 U.S. 398, 403-404 (1945).

And in Mobile Mr. Justice Stewart wrote,[11a] "The ultimate question remains whether a discriminatory intent has been proved in a given case. . . . [T]hose features . . .such as the majority vote requirement, tend naturally to disadvantage any voting minority. . . .They are far from proof [of] purposeful discrimination against Negro voters."

How are purpose and intent to be g aged in discrimination cases? By the same sorts of indicia used elsewhere in the law. First, one looks in terms of stated goals.

> . . .[A]ssume you have before you a law that classifies in racial terms to the disadvantage of a racial minority, and the state wishes to make an argument in justification of it. Naturally you suspect (le mot just)that the law's motivation was that most naturally suggested by its terms, namely a desire to disadvantage blacks. But you know that is not necessarily the case and so you listen. What would it take to allay your suspicion? To start with, a goal the classification fits as well as it fits the invidious goal you suspect was really operative. For if the goal the state comes up with turns out to fit the classification less well than the invidious one, you will ask yourself why they did not classify in terms more germaine to the goal they are now argu ing, and your suspicion that the goal suggested by the face of the statute was the real one will hardly be allayed. If, however, the goal the state is arguing fits the classification as well as the invidious one. . . you should begin to pause.[12]

This fit, together with the substantiality and permissibility of the goal will prove lack of intent. Poor fit, lack of substantiality or permissibility of goal will prove invidious intent.

A court wishing to make a determination of intent will have to look at an indefinitely large number of factors, among them: the place oc the minority in the jurisdiction, access of its members to the ballot, to schooling, to appointive and elective offices, to slating committees to municipal services, the current status of minority-majority relations, the level of rhetoric versus the level of reality. Here, as in other branches of the law there is no mechanical jurisprudence, no legal rule of inference which will work automatically. But common sense with a bit of wisdom should enable a court to distinguish a high school principal's seating blacks and whites separately for esthetic reasons from a prison warden's separating inmates by race during a tense period.[13] Permissible

purposes may have differential impact.[14] If we cannot suppose common sense and a bit of wisdom, then our legal system is undone.

The House Committee Report claims that intent must be dropped as a standard because it embodies "highly subjective factors" which create "inconsistencies among court decisions . . .and confusion about the law among government officials and voters."[14a] It goes on to cite approvingly many commentators who have said that it is difficult or impossible to determine legislative intent or motivation.[14b] Without doubt, this is sometimes the case. But it is also sometimes the case in questions of individual criminal or tortious actions as well. From this we can scarcely arrive at the conclusions that it is so in most cases or that because of this intent must be dropped everywhere in the law or in human affairs.

Though it is the case that some measures are adopted with little debate by legislatures, both the 1964 Civil Rights Act and the 1965 Voting Rights Act have unusually complete legislative histories. The intent of Congress in passing them is plain for those who will see it. Jurisdictions will know in advance that changes in voting regulations h bear a heavy burden of justification. It is not likely they will cloak them in mystery. Indeed, it is hardly possible for them to do so. For the issue is very narrow indeed and the boundry line between permissible and impermissible motive is sharp. Though it is possible that for any piece of randomly chosen legislation it may be difficult to impute motive sometimes, in such narrow bounds as voting this is unlikely in the extreme to occur.

5.

EFFECTS STANDARD

An effects standard denies that there are permissible and legitimate purposes for which an alleged minority voting block could be diluted. It also denies that there are other reasons why a minority might not elect candidates. If the dilution of a minority potential voting strength or an alleged consequent failure to elect a particular proportion of minority office holders triggered a violation, then no jurisdiction could do any of the following which common sense supposes are legimate.

No jurisdiction containing minority voters could move from single member districts to at large voting to break up corruption. No jurisdiction could annex suburbs to broaden its tax base. No jurisdiction could annex suburbs to break up restrictive zoning. No politicial could engage in honest gerrymandering. And, in the unlikely event that Boston decided to annex Brookline for the purpose of integrating its schools, it would stand in violation.

But, are these not legitimate and permissible actions of any jurisdiction? Would not all of them be advantageous to all citizens, majority and minority alike in most circumstances? Under none of these actions is anyone disfranchised. But under an effects standard all would be prohibited. I submit that such a standard would be impermissibly overinclusive.

The effects standard presupposes that the prime, perhaps the sole reason for failure to elect a determinite ratio of minority office holders is impermissible action on the part of the jurisdiction concerned. But Karnig and Welch, two social scientists who take minority proportionality in electoral results as a desireable result, write:

> Far and away the most critical variables [affecting election of black candidates] were black resources. Almost without exception, this cluster accounted for the most variation in the black candidacy and representation rates.[15]
>
> In the South, black representation is low primarily because blacks have fewer resources. The gaps between blacks and whites in economic and educational attainments are so great that blacks have difficulty competing politically. The shortage of essential socioeconomic resources . . . constrains black political fortunes in the South and thus helps explain the poor representation level.[16]

This conclusion arrived at after exhaustive analysis makes nonsense of the claim that the effect of "diluting" minority voting power can only be the result of improper causal actions on the part of the majority.

6.

ENTITLEMENT

All eligible citizens of the United States are entitled to vote in elections and to have their votes count. Because that right was so long denied to black citizens even after its guarantee in the Fifteenth Amendment, special vigilance is needed now and continues to be needed. This is the true premise upon which the Voting Rights Act rests.

From this it does not follow by any imaginable logic that any citizen or group of citizens has a right to win an election or to special representation through the electoral process. This is the meaning of Mobile[17] "But those features of that electoral system [at large voting] such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in White v. Register 412 U.S. 755. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters."[18] "The Equal Protection Clause of the Fourteenth Amendment does not

require proportional representation as an imperative of political organization."[19] "It is, of course, true that the right of a person to vote draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independant Constitutional claim to representation. And the Court's decisions hold squarely that they do not. [Citations omitted] . . . .The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."[20]

Proponents of the effects standard and proportional representation have conflated a correct understanding of a right which all citizens have to unhindered access to the ballot, with a misunderstanding of a second right, to be free of hindrance in the attempt to form groups and launch candidates. Thus they derive a third, but non-existent right: to be represented as a group and in electoral results in numbers reflecting their voting strength. This they attempt to butress by arguing that unless there is some such right, then their votes have lost full value.

But they are wrong. There is no such Constitutional right. The value of a vote is full when it is freely cast and accurately counted. There is no other right nor value. ". . .[T]here must be juries, but no one has a constitutional right to sit on one. Nor has any of us a constitutional right to have the boundaries of Tuskegee drawn to include his house. The point of Gomillion v. Lightfoot, 364 U.S. 339 (1960), was that that nonconstitutional right was distributed on an unconstitutional basis."[21] You have no right to sit on a jury. You do have a right to be free of hindrance from so sitting.

An effects standard marks the shift from the Constitutionally permissible perspective of minority enfranchisement to the Constitutionally impermissible standard of guaranteed minority power. There is a double seduction. First, the powerless will become powerful and the granting of this power serves as a compensation for its previous wrongful denial. Second, it is seductively easy to count. Perhaps partof the reason that the 1965 Voting Rights Act has been hailed as the greatest piece of social legislation in our history is that you can prove it works. Just compare the numbers before and after. Such is also the appeal of the effects standard. Merely compare numbers if you want to see whether there is a violation. Nineteen percent minority representation before and eighteen percent after? Ergo, Violation!! Is there a more fruitless dispute than the current one over the NYC City Council redistricting?[22]

7.

PROPORTIONALITY

The notion that groups are usually represented in elective bodies in proportion to their percentage in the general population is bankrupt in social analysis, in logic, and in Constitutional theory. In fact, groups taken arbitrarily are not so represented, as any analysis by occupation, ethnic background, age, sex, status or any other factor reveals. One reason for this, of course, is that individuals are not naturally added together in any particular way to form a group. Each individual is potentially a member of a large numbr of different groups. Which group one counts him in depends upon a great many factors, not least of which is the particular interest of the counter at that time.[23]

Where no group is represented in electoral bodies in a proportionate way it is easy, though virtually meaningless, to pick out one set of individuals, band them together into a group and show that they are not proportionately so represented. But, what does this prove? It is tragically true that in the United States discrete and insular minorities have been constituted through historic persecution and indifference to it by a majority of their fellow citizens. However, this gives them no more natural cohesion than any other articifially formed group might have. It requires a further argument to the conclusion that they ought to have special status, to make the case for proprtional representation.

In the case of blacks this move also requires us to maintain both that racial block voting is in fact the norm and that it is, or ought to be a Constitutionally protected norm. For racial block voting to be the norm it is further required that all blacks have the same interests. This is both a political fiction and a racist misperception. As a group blacks have divided interests which vector out on class, business, religious, ethnic, regional, and political lines.[24] Some blacks vote for whites and some whites vote for blacks. Where blacks make up swing votes whites court their votes as they do those of other factions. In Indianapolis, despite Judge Kerner's findings, the Supreme Court discovered no evidence of racial block voting nor of black isolation. Rather, there was regular political intercourse. Failure of election resulted from heavy black Democratic party membership in a largely Republican jurisdiction.[25] In East Carrol Parish blacks received white support[26] and an equitable amount of municipal services. Indeed, if racial block voting were the norm it is hard to see how Mr. Bradley became mayor of Los Angeles, nor how intelligent politicians can conceive of backing him for the governorship of California.

Apart from the artificiality of group construction and lack of racial block voting, there are other reasons for a lack of proportionality

in electoral results. Lack of interest in politics, lack of resources[27], lack of political awareness, satisfaction with present representation, scattered population[28] or unfortunate party affiliation all work to that end.

We have, too, to consider whether even if racial block voting were the norm and were permissible, it would be worth protecting. Times change; things change. Change in a divided society is presumably what w we wish. We wish for the divisions to break down. It can scarcely, then, be rational policy to reify these divisions, to supply vested interests which will then work to preserve them. If our goal is one society it bodes ill indeed to create legislatively reasons for preserving its division in two.

The Constitution speaks only of individuals[29] and political subdivisions. There are many theories of political representation and many ways in which people, groups, and interests may be represented.[30] But only one of these is enacted in the Constitution.[31] Individuals choose by election other individuals to represent them from political subdivisons spread out over regions. There is no provision for group representation no matter how shamefully treated they were, nor how tragic their history. The remedy for the vast wrongs inflicted upon black citizens is not more separation but amalgamation within an integrated electoral process where the interests of all are represented as best they can be under the Constitution and with human foibles.

If there is no group representation then lack of proportionality can be no indication of vote "dilution" for there is no such thing. Nor, then, can it be a denial of the right to vote as provided for in the Constitution.

8.

THE RIGHTS OF THE PEOPLE

There are legimate and permissible actions already ennumerated[32] which States may take that have many unmotivated and unintended effects. Among these may be the effect of thining out one or another minority population for voting purposes. It would thus be an infringement of the rights of the citizens of these jurisdictions, white and black, to prohibit such actions. These rights are guaranteed under the Constitution.[33] If there were a right to proportional representation, then in taking some of these actions the states would present a clash of rights—rights in conflict. But there is no right to proportional representation; hence in taking actions permitted to them the people of individual jurisdictions work no Constitutional wrong unless they take such actions with the

intent to prevent some group of citizens from forming a partyor launching a candidate. Action so intended is clearly unconstitutional. But action not so intended is not unconstitutional. To deny the people the right to take such action is to abridge their rights unconstitutionally. An effects standard must cause such unconstitutional violation.

9.

MALEFACTORS

Importing an unconstitutional claim to proportional representation, a result standard would label as malefactors those elected officials who took any action impermissible under it. Hence, their right, absent cause, to be free of taint is abridged. Cause may not be imputed by fiat, but must be shown to flow from some legal or Constitutional violation. Where there is none, there can be no cause. Where there is no cause there can be no legal taint. Where there is legal taint without cause, there is violation of rights.

We must take seriously Mr. Justice Brandeis'caveat. In our zeal to right ancient and terrible wrongs we must not create new ones. We must not in legislation attempt to undo what was done and done for the best under the Constitution. The proposed House amendment to the language of Section 2 of the 1965 Voting Rights Act will work just this mischief. We must not agree to it.

NOTES

1 Karnig and Welch, BLACK REPRESENTATION AND URBAN POLICY, U. of Chicago Press, 1980. pp. 5, 142.

2 Karnig and Welch, p. viii.

3 HOUSE COMMITTEE ON THE JUDICIARY REPORT No. 97-227. p.2.

4 REPORT 97-227. p. 48

5 REPORT 97-227 . p. 8.

6 E.g. Allen v State Board of Electors, 393 U.S. 544 (1969) in REPORT 97-227, n. 42, 43. City of Rome v. U.S., 446 U.S. 156 (1980) in REPORT 97-227 p. 35. City of Richmond v. U.S.422 U.S. 358 (1975) in REPORT 97-227 p. 45 n. 1.

7 Karnig and Welch, p. 146

8 See, e.g. entries under 'intent' and ' motive' in Black's Law Dictionary and The Oxford Companion to Law.

8a P. Brest, "Reflections on Motive Review," 15 San Diego L. R. 1978, at 1142.

[9] See, e.g. Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J. 1205 (1970) ; Brest,"Palmer v. Thompson: An Approach to The Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct. Rev. 95; Brest, "The Supreme Court, 1975 Term--Forward: In Defense of The Antidiscrimination Principle," 90 Harv. L.Rev. (1976); Symposium: "Motivation and Constitutionality", 15 San Diego L.R. 1978 .

[10] E.g. Washington v. Davis 96 S. Ct. 2040 (1976), Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. (1977), and Mobile v. Bolden, 446 U.S. 55,(1980)

[11] Washington v. Davis

[11a] See n. 10, supra.

[12] Ely, "The Centrality and Limits of Motivation Analysis," 15 San Diego L.R.1155, 1158 (1978)

[13] C.f. Ely, supra, n. 12, at 1159.

[14] E.g. test 21 results in Washington.

[14a] H.R. REPORT 97-227 p. 20

[14b] H.R. REPORT 97-227 P. 29 and n. 97

[15] Karnig and Welch, p. 145

[16] ibid. p. 145

[17] Mobile, n. 10 supra

[18] Mr. Justice Stewart, for the Court in Mobile

[19] ibid.

[20] ibid.

[21] Ely, supra. n. 12, at 1161, n.25

[22] See the letter of seven NYC City Council members, which explains the tortures gone through to reshape Manhattan's 5th and 6th Districts so as to keep minority seats though these districts lost minority population. The Justice Department did not accept their reasoning. District 6 has a white incumbent. (NY Times. Letter dated Nov. 5, 1981; appeared subsequently).

[23] See Mr. Justice Stewart's opinion in Mobile, 100 S.Ct. 1490, 1506, n. 26 (1980)

[24] See, e.g. Sowell, "Three Black Histories" in Soewll, ed., ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, The Urban Institute; Sowell, "Americans From Africa" in ETHNIC AMERICA, Basic Books, 1980; Wilson, THE DECLINING SIGNIFICANCE OF RACE, U. of Chicago Press, 1979; and Kilson, "Black Social Class and Intergenerational Poverty", THE PUBLIC INTEREST, summer 1981.

[25] See, e.g. Chavis v. Whitcomb, 403 U.S. at 153

[26] See Zimmer v. Mckeithen 485 F. 2nd. at 1037

[27] See Karnig and Welch, n. 15 Supra.

[28] See n. 22, supra.

[29] See the Fifteenth Amendment, The Fourteenth Amendment, Article I, Secs. 1-4, Article II, Fifth Amendment.

[30] See, e.g. ETHICS, vl 91, April 1981 No. 3: Symposium on Representation.

[31] See e.g. Federalist 10

[32] See Sec. 5, supra.

[33] Article I, Sec. 4; Article II Sec. 1; Article IV, Sec. 1; Amendment IX, Amendment X.

Senator HATCH. The next witness will be the Honorable Henry Marsh, the mayor of Richmond, Va.

Mayor, we're very happy to have you here. Welcome to the committee, and we look forward to your testimony.

Go ahead.

STATEMENT OF HON. HENRY L. MARSH III, MAYOR OF THE CITY OF RICHMOND, VA.

Mayor MARSH. Mr. Chairman members of the subcommittee, and Senators, I appreciate the opportunity to testify before you today on the important questions of extending and strengthening the Voting Rights Act of 1965.

I have a prepared statement which, with your permission, Mr. Chairman, I would like to include in the record of these hearings.

Senator HATCH. It will be included as though fully delivered, without objection.

Mayor MARSH. My name is Henry Marsh, and since 1977 I have been mayor of the city of Richmond, Va. I've held elective office in the city of Richmond for the past 17 years.

In addition to my public service as an elected official of the city, I have also been a practicing attorney for the past 21 years, during which time I have specialized in civil rights and voting rights litigation.

I would like to share with you some of the experiences in Virginia, the black people in Virginia, and it is because of these experiences that I strongly supported the original Mathias-Kennedy bill and testified in support of its companion bill, House rule 3112, before the House subcommittee, and also I am here today to urge your support of Senate bill 1992.

The provisions of this bill, while reflecting a significant compromise, continue the protections essential to the rights of minorities to particpate in the political process.

I think everyone has conceded that the Voting Rights Act should be extended. Some think that the problem of minorities becoming registered voters and voting are over, and that the problem now is dilution of black voting strength. This is not the case. It's certainly not the case in Virginia today. Although the poll tax, the literacy test, and the blank voter registration forms have been effectively outlawed by the Voting Rights Act, serious obstacles to blacks registering and voting and gaining the ballot in Virginia remain.

Just one statistic, according to the 1980 figures from the Bureau of the Census, only 49.7 percent of the eligible black citizens in Virginia are registered to vote, as opposed to 65.4 percent of the eligible whites.

In my written testimony today, I outline many of the problems that the blacks in Virginia experience in registering and voting, but because of the other testimony today and the testimony of the Attorney General, and the admitted need for the extension of the act, I will not dwell on the need for the extension. Instead, I would like to discuss some of the critical questions raised by the testimony and the comments today.

Specifically, I would like to discuss whether the amendment to section 2, as proposed, is needed; and would the section 2 amend-

ment require proportional representation; and, third, would the results test overrule the *Mobile* decision, and is it inconsistent with the 14th and 15th amendments?

The black organizations and voters in Virginia are strongly committed to the amendment to section 2 of the act to incorporate the results test and consider it just as important as extending the Federal preclearance requirements of section 5 and the bilingual assistance provisions.

This amendment is absolutely necessary to enable the black voters of Virginia to overcome the existing barriers to full political participation in the State. Any effort to pass a bill which omits or eliminates this proposed section 2 amendment would gut the House-passed bill, and would be widely interpreted as providing aid and encouragement to those who seek to maintain racially discriminatory barriers to the meaningful ballot in the State of Virginia and in the Nation.

In the *Mobile* case, a plurality of the Supreme Court, but not a majority, interpreted section 2 of the Voting Rights Act as it presently exists to require proof of discriminatory intent, and we've heard other summaries of what the various factions of that Court decided.

Congress lacks the authority to overrule the Supreme Court on its interpretation of the Constitution, but it clearly has the authority to address the proper interpretation and construction of the Voting Rights Act protected by section 2 of the Voting Rights Act.

As I said, I am a practicing attorney and for the past 21 years, I have been litigating—and there are practical experiences in proving discrimination in all types of cases. Based on my experience in civil rights litigation, I know that the proof of discriminatory intent generally is not required in cases brought pursuant to our civil rights statutes.

We are all familiar with *Griggs* v. *Duke Power Co.* where the Supreme Court held, in a decision written by Chief Justice Warren Burger, that title VII of the Civil Rights Act prohibits employment practices which have a discriminatory effect in absence of an intent, and the absence of an intent is no defense. This holding has been reaffirmed in many cases, *Albemarle* v. *Moody* and others.

Similarly, the Court has held that title VI of the Civil Rights Act prohibits actions also which do not have a discriminatory intent but which have a discriminatory effect.

Both of these statutes were enacted pursuant to the congressional enforcement of the 14th amendment, and they show that Congress does have the power, by appropriate legislation, to prohibit discriminatory practices that have an adverse racial result.

For the minority citizens whose votes are being diluted or cancelled out by discriminatory voting laws, proving discriminatory intent is virtually an impossible burden to meet. The intent requirement ultimately demands a determination of what was in the minds of the legislators who enacted a voting law alleged to be discriminatory.

As Judge Amalya Kearse has aptly pointed out, overtly bigoted behavior has become more unfashionable, and evidence of discriminatory intent has become harder to find. Clever men may easily conceal their discriminatory motivations.

The need for this proposed amendment to section 2 and the extreme difficulty of meeting this onerous intent requirement were recently described in the reapportionment litigation, which is discussed extensively in my testimony.

I will not go into a discussion of the details of the case in the interest of time, but this case dramatically demonstrates how the *Mobile* decision has changed the law in this area. Prior to *Mobile*, racially discriminatory multimember legislative districts were struck down in the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina in the House, and in Texas, either by Federal courts declaring them unconstitutional under the then-prevailing *White* v. *Regester* decision or standard or by section 5 objections of the Attorney General. Now, under *Mobile*, it is clear that nothing less than a smoking gun, direct evidence of discriminatory intent, will suffice.

I would like to respond to the question that has been raised about whether or not there is a need for proportional representation, or whether or not the proponents of this change are claiming proportional representation, and I would say that really what we are asking for is simply a return to the large body of case law which existed during the 15-year period prior to the *Mobile* decision.

The *White* v. *Regester* case, which was the Supreme Court case, made it clear that the proponents are not seeking any special treatment or proportional representation, and I will quote from the Supreme Court in terms of what kind of proof is required: "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election"—and this is critical—"were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice, not of their color." This is in the Supreme Court 412 U.S. 765.

Now, under this standard, not all at-large election systems or multimember legislative districts would be prohibited, but only those which are imposed or applied in a manner which accomplishes a discriminatory result and denies minorities equal access to the political process.

The measure of whether a challenged voting law or practice achieves a discriminatory result would be whether it denies minorities equal access to the political process. The standard does not incorporate the more vigorous effects of *Beer* v. *United States*; that is, no voting law would be struck down merely because it is retrogressive or leads to a retrogression in the position of racial minorities with respect to their effective exercise of the political process.

Although, according to the *Mobile* majority, violations of the 14th and 15th amendments require a showing of an intent to discriminate, the section 2 amendment is well within the legislative authority of Congress. For instance, as early as 1966 in *South Carolina* v. *Katzenbach*, and as late as 1980 in the case of *City of Rome* v. *United States*, the Supreme Court has made it clear that Congress has broad remedial power to enact legislation which goes

beyond the specific prohibitions of those amendments to protect the rights secured by the 14th and 15th amendments.

So I think it's clear that the horror stories about proportional representation which we've heard here today are simply not relevant to the discussion that we have. We simply want to restore the law to what it was, and during the period of this law, we have not had an overwhelming avalanche of blacks frustrating the political process. Blacks still constitute 5 percent of the elected officials in an area where they are over 26 percent.

So I can't understand the concern that if we would turn to what we had, it would result in the chaos that some people are predicting.

I would submit that the amendments are very appropriate, and that there is no more basic right provided by the Constitution than the right to vote. The Voting Rights Act has been the most powerful tool devised by Congress to protect that right. The section 2 amendment and the retention of the bailout provisions of this bill are critical to protect the right to vote and to strengthen the guarantees of the Voting Rights Act.

The facts which I have presented demonstrate the compelling need to pass Senate bill 1992.

I'll be happy to respond to any questions.

Senator HATCH. OK, thank you.

[The prepared statement of Hon. Henry L. Marsh III, follows:]

PREPARED STATEMENT OF HON. HENRY L. MARSH

My name is Henry Marsh and I am presently the Mayor of Richmond, Virginia. I have held elective office in the State of Virginia for the last 17 years. I first ran for elected office in 1966 and gained a seat on the nine-member Richmond City Council. In 1970 I was elected Vice-Mayor by my colleagues on the Council and held that position until 1977 when I was elected by the Council to serve as Mayor.

I would like to share with you some of the political experiences of black people in Virginia. It is because of these experiences that I strongly supported the original Mathias-Kennedy bill and testified in support of its companion bill, H.R. 3112 before the House Subcommittee on Civil and Constitutional Rights. I am here today to urge your support of S. 1992. The provisions of this bill, while reflecting a significant compromise, continue protections essential to the right of minorities to participate in the political process.

A. THE NEED FOR EXTENSION OF THE VOTING RIGHTS ACT

The reality of black political participation reflecting the impact of past and present racial discrimination is revealed in statistics which show both progress resulting from the Voting Rights Act and the distance we have yet to go in opening the democratic process to all citizens regardless of race. The number of black elected officials in the state increased from 36 in 1979 to 126 in 1981. It is progress, but blacks are only 4 percent of the 3,599 elected officials in a state where approximately 20 percent of the population in black. Only one black has been elected, since Reconstruction, to the Virginia Senate which has 40 members. There are only four black members of the 100-member House of Delegates. All four of the black House members were elected since 1975 when the Voting Rights Act was last extended. Prior to the passage of the Voting Rights Act there were no black state elected officials.

Continuing discrimination in voter registration

1980 Voter registration figures from the Bureau of the Census also reflect obstacles to equal access to the political process. Only 49.7 percent of eligible blacks are registered to vote compared to a registration level for eligible whites at 65.4 percent. These statistics are significant because they reflect the result—not of the normal give-and-take of politics—but the countinuing impact of racism which denies to black citizens the right to fully participate in the political process.

Some people think that problems of minorities getting registered and voting are over, and that the only problems encountered now are dilution of minority voting strength. That is not the case in Virginia today. Although the poll tax, the literacy test, and blank voter registration forms have been effectively abolished by the Voting Rights Act, serious obstacles to blacks registering to vote and gaining the ballot remain. Many black citizens in Virginia are simply denied a fair opportunity to register to vote. Virginia's voter registration laws prohibit voter registrars from actively soliciting anyone to register (Va. Code § 24.1-46(1): "no registrar shall actively solicit any application for registration") and require registrar's offices to be open only "a minimum of one day a week" (Va. Code § 24.1-49). The following examples show the determination which still exists among some white officials to deny blacks access to the political process.

1. A number of registrars are unwilling to establish additional temporary locations for registration. In Waynesboro, the local NAACP branch put in a timely request for temporary registration site, to be informed by the General Registrar that if she went to the requested shopping center, she would be discriminating against shoppers at the other shopping center. The registrar further indicated that if anyone wanted to register they could do so at City Hall "since everyone is in City Hall at least once a month anyway." The registrar's husband is the chairman of the local electoral board.

2. In the County of Nottoway (39 percent black) where the Central Office for registration is in a different part of the County, the local NAACP requested the registrar to establish a temporary site in the two towns that were preparing for a town council election in 1980. The request was denied by the Registrar who informed branch officials that she had been to one of the towns back in 1956 and she did not register that many people there then. A black was running for one of the council seats and lost by a thin margin in the town of Blackstone which is 43 percent black.

3. In Caroline County which is 43 percent black, the local NAACP branch reported that the General Registrar is negative and indifferent and does not demonstrate a willingness to assist prospective registrants, especially blacks.

4. In Hanover County, which is 13 percent black, the local NAACP branch reports that the request of the Hanover Civic Association to have a black deputized as an Assistant registrar was denied.

5. In Pulaski County, the local NAACP branch reported that the registrar is unwilling to register voters at places other than her office because she feels that "if people are interested enough, they will come to the office."

6. In Mathews County, the General Registrar's office is located in the Mathews Furniture store. There is no identifying sign outside or inside the store to indicate that persons may register there. The registrar's office is in the back of the store and the storeowner is the registrar.

7. In Southampton County, which is 48 percent black, the General Registrar's office is located next door to the sheriff's office.

8. In Mecklenburg County (40 percent black), the Registrar's office is in a sporting goods store.

It is hardly coincidental that a number of registrar's offices have no signs on the outside of buildings to indicate where the registrar is located; yet many of these same locations have signs indicating the offices of the Clerk of the Court and the County Treasurer.

Other practices and problems connected to the electoral process include:

1. There are only 2 black registrars out of a total of 136 in the State of Virginia;

2. Of the 136 local electoral boards, not one has a black majority;

3. There are few assistant or deputy registrars and even fewer blacks serve on the 136 local electoral boards;

4. Most registrars, after purging the rolls, use the single option of posting the names at the courthouse and do not publish the names in a newspaper of general circulation within the jurisdiction;

5. Although the registrar is required to mail a notice to the last known address of the person purged from rolls, failure to mail such notice does not affect the validity of the purge;

6. There are 17 cities and counties where the General Registrar's office is open only 1 day a week and 9 of them are located in cities or counties that are at least 25 percent black or higher. Seven (7) of those cities or counties have only 1 black elected official; 1 county has 2 and the other county has none;

7. There are only 4 counties that are 33 percent black or higher and the registrar's office is open only 2 days per week. Three (3) of the 4 counties have only 1 black elected official.

A major problem in the State is that most registrar's offices in cities and counties are open only 1 or 2 days a week during working hours and some of these are closed during the normal lunch hour.

In Greenville County, which is 57 percent black, and the City of Emporia (40 percent black), the registrar's office is closed even during some regularly scheduled hours. Both locations are open only 1 day per week.

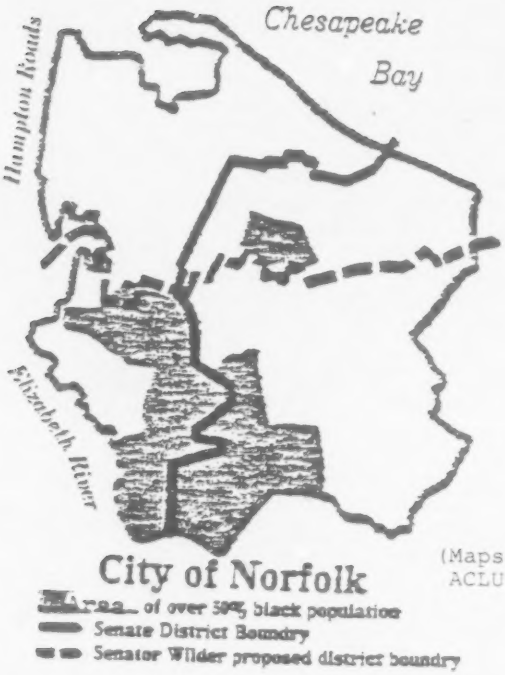
All of these problems—purging of voter registration rolls without giving adequate and personal notice to those purged, refusing to establish voter registration sites convenient to minority voters and maintaining offices at unmarked and unaccessible locations, allowing registration only one day a week during working hours, refusal to appoint qualified blacks to assist in the voter registration and electoral process—effectively deny blacks in many areas of Virginia the opportunity to register and participate in the electoral process. These persistent and continuing problems militate against any weakening of the bailout in S. 1992.

Continuing racial gerrymandering and dilution of black voting strength

In July, 1981, the Attorney General objected pursuant to Section 5 of the Voting Rights Act to Virginia's Senate and House legislative reapportionment plan for unlawful dilution of black voting strength. In both cases, the Attorney General stated that he was unable to conclude that the proposed district lines were drawn without any racially discriminatory purpose or effect. In other words, both plans gerrymandered district lines to dilute black voting strength. These two Section 5 objections were the first Voting Rights Act objections to statewide legislative reapportionment plans drawn up after the 1980 Census. Since then, the Attorney General has objected under Section 5 to the North Carolina congressional redistricting plan, state legislative reapportionment plans in North Carolina, South Carolina and Texas, and city council redistricting plans in New York City and Montgomery, Alabama. We now have a whole new era of recial gerrymandering, and the protections of Section 5 must be continued to stop it.

The recent effort to reapportion the Virginia Senate and House of Delegates amply shows the continued need for the protections of S. 1992. The Virginia legislature has spent more then $1 million, indulged in more than 12 special sessions, and passed five different redistricting plans—it has been a spectacle of resistance to adopting a non-discriminatory plan.

According to the 1980 Census, the City of Norfolk, with 93,987 black residents, has the second largest black population of any city in Virginia and enough to comprise a majority in a Senate district. Census data show that Norfolk's black population is most heavily concentrated in a number of contiguous, majority black voting precincts in the Southern part of the city. In drawing the lines for the two Norfolk Senate districts, the Virginia Senate split this black population concentration almost equally between the two districts. As a result of this division, one district (District 5) was 62 percent white in population and the other district (District 6) was 60 percent white.



(Maps by Judy Goldberg, ACLU of Virginia)

During the floor debate in the Senate, Senator L. Douglas Wilder of Richmond, the only black senator in the 40-member Virginia Senate, strongly criticized this division of black voting strength in Norfolk as racially motivated:

"What we're talking about is a situation that dilutes votes," Wilder said. He added that Norfolk blacks who support single-member districts must be "invisible men" to the city's Senate delegation. And he said, "We haven't injected racism into Virginia politics for a long time."

Sen. Wilder offered a floor amendment to the Senate bill which would have equalized population between the two Norfolk Senate districts without dividing this black population concentration, but the amendment was defeated by a vote of 35 to 3. The proposed floor amendment resulted in a majority black senatorial district which would have been over 52 percent black.

In objecting to this splitting up of black voting strength, the Justice Department noted that "one of the most striking elements of the plan" was its similarity to previous Senate redistricting plan to which the Attorney General objected in 1971, and that "this choice of district lines was made with the full awareness and expectation that it would fragment the black electorate and create two majority white districts."[1] The Justice Department also found that Virginia "presented no plausible non-racial justification for its choice of district lines . . ."

The objected-to House plan reduced the number of majority black districts from three (prior plan) to one (1981 plan), and the number of delegates elected from majority black districts from seven to four.

The district with the highest black percentage (61.09 percent, 1980 Census) in the prior plan was District 30, consisting of the City of Petersburg. Under the new Census, Petersburg lacked the population necessary to remain a correctly-apportioned district. Given the House Privileges and Elections Committee's preference for keeping political subdivision boundaries intact, Petersburg could have been combined with Brunswick, Dinwiddie, Greensville, and Sussex Counties and the City of Emporia in a two-member, 55-percent black district with a population variance of only −0.95 percent. Instead, Petersburg was combined with the adjacent, almost totally white community of Colonial Heights to form a single-member House district which was 60–64 percent white.

[1] Copies of the Attorney General's objection letters are attached to my Statement.

In the prior plan, Colonial Heights had been placed in a two-member district with Chesterfield County, of which it originally was a part, and during the public hearings in March, officials of both Chesterfield County and Colonial Heights testified in favor of retaining this alignment.

The other majority black district which was eliminated in the House plan was District 45, which consisted of the four majority black Southside counties of Charles City (70.62 percent black), Surry (62.50 percent black), Sussex (61.02 percent black), and Greensville (56.64 percent black), and white majority New Kent County and the City of Emporia. Altogether, District 45 was 53.09 percent black in population. In the 1981 plan, all four of these majority black counties were split up and distributed among five separate districts, all of which were majority white in population. In new District 27, Greensville County, which is majority black, and the City of Emporia were connected to Dinwiddie County, with which Greensville County is contiguous only at a point consisting of a two-mile stretch of the Nottoway River.

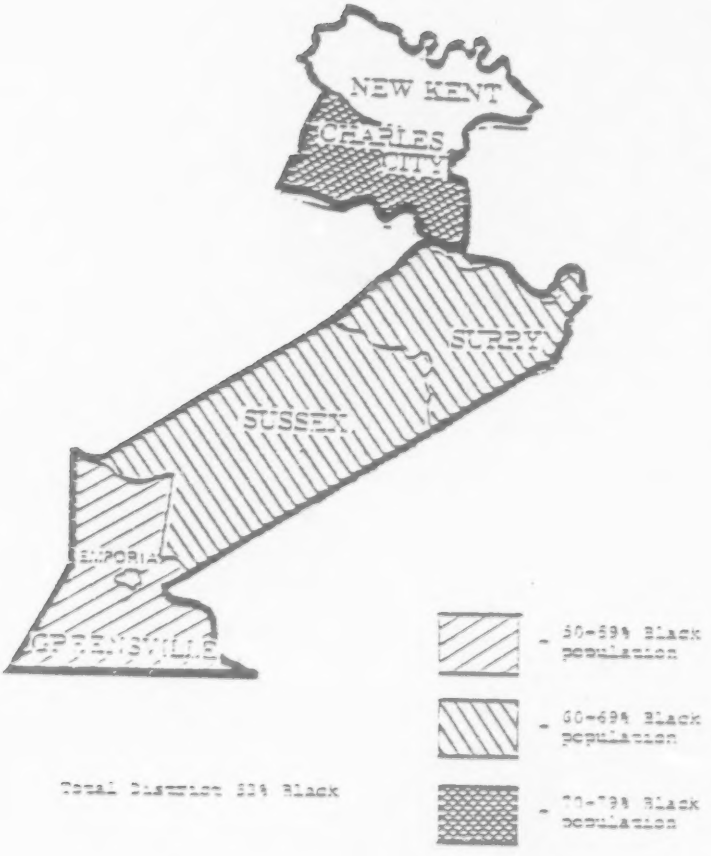
PLAINTIFF'S EXHIBIT 77

1971 House District 10

Black population
42.09%

Black population
43.56%

1981 House District 10



50-59% Black population

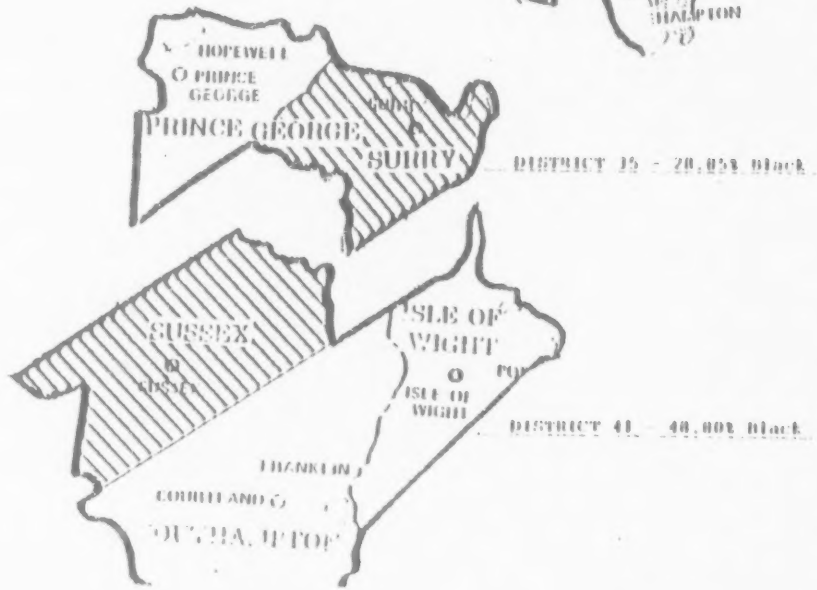
60-69% Black population

70-79% Black population

DISTRICT 46 - 27.7% Black

NEWTER DISTRICT 47 - 29.1% Black

DISTRICT 27 - 44.1% Black



DISTRICT 25 - 20.8% Black

DISTRICT 41 - 40.8% Black

According to Del. Elise B. Heinz, House Committee members acknowledged in informal conversations that splitting up this majority black district would dilute black voting strength:

It was mentioned in conversation, although not in committee discussion, that open season on Ray Ashworth's district [District 45] would involve, and would—disposing of the counties and city, in that district, would have the effect of diluting the black vote because that was, other than the City of St. Petersburg [sic], the blackest district of the case.

So, once we dismantled it, it wasn't so black anymore. * * *

There were one or two occasions in which somebody at the committee table remarked that, for instance, using one or more of the counties in Ray Ashworth's district to fill out some other district in the neighborhood certainly would not please the black folks, but that is as far as it ever went.

During the House redistricting subcommittee's deliberations, a draft plan respecting all political subdivision boundaries was proposed which would have created a new equipopulous district consisting of portions of the same area with a black population of 52.81 percent and a population variance of only −1.51 percent.

Had it not been for the Voting Rights Act, these plans would have gone into effect. Because of the Act, Virginia was forced to abandon these discriminatory districts and to devise new districts.

Before the General Assembly acted on these new districts, I met with officials of the Justice Department and specifically requested an opportunity to comment on any new districts submitted under Section 5 to replace the discriminatory districts of the objected-to plan. Justice Department officials assured me that there would be adequate opportunity for me to submit my comments to Department officials. Subsequently, this opportunity was denied. The new districts were passed by the General Assembly on August 11, 1981, signed by the Governor, and approved by the Justice Department the same day, without giving any voters affected by the new districts or their representatives any opportunity to comment on them. Instead of going to single-member districts in these affected areas, the Virginia legislature enacted new multi-member districts which diluted black voting strength.

The second plan proposed by the legislature was held unconstitutional by a three-judge federal court in a pending action in which I represent several plaintiffs.[2] The third plan was vetoed by Governor Dalton, in part because of discriminatory multi-member districts. At one point, the legislature passed two plans—one containing multi-member districts for the House and an alternative "fall back" plan of 100 single-member districts in case the multi-member plan was found to discriminate against black voters by either the Attorney General or the three-judge court. The plan finally passed by the legislature in January, 1982 and signed by the governor, uses single-member districts except in Norfolk and has not yet been precleared.

At the county level, 94 counties in Virginia must redistrict as a result of the 1980 Census. Five of these counties are 50 percent black or higher and blacks govern only two of them. Among counties with populations over 40 percent black, four have no blacks on the board of supervisors, five have one black on the board, one has three blacks on the board. Among the thirteen counties with black populations of over 30 percent, 9 have no black county elected officials. Without section 5 coverage, the black citizens of these counties will not have effective protection from discriminatory redistricting.

All but 8 of Virginia's 41 independent cities elect city council members by at-large, citywide voting. Because of Virginia's history of discrimination affecting the right to vote including the "Massive Resistance" of the recent past, the prevalance of racial bloc voting, the staggered-term device, and discriminatory slating, these at-large systems discriminate against black citizens in cities where district elections would provide an opportunity for blacks to elect candidates of their choice. For example, in Hopewell, Virginia where blacks are approximately 20 percent of the population, the city council is elected at-large and has always been all-white. In November, 1981 a referendum to change to a mixed ward-at-large system was overwhelmingly defeated by the white majority. A subsequent poll shows that 61 percent of those whites voting against the change to wards considered race as a factor in their decision.

The recent history of the city of Richmond shows the continued need for the Voting Rights Act. Had it not been for the Voting Rights Act, it is doubtful that I or any other black person could be Mayor of Richmond, even though Richmond has a substantial black voting population. Because of my personal success, and because of my length of public service, I would like to describe the experiences of Richmond

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[2] *Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court).

under the Voting Rights Act. In doing so, I'd like to highlight the problems black voters face in Virginia and the several reasons why the State of Virginia should continue to meet the Section 5 preclearance requirements of the Act.

In 1966 Richmond was using at-large election schemes for all of the nine seats on the city council. The city had used at-large elections since 1948. In 1966 I was one of three blacks who ran for the council, we all won seats even though I ran as an independent candidate, and the other black candidates were part of a predominately white, well-financed team. Two years later the other two black candidates lost, so that I was the only black member of the City Council.

Richmond's black population during the period from 1966–1970 grew to 52 percent of the total population. Along with its growth came a greater demand for representation in elective office. Voter registration and education became a prority. Because of the election of blacks to the city council the voter registration was stimulated as was the desire for better community services, schools, and a more responsive government.

Just as the enthusiasm grew in 1969, the Mayor or Richmond and a few members of the city council decided to compromise a pending suit to annex portions of Chesterfield County, Virginia with the sole purpose of diluting the black vote. I knew that this change was racially motivated because the news accounts and public statements during that period demonstrate the predominent desire of the negotiators of the 1969 annexation settlement was to acquire 44,000 additional white citizens for Richmond.

In explaining the need for the annexation compromise, Mayor Phil Bagley was quoted at public events stating "I don't want niggers to take over the city." Another indication of their intent was the fact that Mayor Bagley and others who spearheaded the plan moved so quickly that they sacrificed several benefits of expansion such as lucrative industrial sites, tax revenues, and utilities in order to gain 44,000 white voters by the 1970 elections. In addition, the negotiations made no arrangements for schools for the new citizens of Richmond so the students had no place to go.

The leaders of the annexation movement failed to consult with the City Boundary Expansion Coordinator and with the those of us on the City Council who were unlikely to agree with the plan. In fact, it was not submitted to the Justice Department unitl 1971, over a year after the annexation was adopted, and after the 1970 City Council elections. These elections took place in clear violation of the Voting Rights Act. I submit to the committee that had it not been for the annexation of white voters, Walter Kenney, a black candidate for city council in 1970 would have won. Election returns showed that Kenney received a majority of votes in the old city boundaries. The Justice Department lodged an objection to the annexation, but the decision was appealed to the District Court and finally the Supreme Court of the United States. After the 1970 elections, the Supreme Court enjoined all city council elections until litigation was completed in 1977.

The City of Richmond was allowed to retain the annexed portions of Chesterfield County in view of the fact that the City had shifted from at-large elections to single member districts as recommended by the Justice Department. Since 1977, Richmond has had a nine-member city council, five of whom are black.

The point of my discussion of the Richmond annexation suit is to demonstrate that despite the preclearance requirements of the Voting Rights Act, the voting rights of blacks in Richmond were abridged, diluted or otherwise violated for seven years because of the determination of the pre-existing government. Some Virginia legislators will argue that my story about Richmond is history and that Virginia no longer needs preclearance. While progress has been made, it is very recent. Indeed, progress came only because of the protections of the Act, some 107 years after the passage of the 15th Amendment. Four years of the opportunity to effectively participate in the electoral process in the town is hardly indicative of the Act that has outgrown its usefulness.

Other sections of Virginia continue to benefit from the Voting Rights Act. In the City of Petersburg, Virginia, for example, the city government attempted to annex 14 square miles of the surrounding area in 1970. The effect of the annexation would be to reduce the percentage of the black population from 55 to 46 (from a majority to a minority). The annexation combined with the system of at-large elections and a historical pattern of racial bloc-voting had the effect of eliminating the opportunity for black representation. This change was submitted to the Justice Department under Section 5. The Attorney General interposed an objection, the City appealed his decision to the District Court. The District Court as well as the Supreme Court agreed with the Justice Department. The Department stated in their brief in *Petersburg* v. *United States:*

". . . in readopting the at-large election system in the context of a significant change of population—from black to white majority—and simultaneously rejecting a proposed ward system, the potential for an adverse and discriminatory voting effect has been written into the Petersburg election law." 410 U.S. 962 (1973).

Petersburg now has ward rather than at-large elections. It has a seven member city council, and three of the council members are black.

When one contrasts and examines the experiences of Richmond and Petersburg under the Voting Rights Act, one has to conclude that the Voting Rights Act provides the opportunity for blacks to have a choice as to who represents them. Prior to the Voting Rights Act, blacks in Petersburg and Richmond had no choice because the at-large election schemes, racial bloc voting, discriminatory annexation, precluded their right to participate effectively in the electoral process. Even though Richmond and Petersburg eventually adopted single-member or ward elections while blacks were a majority of the population, blacks now comprise a majority of the council in Richmond and a minority in Petersburg. The Voting Rights Act does not guarantee proportional representation of blacks nor does it require quotas. It serves as a deterrent to further discrimination.

Some have argued that municipal annexations were not intended to be covered by the Section 5 preclearance requirement, and that the Justice Department has erred in requiring them to be precleared. This view cannot be sustained. The Supreme Court first held that municipal annexations were covered by Section 5 in 1971, only six years after the Act was passed: "Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation."

Perkins v. *Matthews*, 400 U.S. 379, 388–89 (1971). This holding was reaffirmed by unanimous Supreme Courts in *City of Petersburg* v. *United States*, 410 U.S. 962 (1973) (Powell, J., not participating), and *City of Richmond* v. *United States*, 422 U.S. 398 (1975) (Powell, J., not participating).

B. THE NEED FOR A "RESULT" TEST IN SECTION 2

The House-passed bill (H.R. 3112) and S. 1992 amend Section 2 of the Voting Rights Act to prohibit any voting laws and practices which result in a denial or abridgement of the right to vote on account of race. The amendment also provides: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

Black organizations and black voters in Virginia are strongly committed to this amendment to Section 2 of the Act to incorporate this "result" test, and consider it just as important as extending the Federal preclearance requirement of Section 5 and the bilingual assistance provisions. This amendment is absolutely necessary to enable black voters in Virginia to overcome existing barriers to full political participation in the state. Any effort to pass a bill which omits or eliminates this proposed Section 2 amendment would gut the House-passed bill and would be widely interpreted as providing aid and encouragement to those who seek to maintain racially discriminatory barriers to a meaningful ballot in Virginia.

In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), a plurality of the Supreme Court—but not a majority—interpreted Section 2 of the Voting Rights Act as it presently exists to require proof of discriminatory intent. Justices White, Blackmun, and Stevens did not discuss the statutory issue of the correct interpretation of Section 2, and Justices Marshall and Brennan expressed the view that present Section 2 would prohibit voting laws and practices which are racially discriminatory in purpose or effect. However, a majority of the Court did hold that the Fourteenth and Fifteenth Amendments require proof of discriminatory purpose.

Congress lacks the authority to overrule the Supreme Court on its interpretation of the Constitution, but it clearly has the authority to address the proper interpretation and construction of the rights protected by Section 2 of the Voting Rights Act.

In addition to my public service as an elected office-holder in Virginia, I have been a practicing attorney for the past 21 years, specializing in civil rights and voting rights litigation. Based on my extensive experience in civil rights litigation, I know that proof of discriminatory intent generally is not rquired in cases brought pursuant to our civil rights statutes. For example, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held in a decision written by Chief Justice Warren Burger that Title VII of the Civil Rights Act of 1964 prohibits employment practices which have a discriminatory effect, and absence of an intent to discriminate is no defense. This holding was reaffirmed in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975). Similarly, in *Lau* v. *Nichols*, 414 U.S. 563, 567–69 (1974), the

Supreme Court held that Title VI of the Civil Rights Act prohibits actions having a discriminatory effect.

Both of these statutes were enacted pursuant ot the congressional enforcement provisions of the Fourteenth Amendment. They clearly show that Congress does have the power, by appropriate legislation, to prohibit discriminatory practices that have an adverse racial result.

For minority citizens whose votes are diluted or cancelled out by discriminatory voting laws, proving discriminatory intent is a vitually impossible burden to meet. The intent requirement ultimately demands a determination of what was in the minds of legislators who enacted a voting law alleged to be discriminatory. As Circuit Judge Amalya Kearse has aptly pointed out, overtly bigoted behavior has become more unfashionable, and evidence of discriminatory intent has become harder to find. Clever men may easily conceal their discriminatory motivations.[3]

The need for this proposed amendment to Section 2 and the extreme difficulty of meeting this onerous intent requirement were recently demonstrated in the Virginia reapportionment litigation. Before and since the Voting Rights Act was enacted, the vast majority of the members of Virginia's House of Delegates have been elected at-large in multi-member districts. Multi-member districts in Virginia minimize and cancel out black voting strength by submerging black population concentrations large enough for separate representation in white citywide and districtwide majorities. As a result, although Virginia is 20 percent black, there are only four black delegates (4 percent) in the 100-member House of Delegates.

In April, 1981 the Virginia General Assembly enacted a new statewide reapportionment plan for the House of Delegates in which 33 of the 52 districts were multi-member and floterial districts with at-large voting. Black voters whose voting strength was diluted by the new plan filed suit, alleging that the new plan was unconstitutionally malapportioned and also unconstitutionally diluted black voting strength through racial gerrymandering and multi-member districts. When the new plan was submitted to the Justice Department for preclearance under Section 5 of the Voting Rights Act, the Attorney General objected to racial gerrymandering of district lines. However, no objection was lodged to the discriminatory multi-member districts, apparently because of the Supreme Court's decision in *Beer* v. *United States*, 425 U.S. 130, 138–39 (1976), holding that at-large voting schemes instituted before the effective date of the Voting Rights Act were not subject to Section 5 review.

After the General Assembly revised the House plan to meet the Attorney General's objection, a three-judge District Court held the plan unconstitutional for failing to meet the one-person, one-vote requirement. *Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court). However, the District Court rejected plaintiffs' contentions that multi-member districts were unconstitutional for dilution of black voting strength. Adverse racial effect, the court held, was not enough, and under the *Mobile* decision "must be accompanied by proof of purposeful discrimination" (522 F. Supp. at 362). The court noted that the extensive number of multi-member districts was not required by the state's policy of not crossing political subdivision boundaries because "the State could have created more single-member districts without crossing the boundaries of political subdivisions" (id.). Nevertheless, the court held that the apparently indiscriminate creation of many multi-member districts both in predominantly white areas and in areas with black population concentrations "negates the claim of purposeful discrimination" (id.).

This case illustrates the inherent impossibility of overcoming racially discriminatory barriers to minority political participation under the "intent" standard. Indirect and circumstantial evidence of discriminatory purpose was not sufficient, because the record in the Cosner case contained extensive circumstantial evidence from which a reasonable inference of discriminatory intent could be drawn. Virginia has an extensive past history of racial discrimination and disfranchisement of its black citizens; multi-member districts have a severe discriminatory impact; numerous black organizations and black citizens in the public hearings which preceded enactment of the plan pointed out the discriminatory features of multi-member districts, and therefore this discriminatory impact was inevitable and readily foreseeable; discriminatory multi-member districts were not the unavoidable consequence of a legitimate state policy of preserving political subdivision boundaries; and there were departures from the normal and required state procedures when the House Privileges and Elections Committee unlawfully excluded members of the public and press from committee meetings on the plan.

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[3] *Robinson* v. *12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d. Cir. 1979).

This case also dramatically demonstrates how the *Mobile* decision has changed the law in this area. Prior to *Mobile*, racially discriminatory multi-member legislative districts were struck down in Alabama, Georgia, Louisiana, Mississippi, South Carolina (House only), and Texas, either by Federal courts declaring them unconstitutional under the then-prevailing *White* v. *Regester*, 412 U.S. 755 (1973), standard or by Section 5 objections of the Attorney General. Now, under *Mobile*, it appears that nothing less than a "smoking gun," direct evidence of discriminatory intent, will suffice.

The *Mobile* decision has brought efforts to overcome discriminatory barriers to minority political participation almost to a complete halt. In the twenty-one months since that decision, minority voters challenging structural barriers to electoral participation have been successful in only two cases decided at the appellate level. In *McMillan* v. *Escambia County*, 638 F.2d 1239 (5th Cir. 1981), there was a "smoking gun." *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), is the only post-*Mobile* case in which an appellate court sustained plaintiffs' claims on the basis of circumstantial evidence, and that case currently is on appeal to the Supreme Court and the Supreme Court has scheduled plenary oral argument. In two companion cases, *Cross* v. *Baxter*, 639 F.2d 1383 (5th Cir. 1981), and *Thomasville Branch, NAACP* v. *Thomas County*, 639 F.2d 1384 (5th Cir. 1981), plaintiffs lost on facts virtually identical to those present in *Lodge*.

The "intent" test is detrimental to equal black political participation in Virginia in other ways, as well. In Virginia, all but eight of the 41 independent cities elect all members of their city councils in at-large, citywide voting. As a result, Virginia has the lowest number of black municipal elected officials of any state covered by the Voting Rights Act. In some cities, black city council members have been elected in at-large voting, but in the vast majority of cities at-large voting prevents black citizens from electing municipal officials of their choice. The discriminatory impact of at-large municipal elections in Virginia has been previously noted. A 1979 study by the Institute of Government of the University of Virginia concluded: "In summary, both the national data and the Virginia data on the impact of at-large elections show a general (if inconsistent) relationship between at-large election and depressed levels of minority representation on local governing boards."[4]

Similarly, a 1977 study by the Virginia Municipal League found:

". . . [W]hite males dominate the office of council member in Virginia cities and towns, although a marked increase in the numbers of females and blacks have been noted since 1970. Nevertheless, the percentages of females and blacks serving on council are still quite small.[5]

According to this survey, of the 873 city and town council members in Virginia, only 54 (6 percent) are black in a state which is 20 percent black. Because they were adopted before 1964, none of these municipal at-large election systems are covered by the preclearance requirement of Section 5. Because city council members are all elected at-large, no redistricting is required to adjust for changes in population. The only time they are subjected to Section 5 scrutiny is when these municipalities attempt further to dilute black voting strength by municipal annexations, as in the *Richmond* and *Petersburg* cases.

Proving that these discriminatory at-large election systems were adopted for a discriminatory purpose would be extremely difficult. Most of these municipal at-large election systems were originally adopted years ago by city council members and legislators who are now dead. As the Birmingham (Alabama) Post-Herald noted in an editorial supporting the House-passed Section 2 amendment: "It would be a neat trick to subpoena them from their graves for testimony about their racial motivations."

In addition, the courts have erected other legal barriers to proving discriminatory intent. In *Arlington Heights*, 429 U.S. 252, 268 (1977), the Supreme Court held that calling legislators to the stand to question them about their motivation "frequently will be barred by privilege." Last month, in *Kirksey* v. *City of Jackson*, 663 F.2d 659 (5th Cir. 1981), the Fifth Circuit ruled that the motivation of the voters in adopting and retaining a discriminatory at-large election system by popular referendum is completely immune from judicial scrutiny. Thus, the best sources of legislative motivation are cut off by restrictive court rulings barring important, sometimes critical evidence.

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[4] Timothy G. O'Rourke, "City and Country At-Large Elections and the Problem of Minority Representation," 55 University of Virginia News Letter (Institute of Government, University of Virginia, February, 1979).

[5] Michael S. Deeb, "Election and Composition of City and Town Councils in Virginia," p. 47 (Virginia Municipal League, June 1977).

The proposed amendment to Section 2 of the Act would resolve the confusion and difficulties caused by the *Mobile* decision. In that case the nine Justices of the Supreme Court were unable to agree on a majority opinion setting forth the proper legal standard for proving discriminatory intent. As Justice White noted in dissent, the *Mobile* decision "leaves the courts below adrift on uncharted seas with respect to how to proceed" (446 U.S. at 103).

The proposed amendment would restore the pre-*Mobile* standard under which a violation could be established by direct or indirect evidence focusing on the context, nature, and result of the challenged voting law or practice. This standard was followed by the courts for the fifteen-year period prior to *Mobile*, and is illustrated by the decisions in *White* v. *Regester*, 412 U.S. 755 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub non. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1977). The amendment would make clear that proof of discriminatory intent is not required in cases brought under Section 2. It does not overrule the law as declared in *Mobile* because, as I indicated earlier, a majority of the Court failed to reach as conclusion on the statutory issue.

The proposed standard does not mandate a simple "effects" test, but, according to its legislative history in the House of Representatives, restores the approach followed in the pre-*Mobile* cases under which courts must look to the "totality of circumstances." By its express terms, the amendment does not create a right to proportional representation nor mandate racial quotas. This is clear from the prior cases which incorporate the intended standard. As the Supreme Court declared in *White* v. *Register*: "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."

412 U.S. at 765–66. Under this standard, not all at-large election systems or multimember legislative districts would be prohibited, but only those which are imposed or applied in a manner which accomplishes a discriminatory result and denies minorities equal access to the political process.[6] The measure or whether a challenged voting law or practice achieves a discriminatory result would be whether it denies minorities equal access to the political process. The standard does not incorporate the more vigorous effects test of *Beer* v. *United States*, 425 U.S. 130 (1976); no voting law would be struck down merely because it is "retrogressive" or lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electorial franchise.

Although, according to the *Mobile* majority, violations of the Fourteenth and Fifteenth Amendments require a showing of an intent to discriminate, the Section 2 amendment is well within the legislative authority of Congress. As early as 1966, in *South Carolina* v. *Katzenbach*, 383 U.S. 301, and as late as 1980 in *City of Rome* v. *United States*, 446 U.S. 156, the Supreme Court has made clear that Congress has broad remedial power to enact legislation which goes beyond the specific prohibitions of those amendments to protect the rights secured by the Fourteenth and Fifteenth Amendments.

C. WHY THE BAILOUT STANDARDS OF THE HOUSE-PASSED BILL SHOULD NOT BE WEAKENED

The House-passed bill—for the first time—allows jurisdictions with a ten-year history of compliance with the Act and which have eliminated discriminatory voting practices and electoral mechanisms to exempt themselves from the Section 5 preclearance requirement. These bailout provisions provide a strong incentive for covered jurisdictions to comply with the Act and to make necessary changes to insure that minority voters have full and equal access to the voting and electoral processes. These bailout provisions are eminently reasonable and permit jurisidictions which are operating in good faith and which have no intent to discriminate against minority voters to bail out.

Any weakening of these bailout provisions would be tantamount to a "back door" repeal of the Voting Rights Act itself. Watering down these bailout requirements would deprive minority voters of the Act's protections in covered jurisidictions which continue to discriminate. Any attack on these bailout provisions constitutes

[6] See, e.g., *Vollin* v. *Kimbel*, 519 F.2d 790 (4th Cir. 1975), cert. denied, 423 U.S. 936 (1975), in which at-large elections in Arlington County, Virginia were held to be constitutional under the *White* v. *Regester* standard.

an indirect attack on the Section 5 preclearance requirement itself, which everyone admits still is needed. The Voting Rights Act would become a farce if the bailout section is weakened any further.

Many civil rights organizations have been against any bailout provision from the beginning. However, in order to gain the fullest possible bipartisan support for an effective extension of the Act, a compromise was reached in the House of Representatives on this new bailout provision. This bailout feature is the result of that compromise. It incorporates 90 percent of the features proposed by Representative Henry Hyde in the House deliberations. Efforts to weaken these bailout provisions were defeated by bipartisan votes of 3 to 1 and 2 to 1 on the House floor. On the final vote, the House bill had the unanimous support of the South Carolina, Louisiana and Florida House delegations and received a majority of the votes of the House delegations from Alabama, Georgia, Mississippi, North Carolina, and Texas.

In light of the overwhelming support already demonstrated in Congress for the bailout provisions of the House bill, the burden is on those who oppose them or seek to weaken them to demonstrate by clear and convincing evidence why these bailout criteria are unreasonable. We ask the opponents who seek to weaken these bailout provisions: You tell us why these bailout criteria are unreasonable and can't be met.

The State of Virginia itself would be barred from immediately bailing out because of the Attorney General's Section 5 objections to the House and Senate legislative reapportionment plans last year. This is fair and reasonable. The House of Delegates knew it was trampling on the voting rights of black citizens when it passed the discriminatory House and Senate reapportionment plans. The court record in the *Cosner* case proves that closed-door sessions and informal off-the-record conversations, House Privileges and Elections Committee members knew that splitting up old District 45 would dilute the black vote in Southside Virginia. In the Senate, Senator Douglas Wilder, pointed out in the floor debate that dividing the black population concentration in Norfolk intentionally diluted the votes of black Norfolk voters, and charged that the Senate plan was racially motivated. These cases were not accidental or unintentional discrimination; the delegates and senators knew exactly what they were doing.

Many Virginia cities and counties have avoided enacting new voting laws which would draw Section 5 objections, and undoubtedly many of them would be able to take advatage of the new bailout provisons. The fact that there have been so few objections in Virginia goes against weakening the bailout criteria. The bailout criteria should not be weakened because the deterrent effect of the Voting Rights Act is so powerful. Because of the Voting Rights Act cities and counties in Virginia have avoided wholesale discrimination which would violate the Act's provisions, but this does not mean that there is not widespread, racial discrimination in Virginia affecting the registration and electoral processes. In a number of cities and counties there are still discriminatory barriers to qualified black citizens registering to vote and participating in the political process. Virginia still has a law on the books which prevents local voter registrars from soliciting or encouraging any person to register to vote. Should localities be able to bail out which still make it as difficult as possible to exercise so fundamental a right as registering to vote? Should jurisdictions be allowed to bail out which only permit voter registration once a week, or where the registrar's office is hidden away in some unmarked place? Should a city or county which has discriminated in the appointment of registrars or deputy registrars, and which has denied black voters the opportunity to serve as election officials be exempted from the coverage of the Voting Rights Act?

The bailout criteria of S. 1992 are designed to ensure that covered jurisdictions such as these provide an "expanded opportunity for convenient registration and voting for every person of voting age" before they are permitted to bail out. They also require "the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process" to ensure the fullest possible participation for minority citizens in the registration and electoral processes. There requirements are not impossible to fulfill; indeed, these opportunities should be provided without legal compulsion in any jurisdiction which has a commitment to democratic government.

CONCLUSION

There is no more basic right provided by the Constitution than the right to vote. The Voting Rights Act has been the most powerful tool devised by Congress to protect that right. The Section 2 amendment and retention of the bailout provisions of S. 1992 are critical to protect the right to vote and to strenghten the guarantees of

the Voting Rights Act. The facts which I have just presented demonstrate the compelling need to pass S. 1992.

DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION,
Washington, D.C., July 17, 1981.

PERKINS WILSON, Esq.,
Assistant Attorney General, Supreme Court Building, 1101 East Broad Street, Richmond, Va.

DEAR MR. WILSON: This is in reference to the reapportionment of the Virginia Senate by Chapter 2, 1981 Acts of the General Assembly (Special Session), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on May 19, 1981.

We have given careful consideration to the materials you have submitted, as well as information and comments of other interested parties and information contained in other Department files. On the basis of our review, the Attorney General does not interpose any objection to the Senate reapportionment except with respect to the districts discussed below.

At the outset, we note that on May 7, 1971, the Attorney General found it necessary to interpose an objection to the division line between Senate districts 5 and 6 in the City of Norfolk. At that time the Department concluded that "[t]he division of Senate districts 5 and 6, which divides concentrations of Negro voters, appears contorted and does not conform to natural boundaries", while more natural boundaries appeared feasible, which would have avoided such an adverse effect on the black voting strength. As a result of that objection the 1971 legislation was amended to relocate the boundary between districts 5 and 6 in such a way as to eliminate substantially the bifurcation of black concentrations in the city. As so modified, the plan was precleared on August 13, 1971.

The precleared plan was not implemented because of the lack of accurate data regarding the residence of Naval personnal. Instead, the federal court ordered an interim plan combining districts 5, 6, and 7 into one multi-member district. That plan was to stay in effect until the General Assembly enacted a single-member district plan consistent with legal requirements. See *Mahon* v. *Howell*, 410 U.S. 315 (1973).

Our current analysis shows that one of the most striking elements of the plan presently under submission is the similarity of its characteristics to those of the plan objected to in 1971 insofar as districts 5 and 6 are concerned. Our inquiry has revealed that the boundary between districts 5 and 6 in the 1981 plan cuts through the black community in such a way that neither district has more than a 37-percent black population. At the same time, our analysis shows that the Senate rejected an alternative configuration which would have combined contiguous black neighborhoods, producing a district in which black persons would have constituted a majority. There is substantial information that this choice of district lines was made with the full awareness and expectation that it would fragment the black electorate and create two majority white districts.

In its consideration of the current plan, the Virginia Senate was aware that in 1971 the Attorney General had found it necessary to interpose an objection to the then proposed configuration of districts 5 and 6 because those lines appeared unnecessarily to fragment concentrations of black voters, and that that objection had been overcome by the reconstruction of those districts in a way which did not divide the black concentration in the southern part of the city. The Commonwealth has presented no plausible non-racial justification for its choice of district lines in Norfolk, strikingly similar to the unacceptable 1971 plan.

Under these circumstances I am unable to conclude, as I must under the Voting Rights Act, that the presently proposed district lines within Norfolk were drawn without any discriminatory racial purpose of effect. Accordingly, I must, on behalf of the Attorney General, interpose an objection to Chapter 2, 1981 Acts of the Virginia General Assembly (Special Session) insofar as districts 5 and 6 of the plan are concerned.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attor-

ney General is to make the reapportionment of the Virginia Senate legally unenforceable with respect to the districts in question.

To enable this Department to meet its responsibliity to enforce the Voting Rights Act, please inform us within twenty days of your receipt of this letter of the course of action the State of Virginia plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

JAMES P. TURNER,
Acting Assistant Attorney General.

DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION,
Washington, D.C., July 31, 1981.

PERKINS WILSON, Esq.,
Assistant Attorney General, Supreme Court Building, 1101 East Broad Street, Richmond, Va. 23219

DEAR MR. WILSON: This is in reference to the reapportionment of the Virginia House of Delegates by Chapter 5, 1981 Acts of the General Assembly (Special Session), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on July 2, 1981. In accordance with your request, this submission has been reviewed on an expedited basis.

Under Section 5, the Commonwealth of Virginia has the burden of proving that its proposed reapportionment does not represent a retrogression in the position of its black residents, and that the new plan was adopted without any racially discriminatory purpose. See *Beer* v. *United States*, 425 U.S. 130 (1976). We have carefully reviewed the material you submitted and for the most part find the proposed reapportionment plan to have neither the purpose nor effect of diluting or abridging the voting rights of black citizens.

However, there is one general area where the proposed plan appears to dilute and fragment black voting strength unneccesarily. According to the 1980 census the southern part of the Commonwealth contains five contiguous rural counties with black population majorities (Brunswick, Greensville, Sussex, Surry and Charles City). The nearby City of Petersburg also has a majority black population of 61.09 percent. Under the pre-existing apportionment plan four of the five black majority counties were grouped together with New Kent County to make up District 45, which by 1980 census figures was 53.09 percent black. In the proposed plan each of the five majority black counties is combined with one or more predominently white counties in such a way that there is a black minority in each of the resulting districts (Nos. 26, 27, 35, 41 and 46). We note that one of the resulting districts (No. 27), which combines Nottaway, Dinwiddie and Greensville Counties and Emporia City, connected only be a two mile stretch of the Nottaway River, does not seem to comply with the Commonwealth's standard of compactness. Testimony prepared for the pending lawsuits indicate that the legislature was aware that dispersing the majority black counties that were in former district 45 would necessary dilute the voting strength of blacks in this area.

Similarly, the City of Peterburg is combined in the plan with the virtually all white city of Colonial Heights resulting in a district (No. 28) which is 43.66 percent black. This district was formed notwithstanding the fact that Colonial Heights had historically been associated with Chesterfield County and, in fact, had been combined under the 1971 plan with Chesterfield to form District No. 36 which, with a population of 157,881, could have been continued as a viable three-member district in the new plan. This latter approach was supported by representatives of the Colonial Heights city government. Material submitted to us indicates there are a number of options available that would not have the effect of diluting the voting strength of the black citizens of Petersburg.

Accordingly, after careful consideration of the materials you have submitted, as well as comments and information provided by other interested parties, I am unable to conclude, as I must under the Voting Rights Act, that the submitted plan for the reapportionment of the House of Delegates is free of any racially discriminatory purpose or effect in the described area. For that reason, I must, on behalf of the Attorney General, interpose an objection to Chapter 5 of the 1981 Acts of the General Assembly of Virginia (Special Session) as it affects the district lines in the Southside Petersburg area.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the reapportionment of the Virgina House of Delegates legally unenforceable with respect to the districts in question.

We are aware that there is a severe time problem if the Commonwealth is to hold timely elections for the General Assembly. Please be assured that we stand ready to do all we can to assure that any future review of such limited changes as may be necessary to comply with the requirements of Section 5 is accomplished in the most expeditious way possible. If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-7439), Director of the Section 5 Unit of the Voting Section.

Sincerely,

WM. BRADFORD REYNOLDS,
Assistant Attorney General.

Senator HATCH. Senator East?

Senator EAST. Mayor, it's a pleasure to have you here this morning, and I appreciate your valuable testimony.

I will keep this short. In your race for mayor in Richmond—I'm just inquiring as a matter of educating myself as a matter of information—what is the electoral mechanism in Richmond for electing a mayor?

Mayor MARSH. Actually, we have a system where nine persons are elected from districts to council, and then the council by majority vote elects the mayor.

Senator EAST. All right.

Mayor MARSH. So I've been elected three times by a vote of at least five of my peers, but I had to run for a seat in a district.

Senator EAST. So in effect what you have in Richmond, it strikes me, is an example of where we could be headed on a nationwide scale if this act goes through, because—am I not correct here—at-large elections would be out. We would be back to district elections. And it strikes me, mayor, that that could tend over a period of time, ironically, to polarize racial attitudes because blacks would only campaign in the black districts for the black votes, whites in the white districts. There isn't any need to go elsewhere, and so there isn't any building of consensus, isn't any need to harmoniously work together in the political process to build a coalition.

I mean, with all due respect to you, I'm sure an outstanding mayor, it means you really need only build your coalition with blacks, that you can—it's just a sheer numbers game; you've got *x* number of districts, and blacks represent a majority of those districts, and blacks pick a black mayor.

If I'm not mistaken, I think in Richmond right now, certain white groups are contending their voting strength is being diluted. I don't mean to get into pros or cons of that, and I may, of course, not understand the implications of it.

I don't wish to overstate the case, but it strikes me that what you are defending and what you represent, not because you are not an outstanding person and doing an outstanding job, but it shows us the road we're going to be going down, proportional representation, single districts, no at-large elections, no building of consensus.

That's a very fundamental alteration in democratic political theory. As one Senator from the South, where obviously we have this question of building a consensus, obviously Senators run in at-large elections—it makes one sensitive to the broad base, to the broad coalition you represent. You try to find those reasonable points of agreement and consensus and what seems to be practical and realistic and constitutional.

We can't get away with just representing solely and exclusively a particular clientele, be it racial or otherwise, and I'm not too sure that doesn't produce a better form of democracy, in the long run, than ensconcing a system that rewards a provincial single-district representation which allows us to fragment and polarize possibly on race, ethnic origin generally, conceivably ultimately even religious.

I mean, it has endless ramifications, and in terms of building harmony in the great American melting pot, what about that? What would be your reflection on it, since you've been right in the center of this sort of problem?

Mayor MARSH. Senator, that's an excellent question, and I'm very glad you asked that question, and it's a multifaceted question, so I would like to take a few moments to respond.

The reason why we have a ward system in Richmond is because we were running at large up until we had the ward system.

I first was elected in 1966, and I ran at large, and I appealed to all segments of the community. I got at least 30 or 40 percent of the white vote. And we began to get more and more blacks to register to vote because of the Voting Rights Act.

As our numbers grew, I became a part of coalitions with whites to try to gain more influence in the government, and we ran as a team, black and white, to get control of the government from a single-interest minority group, which was business establishment.

As we began to get close to five votes, three black and two white or two black and three white, the whites then broke the rules of the game, and they annexed some surrounding territory, and the testimony was clear that the reason for the annexation was they did not, quote, want the niggers to take over the city. And the mayor made this statement to many people at that time as to his intent.

So because of this, the Attorney General objected to the annexation or the timing of it. What happened was they compromised it quickly to head off an election where they thought this group of blacks and whites working together would take over the city.

We litigated the case for 6 or 7 years, and from 1970 until 1977, we had no elections. We were frozen in office. Finally, the Supreme Court ruled that the city could keep the territory, but because of the discrimination which had been proven in many courts, it had to go to the district system.

Now, we've had district elections since, and I find myself still trying to build the consensus that I was trying to build in the at-large elections. We're doing it from districts, but every mayor in this country knows that if his city is going to survive, he's got to build coalitions with the business community, because the private sector is where the resources are to save cities.

The legislature has the power to kill a city, to choke it off, or to give it the authority to tax to save itself. We have to build coalitions to save our cities, and we have the need for consensus that you're talking about just as badly as we needed it before.

What Richmond is all about is living proof that you have to comply with the rules of the game, and if you cheat and get caught cheating, then there are laws that Congress has passed to deal with that and there are courts that will enforce those laws.

Now, I would suggest that the Richmond case is a good example of why the Voting Rights Act should not be weakened, because were it not for the Voting Rights Act, this would have been a travesty of one of the fundamental principles of America, the promise of America, that race will not be a barrier to participating in the political process.

So I don't think Richmond is an example of why we don't need a strong act.

The other point you raised is——

Senator HATCH. While you're on that point, Mayor, who was the prior mayor who made that statement?

Mayor MARSH. A gentleman named Phillip Bagley.

Senator HATCH. Egley?

Mayor MARSH. Bagley. He was the mayor at the time who negotiated this compromise with the county, and during these negotiations he gave up valuable land, which I wish I had now.

Senator HATCH. Sure thing. He made the statement, "The reason we don't want annexation is that we don't want niggers to take over our city".

Mayor MARSH. Right. And he said other statements—"We don't want another Washington, D.C.," and other statements. It was clear that the reason for the annexation's compromise was to avoid this coalition of blacks and whites working in harmony to gain influence in the city.

Senator EAST. But there my point would be, Mayor, you are suggesting that kind of talk would clearly indicate intent.

Mayor MARSH. Right.

Senator EAST. But, now, we're talking about an effects results test, so that let's say no intent could be shown of that kind of uncalled-for and inflammatory language. Let's say that, just hypothetically speaking, under this section 2, the city of Richmond decided to annex an area having to do with increasing its tax base as a corollary to that—not any intent, but as a corollary—it diminished white or black voting strength, one way or the other. Immediately under section 2, you have a civil rights problem, voting rights problem, because you simply look at the effect; you don't look at intent.

Now, you're offering a classic case of intent, intent to do something deliberately for the sole and overriding purpose of racial discrimination. I don't think that's the issue before us, because that's an agreed-upon proposition.

We're talking about a law that no longer would look for testimony of that kind. And, by the way, that's a good way of showing you can prove intent.

Mayor MARSH. That's a rare situation, extremely rare.

Senator EAST. Well, in any case, be that as it may, you, out of your own mouth, have shown that you can prove intent, and you did prove it in Richmond.

Mayor MARSH. It was a smoking gun. It was a smoking cannon. [Laughter.]

Senator EAST. But, you see, what you're talking about now—we're talking about a wholly different situation, where you don't have to show any intent. You don't even have to look at the total situation. You would simply say, "Is there an alteration, an effect of diminishing of white or black or any other racial minority voting strength," and if you could show that ipso facto, it is concluded, under the currently proposed legislation, that people are being discriminated against for voting purposes on the basis of race, which simply is not true.

Mayor MARSH. No, sir, I respectfully disagree, and I think that that's a good question, because we need to clarify what this section would mean.

I do not interpret this section as asking for an effects test, rather a results test, going back to the standard we had before Mobile, that you have to have more than just the effect. The Supreme Court specifically said that just having a disproportionate number of legislative seats was not enough.

And the plaintiff's burden—now the plaintiff is the person who is challenging the law—the plaintiff's burden is to produce evidence to support findings that the political process leading to the election was not equally open to participation by the groups in question, that its members had less opportunity than the other groups to participate in the political process and to elect the legislators of their choice.

In many cases in Richmond, blacks have voted to elect whites, rejecting other blacks, and so what we are asking for is not proportional representation by this amendment, but the right of minority people, black citizens of this country, to elect the representatives of their choice, and to prove in court, under the new standard, they would have to meet a burden of showing that they were denied equal opportunity to participate in the political process.

I think it's fair and reasonable. It's not a tremendous burden, and I think that this amendment should be supported, and should not be tampered with.

Senator EAST. Maybe this is the focus, then, and this is a fundamental point of disagreement, but as Professor Gross, who has just testified, and Congressman Hyde—granted, they are on the other side on this point, but obviously I think our chairman is alluding to it—as a practical matter, when it comes to interpreting and implementing section 2, though the supporters of it say to the contrary, the practical effect is going to be, in the real world of law and application, proportional application, period. Though they disclaim that, as a practical matter of reading that language and interpreting it and applying it, that's going to be the result.

And if that is—and obviously we've had some very expert political and constitutional testimony saying it is—that is a fundamental constitutional alteration in the American system of voting, and that's what we have. At least I'm deeply concerned about it, and I don't mean to speak for the distinguished Chairman, but I think

that's what anguishes him. When such well-intentioned people can disagree over what it means, we'd better get it clarified.

Mayor MARSH. I agree with you, Senator, and that's one issue where I'm in agreement with you and the chairman and Congressman Hyde. I do not want proportional representation to be a requirement of the law. I find that abhorrent to what the law is supposed to mean, and I think maybe it can be clarified by simply putting the clear language in the legislative history.

But I think it is important that the people who pass this bill recognize that we are a long ways from reaching the results that Congress intended to reach in establishing the Voting Rights Act. It's not enough to come 5 percent of the way. We have to get blacks registered to vote to make this American system work.

And even if they are registered, the dilution issue is very important to get meaningful participation, and to do this, we're going to have to have a strong law to prevent the temptation—the existence of the Voting Rights Act for the past few years has prevented a tremendous—the deterrent effect of that act has prevented many, many opportunities for discrimination, and if it's weakened in the least during this extension fight, it will mean that there will be hundreds and thousands of cases of litigation, there will be situations of discrimination which will not be brought to the attention of the court, and the very essence of our American system will be destroyed by persons who would discriminate against minorities.

And this is a real problem. It's going to exist for many, many years, and I would hope that this committee would not do anything to weaken this provision of the bill.

But we are not asking for proportional representation, but we are asking for this amendment to make sure that we can go back to the standard that we've had over the years.

Let me mention one problem. This case was in litigation 5 or 6 or 7 years. It was very expensive to litigate by the plaintiffs, and even when the Supreme Court finally ruled, they approved a plan that was a compromise plan, and so it's important to understand that under these pre-Bolden rules, it's going to be tough, that only a few cases are going to get to the courts. I mean, we're not going to have a revolutionary change if we go back to what we had.

But what some people are proposing is that we stop the slow, steady progress that we've been making for the past 10 or 15 years, and I say that would be a disaster. It will be a disaster for the country if we let that happen.

Senator EAST. Well, if you want to avoid proportional representation, which you say you detest, it occurs to me the only way you can do it in section 2 is to get rid of the effects test, because the effects test automatically, I submit, is going to give you proportional representation.

The only way you can avoid proportional representation, which you deplore, equally as the rest of us, is to have an intent test. You have to show the intent to discriminate on the basis of race in some alteration of the electoral process, and that's one of the great tenets of tort law, as Professor Gross has said, of the criminal law, and I consider that a radical change just on that matter of intent.

But, back to proportional representation, to me you've got to fish or cut bait. If you don't like proportional representation, you have

to go for intent. If you're going to go for effects test, you're going to have to live with the logic of your reasoning, proportional representation, and, again, I submit that's contrary to a number of fundamental tenets of democratic political theory in this country, and it's going to send us down the road of proportional representation throughout the United States.

Mayor MARSH. Senator, I appreciate your concern, and I know we all want to reach the day where race will not be a factor in the political process, that whites will be electing blacks and blacks will be electing whites, which is happening on some occasions in this country, and we want that to be the standard.

We are going through a period of dealing with a history where there has been discrimination against blacks in this country, and we are still in that period; and while we are trying to protect the rights of black citizens to vote, it's very important that no law be passed that will stop this effort.

I guess from the point of view of minority, when you ask for the right to participate in the political process, what you're asking for is a right to subject yourself to the will of the majority, anyway, so when you get elected in most situations, you're trying to convince the minority persons that they should go along with your political point of view.

So it's very important that as you try to get yourself in a position to be a minority, to persuade the majority to go along with your point of view, you should not be frustrated in that effort. In Virginia, we have 1 black in 40 members of the Senate, 4 blacks in 100 in the House, even though we're 20 percent of the population. We have to fight and scrap to get those persons elected.

And if you pass a bill that would frustrate us from getting that 1 black, or those 4 blacks out of 100, and 1 out of 40, then you are further frustrating the political process, and I know you wouldn't want to do that, but I'm just trying to say that what we're asking for is an opportunity to use our minority status effectively, and that's not asking for a lot.

So I really think we need to be careful in not turning back the clock, and we want to go back to what we had before the *Bolden* decision, because the way the *Bolden* decision is being interpreted, it's being interpreted as requiring an intent requirement, which we don't believe as lawyers that we can meet. It's not a question of winning a case or losing a case; it's a question of breathing life into the promise that voting rights will mean something.

Senator EAST. Well, as always in the law, in the tort law and in the criminal law, if one cannot show intent, as Chairman Hatch has said, one doesn't have a case, and that's the way it ought to be. I think to cave in on that one would get us into a fascinating area of Anglo-American law and one of the fundamental tenets of our law.

All of a sudden we're being told by distinguished lawyers—for example, the ACLU—we ought to get rid of intent as a qualification in determining tort or criminal liability. I'm appalled that the ACLU, for example, of all people, would say that.

We look at collectivities, we look at results, we look at vague things of this kind, and intent gets trampled underfoot. What happens to the great idea of accountability, wrongdoing based upon in-

tention to violate some fundamental premise of statutory constitutional law?

Again, I don't wish to get too long winded here, but when I hear that one batted around, "We can't prove intent, we can't prove our case; therefore, please skew the law so we don't have to prove anything." You know, criminal lawyers can come in here and want the law skewed their way. Prosecutors come in and want it skewed their way. I begin to think we're being double-teamed here, depending on whether lawyers are representing this side or that.

But our responsibility is just to develop a law that does what? That guarantees the right of individual Americans, irrespective of race, to register and vote, period.

Mayor MARSH. I understand.

Senator EAST. But to guarantee results? No. We're going to have to leave that to the world of coalition building out in democratic politics. That's what Mayor Bradley is going to have to do in California, and he'll probably do a very good job of it.

I think this would tend to localize, fragment, and polarize, and probably in the long run adversely affect black elections in this country, who would be better encouraged to get out into the broad mainstream of the electoral process, as Mayor Bradley is going to do, and build those coalitions, Mexicans, blacks, whites, et cetera. And that's where American politics is at its best.

Mayor MARSH. Well, you've raised a good point, Senator, and I would like to respond briefly.

There are several problems with proving intent, which I think we need to recognize. There is a body of law, a substantial body of law, building up that the motives of legislators in enacting their bills are not material, and the Supreme Court mentioned this in the *Arlington Heights* case, and if this is substantiated, then even if you are lucky enough to overhear the conversation which would be the smoking gun, or you're lucky enough to find a Governor Askew, who has the courage to come out and say what people told him, it might be ruled out of order because it's immaterial. I think there are real problems with using a criminal law standard in this area of protecting something as vital as the right to vote.

And I think that what the *White* v *Regester* standard would do is not just—when I say results test, it's not just looking at the results; it's looking at the totality of the circumstances, and the results would be one of the criteria, but the main thing is there would have to be a showing that there was a denial of equal opportunity to participate that has to be shown in the test.

And I would invite the committee to go back and read those cases, the pre-*Bolden* cases, and look at the tough standards that the courts require, and I think if you read those standards, the concerns you've had here today would be alleviated. If you look at those standards carefully, I think you would be reassured that the courts are going to protect the rights.

Someone mentioned that representatives from these little hamlets and villages couldn't be here and couldn't get here to this hearing. Let me assure you that the attorneys general of the various States and the Senators and Congressmen from the various States do have the resources to get here, and if there were countervailing arguments, they would be presented here.

The problem is that the Voting Rights Act has not been the problem that it's been put up to be. The Voting Rights Act has not frustrated the American process; it's made it better.

Senator HATCH. Mayor, nobody is disagreeing with that. I think I set the tone at the beginning of these hearings, and I think everybody here feels that the Voting Rights Act should be extended. The question really is with the proposed changes in section 2.

And I might point out that, other than Richmond, every other city of any consequence—or size—in Virginia is an at-large jurisdiction. This is true of Alexandria, Chesapeake, Hampton, Newport News, Portsmouth, Roanoke, or Virginia Beach, they're all at-large jursidictions. Should this pass, every one of those at-large jurisdictions is going to be attacked, and there is no use kidding about it.

And I might also point out that in your statement you were citing the figures in Virginia to show the differential between white and black registration to vote. Now, I think, if I recall correctly, your figures were 65.4 percent of the whites are registered and 49.7 percent of the blacks.

Mayor MARSH. Voting age.

Senator HATCH. I don't think that proves anything, because I don't think that creates any inference of difficulties in actually registering to vote.

Let me give you a good illustration. In Massachusetts, it shows an even greater differential of whites to blacks. In Massachusetts, the white registration is 73.4 percent and black registration is 43.6. I think you can use statistics, but I don't believe that they conclusively prove anything.

I think the Voting Rights Act is working well at getting people to register to vote, and have the right to register and vote. That was what it was established for, and to overcome these extraordinary approaches that literally were foreclosing blacks from the polling place, and from participation in our representative republic. That's no longer true. Every witness has agreed that those extraordinary conditions no longer are there.

That's why I am so concerned about section 2.

Mayor MARSH. Senator, let me respond. I don't pretend to be an expert on Massachusetts. I've been to Boston a few times. I might suggest that there probably are some problems of discrimination in Massachusetts, as well as Virginia, but I do know about Virginia, and my statement is replete——

Senator HATCH. But there's a difference between discrimination under the civil rights laws and the effect of the Voting Rights Act in ending discrimination with regard to the right to register and vote. Now, that's what this discussion is all about.

Mayor MARSH. Right.

Senator HATCH. I think there is discrimination in probably every State in the Union, more or less.

Mayor MARSH. The only point I was making is we have a unique history in Virginia where we had the constitutional convention in 1902, which disenfranchised blacks widespread, eliminated 90 percent of the blacks who were registered to vote openly. They declared that was their purpose.

Senator HATCH. I understand that.

Mayor MARSH. And up until 1965 we had a poll tax, we had all kinds of——

Senator HATCH. There is no question with that assertion, and everybody agrees that should all be wiped out and that the Voting Rights Act should be extended to insure that that never happens again. That isn't the issue.

The issue is really whether section 2 has been given adequate consideration in the House, and the answer to that is absolutely not. I don't see how anybody could disagree with that. And, second, are we going to give it adequate consideration here, when we look at it and the possible results or effects of that particular enactment in the House bill and how it will affect every municipality, county, and State in this Government.

Mayor MARSH. I share your concern, Senator. I would simply say that what the amendment to section 2 would do, in my judgment, is not what some of the Senators seem to think it would do. I believe the amendment would only restore us back to the *White* v. *Regester* standard, the standard followed by the Supreme Court prior to *Bolden*, and I do not believe that result would be harmful. It's clear, the requirements are spelled out, and I think that's much safer than any other approach, and I think if you read those cases carefully, you will see that there are safeguards there to prevent the proportional representation concern that you have.

Senator HATCH. We'll certainly do that. I do disagree that there was any different standard other than *Mobile* in the past. But be that as it may, that's your opinion, and we'll certainly take note of that, and I'll try to reread some of these cases.

Thank you for coming. We have two more witnesses to go, but we appreciate your testimony.

Were you done, Senator East? I'm sorry.

Senator EAST. I would just like to thank the mayor for coming. Thank you.

Senator HATCH. Oh, I'm sorry, I didn't mean to cut you off.

Senator EAST. No, that's fine. I had more than my opportunity to talk. Thank you.

Thank you, Mayor.

Mayor MARSH. Thank the committee for giving me the chance to appear.

Senator HATCH. Thank you, Mayor. We appreciate your taking time to testify before this committee today.

Our next witness will be the distinguished Representative from Richmond, Va., Representative Thomas Bliley. Representative Bliley was formerly mayor of Richmond himself, and I understand that he served a considerable length of time in that position, not all of which was your own doing, because you were kept on by the courts for an additional 4 years.

Mr. BLILEY. Five.

Senator HATCH. An additional 5 years, excuse me.

Mr. BLILEY. Thank you very much, Mr. Chairman, Senator East.

Senator HATCH. We're glad to have you here.

Congressman, we're trying to keep everybody down to 10 minutes. I've been totally unsuccessful today. In the next hearing, I am hopefully going to be more successful. If you can summarize, we'd appreciate it. We'll put your full statement in the record.

I'm running out of time. I have to leave in no less than probably 20 minutes, and I have another witness after you, but we don't want to——

Mr. BLILEY. I won't be 10 minutes, I don't think.

Senator HATCH. That will be fine. I don't want to stop you from making your full statement.

Mr. BLILEY. Thank you. Thank you, Mr. Chairman.

STATEMENT OF HON. THOMAS J. BLILEY, JR., A U.S. REPRESENTATIVE, COMMONWEALTH OF VIRGINIA

Mr. BLILEY. I appreciate your allowing me the opportunity to testify before you today. I regret that I couldn't be present for the testimony presented early today, and I hope to have the opportunity to review it.

By some calculations, the debate over the extension of the 1965 Voting Rights Act culminated a few months ago when the House considered H.R. 3112, which was to have extended the act, as it is now written, for another decade.

While opinions may differ on the need for extension—and they do vary widely—the focus of the extension debate has been on the Voting Rights Act as is. Is it still necessary? Or has it outlived its usefulness?

I have serious concerns with the House-passed version of this extension because it deviates from simple extension. It is not a simple extension of the act, nor even as the act has been twice amended.

Section 2 of H.R. 3112 has changed the Voting Rights Act in such a manner as to alter its entire substance. Under the guise of extension, dramatic changes have been slipped through the House.

The 1965 Voting Rights Act and subsequent extensions prohibited acts which deny or abridge the right to vote, yet the House bill before you prohibits acts which result in a denial or abridgement of the right to vote.

With that, I'm going to summarize my remarks, Mr. Chairman, and then avail myself for questions.

There was nothing spelled out in the House bill in 3112 to define what constitutes effects of discrimination, yet the proponents of that amendment said that the reason for it was that there was nothing in the previous language to spell out what intent was.

Well, here we have it left up to the courts, and it surely will be tested in the courts often to determine what it means.

Now, you've heard testimony to say, "Well, it doesn't mean a quota system. It doesn't mean this." But that's left up to the courts.

In 1965, I stipulate to you, it didn't mean annexations were covered by the Voting Rights Act. Indeed, it wasn't until 1971 in *Perkins* v. *Mathews* that annexations were covered, or it was definitely decided that they were covered. And I stipulate to you, if this language comes in, the scenario that you presented earlier to the mayor about going into court could very well and probably will happen.

Indeed, last week it was announced in Virginia, at the city of Hopewell, which is a few miles south of Richmond, not in my district, but that the ACLU was moving into court to challenge the

election of members of the city council there in Hopewell, because they're elected at large and the minority population is 20 percent, and there hasn't been a minority member elected, therefore, they're going to ask the court to throw the case out.

Now, you tell me if effects were in that law today that it wouldn't be a prima facie case.

Senator HATCH. It would be a prima facie case, in my opinion.

Mr. BLILEY. And to say just because the minority is only 20 percent, that's the only reason that they haven't had a successful election, is wrong, because to the west of Hopewell and to the west of Richmond is the city of Roanoke.

Senator HATCH. Could I add one other thought? It would be simply more than a prima facie case, because what would you rebut it with? Tell me one thing you could rebut it with.

Mr. BLILEY. Not being a lawyer, I couldn't tell you the first, but I'm sure the lawyers would have a very difficult time, though I am sure for the proper consideration they would be glad to take the case on. [Laughter.]

Senator HATCH. You may have summed up the legal profession pretty well. [Laughter.]

Mr. BLILEY. I paid them a lot when I was mayor. I had them all employed in Richmond, either fighting me or defending me, one or the other.

[Laughter.]

Mr. BLILEY. But to get back to the point I was about to make, in the city of Roanoke the minority population is 22 percent, and the registered voting percentage is a little less than 22 percent. Yet the mayor of Roanoke, elected at large, is minority, and the vice mayor of Roanoke is minority.

So to say that in Virginia, if you have at-large elections it automatically discriminates is wrong. In the city of Richmond today, you have five members of the General Assembly elected at large. Two are minority, and we would have the third, who happened to be running as a Republican and did not receive the endorsement of the black political organization. Had he received it, he would have won. We'd have a majority at large.

So that doesn't automatically establish a case, but the point is, if you leave it effects, as is 3112, and not restore it to the original language of intent, you're going to have quota systems set up throughout much of this country that's covered by this act.

And with that, I will stop and be happy to try to answer any questions.

Senator HATCH. Thank you so much.

[The prepared statement of Hon. Thomas J. Bliley, Jr., follows:]

PREPARED STATEMENT OF HON. THOMAS J. BLILEY, JR.

THANK YOU MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. I APPRECIATE YOUR ALLOWING ME TO TESTIFY BEFORE YOU TODAY. I REGRET THAT I COULD NOT BE PRESENT FOR TESTIMONY PRESENTED EARLIER TODAY. I HOPE TO HAVE THE OPPORTUNITY TO REVIEW IT SOON.

BY SOME CALCULATIONS, THE DEBATE OVER EXTENSION OF THE 1965 VOTING RIGHTS ACT CULMINATED A FEW MONTHS AGO WHEN THE HOUSE CONSIDERED H. R. 3112, WHICH WAS TO HAVE EXTENDED THE ACT, AS IT IS NOW WRITTEN, FOR ANOTHER DECADE.

WHILE OPINIONS MAY DIFFER ON THE NEED FOR EXTENSION, AND THEY DO VARY WIDELY, THE FOCUS OF THE EXTENSION DEBATE HAS BEEN ON THE VOTING RIGHTS ACT AS IS: IS IT STILL NECESSARY? OR HAS IT OUTLIVED ITS USEFULNESS?

I HAVE SERIOUS CONCERNS WITH THE HOUSE-PASSED VERSION OF THIS EXTENSION BECAUSE IT DEVIATES FROM SIMPLE EXTENSION. IT IS NOT A SIMPLE EXTENSION OF THE 1965 ACT, NOR EVEN OF THE ACT AS AMENDED TWICE SINCE.

SECTION TWO OF H. R. 3112 HAS CHANGED THE VOTING RIGHTS ACT IN SUCH A MANNER AS TO ALTER ITS ENTIRE SUBSTANCE. UNDER THE GUISE OF EXTENSION, DRAMATIC CHANGES HAVE BEEN SLIPPED THROUGH THE HOUSE.

THE 1965 VOTING RIGHTS ACT, AND SUBSEQUENT EXTENSIONS, PROHIBITED ACTS WHICH "DENY OR ABRIDGE" THE RIGHT TO VOTE, YET THE HOUSE BILL BEFORE YOU PROHIBITS ACTS "WHICH RESULT IN A DENIAL OR ABRIDGEMENT OF" THE RIGHT TO VOTE. IN OTHER WORDS, H. R. 3112 CHANGES THE VOTING

RIGHTS ACT FROM ITS PRESENT FOCUS ON INTENTIONAL ACTS TO PROHIBIT ANY LAW OR ACTION WHICH HAS THE EFFECT OF DISCRIMINATION, REGARDLESS OF ANY OTHER PURPOSE OR UTILITY.

MY EXPERIENCE AS MAYOR OF THE CITY OF RICHMOND, VIRGINIA, SHOWS THE FALLACY OF CHANGING INTENT TO EFFECT.

WHEN I WAS ELECTED MAYOR OF RICHMOND IN 1970, IT WAS NOT GENERALLY ACCEPTED THAT THE ACT COVERED ANNEXATIONS. INDEED, IT WAS NOT UNTIL THE SUPREME COURT DECIDED PERKINS v. MATTHEWS IN JANUARY, 1971, THAT IT WAS ESTABLISHED THAT ANNEXATIONS WERE COVERED. BECAUSE VIRGINIA CITIES AND COUNTIES ARE COMPLETELY INDEPENDENT OF ONE ANOTHER, THE ONLY WAY A CITY CAN EXPAND ITS REVENUE BASE IS THROUGH ANNEXATION OF COUNTIES. RICHMOND HAS USED THIS PROCEDURE NEARLY A DOZEN TIMES IN HER HISTORY, AND IN 1969 ANNEXED APPROXIMATELY 23 SQUARE MILES OF NEIGHBORING CHESTERFIELD COUNTY. THE FOLLOWING MAY, A COUNCILMANIC ELECTION WAS HELD WITH BOTH OLD AND NEW RESIDENTS VOTING. FOLLOWING PERKINS v. MATTHEWS IN 1971, RICHMOND WAS REQUIRED TO SUBMIT ITS NEW ELECTORAL PLAN TO THE JUSTICE DEPARTMENT UNDER SECTION FIVE PRE-CLEARANCE.

AT THAT TIME, RICHMOND HAD HER FIRST AND ONLY OBJECTION INTERPOSED AGAINST HER, AND THE JUSTICE DEPARTMENT DIRECTED RICHMOND TO GO FROM AT-LARGE TO WARD SYSTEM ELECTIONS. RICHMOND OBJECTED, FOR IN THAT VERY SAME YEAR, THE JUSTICE DEPARTMENT APPROVED A PLAN FOR ELECTING FIVE DELEGATES TO THE GENERAL ASSEMBLY FROM RICHMOND, AT-LARGE, AS WELL AS A FLOATER SEAT FOR ALL OF RICHMOND AND AN ADJOINING COUNTY.

WITH THIS MATTER UNSETTLED, THE JUSTICE DEPARTMENT ENJOINED THE CITY FROM HOLDING ANY ELECTIONS, THEREBY BLOCKING AN ELECTION SCHEDULED

FOR MAY, 1972. FOR THE NEXT FIVE YEARS, UNTIL THE SUIT WAS SETTLED IN 1977, THE CITIZENS OF RICHMOND DID INDEED HAVE THEIR RIGHTS TO VOTE DENIED. FOR SEVEN YEARS RICHMONDERS WERE PREVENTED, NOT BY THE STATE, NOR BY THE CITY, BUT BY THE JUSTICE DEPARTMENT IN WASHINGTON FROM EXERCISING THE VERY RIGHTS THE JUSTICE DEPARTMENT CLAIMED IT WAS SO DILIGENTLY PROTECTING.

AND IT IS VITALLY IMPORTANT TO UNDERSTAND THE OUTCOME OF THIS ACTION THAT KEPT VOTERS FROM GOING TO THE POLLS FOR MORE THAN HALF A DECADE. IN THE SUPREME COURT OPINION OF THIS CASE, FOR THE SUPREME COURT IS WHERE THE MATTER CAME TO REST FIVE YEARS LATER, IT WAS RULED THAT THE ANNEXATION HAD NOTHING TO DO WITH RACE, BUT WAS INDEED ECONOMICALLY MOTIVATED.

THE IMPLICATIONS OF THIS SEVEN YEAR STRUGGLE ARE CLEAR: INTENT TO DISCRIMINATE WAS NEVER PRESENT. YET, TO AVOID PROLONGED AND EXPENSIVE OUT-OF-STATE LITIGATION AND TO ALLOW HER CITIZENS TO VOTE AGAIN, RICHMOND WAS FORCED TO ABANDON AT-LARGE ELECTIONS, WHICH HAD RECEIVED OVERWHELMING SUPPORT IN A PREVIOUS REFERENDUM, AND CAPITULATE TO A BUREAUCRACY WHOSE DEDICATION TO RICHMOND VOTING RIGHTS WAS AT BEST DUBIOUS.

IN THE CASE OF MOBILE VERSUS BOLDEN, THE LANGUAGE OF SECTION TWO OF THE VOTING RIGHTS ACT WAS CLARIFIED TO INDICATE THAT PROOF OF INTENT TO DISCRIMINATE WAS NECESSARY TO SUSTAIN AN OBJECTION TO AN ELECTORAL PRACTICE. THE COURT IN THIS CASE, WROTE THAT SECTION TWO WAS, IN PRACTICE, A REITERATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS. IN 1981 THE SUPREME COURT CONCURRED IN THE LOWER COURTS FINDINGS.

MANY OF YOU, IN FACT, EVERY CONGRESSMAN AND SENATOR, HAS BEEN PETITIONED NOT TO ACCEPT ANY AMENDMENTS TO THE VOTING RIGHTS ACT. SO-CALLED CIVIL RIGHTS GROUPS NATIONWIDE DECRY ALL AMENDMENTS TO THE 1965 ACT AS CRIPPLING, WEAKENING THE VERY BASIS OF VOTER PROTECTIONS. YET WHY SHOULD THESE GROUPS OR ANYONE ELSE SUPPORT THE HOUSE JUDICIARY COMMITTEE'S AMENDMENT? WHAT DOES IT DO TO THE ORIGINAL ACT?

WHAT THE HOUSE BILL DOES IS SUBSTITUTE EFFECT FOR INTENT. ITS IMPLICATIONS ARE FOR GUARANTEED PROPORTIONAL REPRESENTATION -- THE BASIS OF AN ELECTORAL QUOTA SYSTEM. THIS COMMITTEE AMENDMENT, REVERSING THE WISDOM OF NOT ONLY THE MOBILE CASE BUT ALSO THE ACT ITSELF AS ORIGINALLY WORDED, DEFIES A BASIC TENET OF OUR SYSTEM OF GOVERNMENT. AND THAT IS, GOVERNMENT BY CONSENT OF THE GOVERNED. THIS LEGISLATION PRESUMES THAT ALL AT-LARGE ELECTIONS ARE DISCRIMINATORY. THIS LEGISLATION STRIPS THE VOTERS OF A COVERED JURISDICTION OF THE POWER AND THE RIGHT TO DECIDE HOW THEY WISH TO BE GOVERNED.

WHILE THE BURDEN OF PROOF IS CHANGED FROM INTENT TO EFFECT, IT IS NOT ACCOMPANIED BY A DEFINITION OF "EFFECT," NOR BY ANY STANDARD FOR DETERMINING SUCH EFFECT. YET WHEN THE BILL WAS INTRODUCED CONTAINING THIS CHANGE, ITS PROPONENTS DECLARED THAT IT WAS NECESSARY BECAUSE THERE WAS NO CLEARLY ARTICULATED STANDARD FOR PROOF OF INTENT TO DISCRIMINATE. YET THESE PROPONENTS OF CHANGE HAVE BLATANTLY SIDE-STEPPED FORMULATING A CLEAR STANDARD OF EFFECT.

UNDER THIS CHANGE, BY MY CALCULATIONS AND ACCORDING TO THE LIBRARY OF CONGRESS' AMERICAN LAW CENTER, LITIGATION WOULD

UNDOUBTEDLY INCREASE UNTIL A CLEAR STANDARD IS ESTABLISHED, LEAVING THE COURTS FREE TO EXERCISE THEIR WILLS THROUGH INTERPRETATION OF THIS NEW LAW. AND THAT WILL LIES NOT HERE IN THE CONGRESS BUT INITIALLY WITH THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. THAT COURT OR ANY COURT COULD REQUIRE THAT THE RACIAL COMPOSITION OF A GOVERNING BODY EXACTLY REFLECT THE RACIAL COMPOSITION OF THE COMMUNITY. TITLE TWO OF THIS BILL LAYS PRECISELY SUCH A GROUNDWORK. AT THIS POINT I WOULD LIKE TO ENTER INTO THE HEARING RECORD THE REPORT I REFERRED TO EARLIER.

WHEN H. R. 3112 WAS CONSIDERED IN THE HOUSE, I OFFERED AN AMENDMENT TO PRESERVE THE VOTING RIGHTS ACT AS ORIGINALLY WRITTEN AND SUBSEQUENTLY INTERPRETED BY THE SUPREME COURT. I URGE YOU NOW TO REJECT THIS PROVISION OF THE HOUSE LEGISLATION. I AM PLEASED TO READ IN THIS MORNING'S WALL STREET JOURNAL THAT THERE ARE OTHERS WHO FEEL THE SAME WAY.

AGAIN, MR. CHAIRMAN, GENTLEMEN, THANK YOU FOR INVITING ME. I WILLCERTAINLY BE HAPPY TO ANSWER ANY QUESTIONS.

ANALYSIS OF TITLE II OF H.R. 3112, 97th CONGRESS, WHICH WOULD AMEND SECTION 2 OF THE VOTING RIGHTS ACT

Title II of H.R. 3112, 97th Congress, would amend section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by striking out "to deny or abridge" and inserting in lieu "in a manner which results in a denial or abridgement of." The amended section would then read:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title.

No accompanying statement by Congressman Rodino, the sponsor of the bill, was found in the Congressional Record on the date of its introduction, April 7, 1981, but Senator Mathias stated at 127 Cong. Rec. S 3540 (daily ed. April 7, 1981), that the purpose of section 2 of his S. 895, whose language is identical to H.R. 3112, is to:

> [a]mend section 2 of the act to clarify the burden of proof in voting discrimination cases and thus remove the uncertainty caused by the failure of the Supreme Court to articulate a clear standard in City of Mobile against Bolden.

At S 3542 of the same volume, Senator Kennedy, a cosponsor of S.895, stated:

> Until the Supreme Court decision in Mobile against Bolden last spring, a violation of section 2 would be established by a variety of direct or indirect evidence concerning the context, the nature, and the result of the practice in question. This position had been unanimously supported by the Supreme Court in White against Register in 1973. In Mobile, the Court's plurality opinion suggested that direct proof of explicit intent was a necessary element to establish a violation of the Act. That, of course, is usually an impossible task. Because of the absence of a clear standard for section 2 violations after the Bolden decision, it is important for Congress to clarify this provision. We should expressly restate the earlier understanding of Congress and the courts that section 2 violations can be established by direct or indirect evidence showing the discriminatory circumstances of the challenged practice.

City of Mobile v. Bolden, 446 U.S. 55 (1980), was brought by plaintiffs alleging that Mobile, Alabama's, practice of electing its City Commissioners at-large unfairly diluted the voting strength of blacks in violation of section 2 of the Voting Rights Act and of the Fourteenth and Fifteenth Amendments. The Court only briefly discussed section 2 of the Voting Rights Act, believing that it merely reiterated the Fifteenth Amendment. At 60-61 the Court stated:

> Although required by general principles of judicial administration to do so ..., neither the District Court nor the Court of Appeals addressed the complaint's statutory claim -- that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination

> of that claim, however, clearly discloses that it adds nothing to the appellees' complaint... Assuming, for present purposes, that there exists a private right of action to enforce this statutory provision, it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.
>
> Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that § 2 "grants ... a right to be free from enactment or enforcement of voting qualifications ... or practices which deny or abridge the right to vote on account of race or color." H.R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, 89th Cong., 1st Sess., p. 3, pp. 19-20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., p.1., p. 208 (1965).
>
> In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.

A plurality of the Court went on to hold that Mobile's at-large electoral system did not violate either the Fourteenth or Fifteenth Amendment because the plaintiffs could not prove that the system was intended to result in racial discrimination. The District Court and the Court of Appeals had found that blacks in Mobile were able to register and vote without hindrance; these lower courts had not found that there was purposeful racial discrimination behind Mobile's at-large electoral system. According to the Supreme Court, these lower courts erred in finding violations of the Fourteenth and Fifteenth Amendments without also finding racially discriminatory intent. The Supreme Court reversed the lower courts' decisions and remanded the case for further proceedings.

Title II of H.R. 3112 would appear to attempt to do away with the racially discriminatory intent requirement as a prerequisite for finding a voting requirement to be in violation of 42 U.S.C. § 1973. Instead, for a voting requirement to be illegal, it would be necessary to show only that the requirement was imposed in a manner which resulted in denial of the right to vote because of race or color. Thus, language of the bill seems to change the burden of proof from an intent requirement to an effect requirement.

It is very difficult to speculate as to what impact this language would have on approval or disapproval of voting requirements by the courts. The standard of proof is not provided for in the bill, and it would seem safe to say that increased litigation would occur in this area until the courts have laid down the standard of proof which must be met in order to show that a voting requirement has the effect of discrimination. Since the standard of proof is not provided for in the bill, the courts would seem to be free to choose what they feel is most appropriate. One such choice which comes to mind in the area of redistricting and councilmanic elections is to require that the percentage of racial representation on the governing body of a jurisdiction approximate the racial mix of the citizens of the jurisdiction. For example, if a jurisdiction were to be 40% black and 60% white, the racial composition of its governing body might be required to reflect these percentages.

However, it appears to be impossible to discuss with any certainty what standard of proof the courts would establish for showing that a voting requirement has the effect of racial discrimination. The bill itself does not contain the standard of proof which is to be applied, nor does the legislative history thus far seem to indicate an applicable standard of proof. Thus, if Title II of H.R. 3112 is enacted, the courts likely would be called on to establish the standard of proof which will be applied to determine whether there is a discriminatory effect caused by a voting requirement.

Michael V. Seitzinger

Michael V. Seitzinger
Legislative Attorney

Senator HATCH. There are one or two questions I would like to ask that are kind of practical questions, and I think it's only fair to say, your viewpoint seems very well reasoned to me. Why, then, has the House voted as overwhelmingly as it has for this bill?

Mr. BLILEY. Well, I pushed the amendment on the floor. I offered the amendment.

Senator HATCH. You offered the amendment, too?

Mr. BLILEY. To put it back to intent.

Senator HATCH. Yes.

Mr. BLILEY. The majority of the House had been contacted, and I talked with many of the members, and they had signed off by the League of Women Voters and the civil rights organizations not to accept any amendments, and they agreed to that in advance, without ever hearing the amendments. They didn't consider any of them, and didn't accept any of them.

Senator HATCH. It doesn't sound like a very representative approach, does it?

Mr. BLILEY. No, not to me, not this member.

When I went into this, I started out with the position that I was against the extension of the act, because I had only been familiar with Virginia, in which there hasn't been a single claim of a person being denied the right to register or vote, much less having it sustained, to my knowledge, so I felt that it had served its purpose.

But in reading the testimony and following the hearing, I changed my mind. There are some communities in our country, unfortunately, I think, that have not been as forthright in dealing with this matter as they should, so it should be extended. But we should have intent. In my opinion, we ought to have two other things at least. One of those is an adequate and a meaningful bailout, which we don't have in 3112. Anybody with a filing fee can move into court and stop you dead in your tracks if you try to get out from under it the way it is currently written.

Senator HATCH. There's no question that's not a bailout in my eyes.

Mr. BLILEY. And I think that you ought to be able to try the case where the crime is alleged to have been committed, rather than have to do everything up here in the District of Columbia.

Senator HATCH. What's wrong with the District of Columbia courts? I share your viewpoint, but why do you think that this requirement so bad in principle?

Mr. BLILEY. Well, normally, when a crime is committed, you try it in the jurisdiction that it was committed in, unless compelling reason is brought forward for a change of venue, and I think it's easier for witnesses, and it's easier for people to testify locally about the problem, if it's done in the district that it's in. But that in the ranking of priority would certainly fall behind the other two.

Senator HATCH. Thank you, Congressman.

Senator East?

Senator EAST. Mr. Chairman, I know you're pressed for time, and having talked with the mayor—and I appreciate his very fine testimony—I think I'll forego any further questions.

But I deeply appreciate your summing up what you think are the critical weaknesses in your House bill; namely, the bailout provision, the intent problem, and then the forum problem. Do you think those are the three major weaknesses in the House bill?

Mr. BLILEY. I think so.

Senator EAST. Good. Thank you.

Senator HATCH. Thank you so much, Congressman. We appreciate your taking time from what we know is a busy schedule.

Mr. BLILEY. Thank you.

Senator HATCH. Our final witness today will be Dr. Edward Erler from the National Humanities Center in Raleigh, N.C.

Dr. Erler has written extensively on the subject of voting rights and representation.

We're very happy to welcome you to the committee, Dr. Erler.

Dr. ERLER. Thank you, Mr. Chairman.

My remarks are directed against the revision of section 2. Some of what I'll say will be repetitious, but at least I can say I'll be the last one on the list today to repeat them.

STATEMENT OF DR. EDWARD J. ERLER, NATIONAL HUMANITIES CENTER, RALEIGH, N.C.

Dr. ERLER. The House amendment of section 2 of the Voting Rights Act is, in my opinion, wholly inconsistent not only with the principled dictates of the 14th and 15th amendments, but with the central purposes of the Voting Rights Act as well.

H.R. 3112 amends section 2 with the explicit purpose of overturning the Supreme Court's decision in *Bolden*. As the Committee on the Judiciary's report states, "the Supreme Court's interpretation of section 2 in *City of Mobile* v. *Bolden* has created confusion as to the proof necessary to establish a violation under that section."

The report continues that "Prior to *Bolden*, a violation of section 2 could be established by indirect evidence concerning the context, nature, and result of the practice at issue. In *Bolden*, Justice Stewart construed section 2 as merely restating the prohibitions of the 15 amendment. The Court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. The committee does not agree with this construction of section 2 and believes that the intent of the section should be clarified."

Now, the committee's interpretation of the pre-*Bolden* cases here is not, in my opinion, entirely accurate. No pre-*Bolden* case has ever interpreted section 2 as allowing intent to be established by indirect evidence concerning the context, nature and result of the practice at issue. Nor is the committee's reading of the *Bolden* case itself accurate. The Supreme Court in *Bolden* did not break with all pre-*Bolden* voting rights cases on the question of intent.

Based on a misunderstanding of both what the *Bolden* case attempted to accomplish and the import of the pre-*Bolden* cases, the proposed amendment therefore attempts to create a remedy for a problem that is nonexistent.

But the proposed amendment is not merely superfluous. It holds the potential for creating great harm. Everyone seems to admit that the establishment of a right to proportional representation

based on race must be avoided. Yet the plurality decision in *Bolden*, more than any other recent decision of the Supreme Court, affirms that resolve to avoid proportional representation. By attempting to overrule *Bolden*, the proposed amendment will, I believe, create precisely the very thing that everyone wishes to avoid.

The language of the amendment and the committee report both seek to dispel that concern. As the amendment itself states, lack of racial proportionality "shall not, in and of itself, constitute a violation of this section."

The committee report confidently asserts that the proposed amendment does not create a right to proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section, although such proof, along with other objective factors, would be highly relevant.

The report further notes that the list of objective factors derives from *White* v. *Regester*.

Let me just repeat here the central statement from the *White* case. The court there remarked: "To sustain claims of voting discrimination, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political processes to elect legislators of their choice."

In other words, lack of proportionality, in and of itself, was not unconstitutional, but lack of proportionality, combined with other factors probative of the fact that the racial group in question has less opportunity to elect legislators of their choice could establish a result which amounts to a violation of the 14th amendment.

Among the factors the Court said could be adduced to establish that the political process was not equally open to minority groups was a history of official race discrimination in the fields of education, employment, economics, health, politics, and others, majoritarian electoral procedures which enhance the opportunity for racial discrimination by perpetuating the effects of past discrimination, and cultural and language barriers that make participation in community processes extremely difficult.

These factors were described by the Court as part of the totality of circumstances, indicating that the list was suggestive, rather than exhaustive.

Let me reiterate that these are the standards that the House committee report characterizes as an aggregate of objective factors which are to be used in determining Voting Rights Act violations under the revised section 2.

Using these criteria, it would be difficult to imagine a political entity containing a significant minority population that was not represented proportionately that would not be in violation of the revised section 2. The argument in its simplest form presumes that a political process equally open to minorities will produce proportional results. When faced with a lack of proportional results, it is

merely assumed that the political process is not equally open. With such assumptions, it is not difficult to find a sociological cause for lack of proportionality.

The committee's reference to *White* and its progeny render unrealistic its assurances that the revised section 2 will not create a right to proportional representation. The courts will undoubtedly regard the amendment as an imprimatur for the decisions that have already, in effect, required proportional representation based on race. This was surely not the intention of the Judiciary Committee of the House, but the result will be the same whether intended or not.

The present language of section 2 is, in my opinion, clearly superior for the accomplishment of the objectives of the Voting Rights Act.

The Voting Rights Act of 1965 originally represented an extensive exercise of Congress enforcement power under the 15th amendment to proscribe the denial or abridgement of the right to vote on account of race or color. In more recent years, however, emphasis has shifted from the issue of equal access to the ballot for racial minorities to the issue of equal result. The issue is no longer typically conceived of in terms of the right to vote but in terms of the right to an effective vote, no longer in terms of disfranchisement, but in terms of dilution.

The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.

This is hardly a surprising development. It parallels other demands that have been pressed so assiduously upon the political system, especially in the area of affirmative action, which explicitly uses proportional results as the standard of nondiscrimination.

The plurality decision in *Bolden* was, I believe, a reasonable and timely attempt to forestall a dangerous drift toward an interpretation of the Constitution and the Voting Rights Act of allowing, indeed requiring proportional representation based on race.

Senator HATCH. Dr. Erler, I wonder if I could interrupt you?

Dr. ERLER. Yes.

Senator HATCH. If I could, I have to leave in just a few minutes, and I'd like to wrap this up.

Dr. ERLER. Surely.

Senator HATCH. I want to compliment you for your statement, which I've read, because I think it's one of the best efforts that has been made in writing a statement that has been made in this matter, either in the House or here.

If you would be kind enough to let me interrupt you to ask a couple of questions, and also, without objection, your full statement will be placed in the record at this point.

Dr. ERLER. Thank you.

Senator HATCH. And I hesitate to do so, except that my time is a real problem to me.

[The prepared statement of Dr. Edward J. Erler follows:]

PREPARED STATEMENT OF DR. EDWARD J. ERLER

The House amendment of Section 2 of the Voting Rights Act is, in my opinion, wholly inconsistent not only with the principled dictates of the Fourteenth and Fifteenth Amendments but with the central purposes of the Voting Rights Act as well. HR 3112 amends Section 2 of the Voting Rights Act with the explicit purpose of overturning the Supreme Court's decision in City of Mobile v. Bolden.[1] As the Committee on the Judiciary's Report states, "the Supreme Court's interpretation of Section 2 in City of Mobile v. Bolden has created confusion as to the proof necessary to establish a violation under that section. Prior to Bolden, a violation of Section 2 could be established by indirect evidence concerning the context, nature and result of the practice at issue. In Bolden, Justice Stewart, writing for the plurality, construed Section 2 of the Act as merely restating the prohibitions of the Fifteenth Amendment. The Court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. The Committee does not agree with this construction of Section 2 and believes that the intent of the section should be clarified."[2]

The Committee's interpretation of the pre-Bolden cases here is not, in my opinion, entirely accurate. No pre-Bolden case has ever interpreted Section 2 as allowing intent to be established "by

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[1]445 U.S. 55 (1980). Debate in the House, although generally sparse and desultory, indicates that this was understood to be the intent of the Amendment. 147 Cong. Rec. H6,982-85 (daily ed. Oct. 5, 1981).

[2]H.R. Rep. No. 97-227, 97th Cong. 1st Sess. 28-9 (1981).

indirect evidence concerning the context, nature and result of the practice at issue." Nor is the Committee's reading of the Bolden case itself accurate. The Supreme Court in Bolden did not break with all pre-Bolden voting rights cases on the question of intent. Based on a misunderstanding of both what the Bolden case attempted to accomplish and the import of the pre-Bolden cases, the proposed amendment therefore attempts to create a remedy for a problem that is non-existent.

But the proposed amendment is not merely superfluous; it holds the potential for creating great harm. Everyone seems to admit that the establishment of a right to proportional representation based on race must be avoided at all costs. Yet the plurality decision in Bolden, more than any other recent decision of the Supreme Court, affirms that resolve to avoid proportional representation. By attempting to overrule Bolden the proposed amendment will, I believe, create precisely the very thing that everyone seeks to avoid.

The language of the amendment and the Committee Report both seek to dispel that concern. As the amendment itself states, lack of racial proportionality "shall not, in and of itself, constitute a violation of this section." The Committee Report confidently asserts that "the proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along

with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy."[3]

The attentive reader will recognize that the language of both the amendment and the Report is derived from the language of a number of pre-Bolden court cases. The Committee Report notes that "By amending Section 2 of the Act Congress intends to restore the pre-Bolden understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."[4] The Report intimates that the plurality decision in Bolden, which demands proof of discriminatory purpose or intent, relies on wholly subjective and hence presumably arbitrary criteria. "The proposed amendment," the Report asserts, "avoids highly subjective factors," relying instead on "an aggregate of objective factors" derived from "the context of the challenged standard, practice or procedure."[5] The Report further notes that its list of "objective factors" derives from White v. Regester, a voting rights case decided in 1973.[6]

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[3] id. at 30 (emphasis added).

[4] id. at 30-1.

[5] id. at 30.

[6] 412 U.S. 755 (1973). The Report notes, however, that White "is not controlling since it established a constitutional violation" (at 30, n. 104). But reliance on White does indicate the extent to which the Committee on the Judiciary expects Fourteenth Amendment Equal Protection standards to prevail in the adjudication of the proposed amendment to Section 2. See infra, p. 15, n. 37.

White v. Regester examined, among other things, claims that multi-member districts in the state of Texas were being used "to cancel out or minimize the voting strength of racial groups."[7] The Court remarked that "[t]o sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[8] In other words, lack of proportionality, "in and of itself" was not unconstitutional, but lack of proportionality combined with other factors probative of the fact that the racial group in question "has less opportunity to elect legislators of their choice" could establish a "result" which amounts to a violation of the Fourteenth Amendment.

Among the factors the Court said could be adduced to establish that the "political process" was not "equally open" to minority groups was a "history of official race discrimination . . . in the fields of education, employment, economics, health, politics and others," majoritarian electoral procedures which enhance "the opportunity for racial discrimination" by perpetuating the effects of past

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[7] id. at 765.

[8] id. at 765-6.

discrimination, and "cultural and language" barriers that make "participation in community processes extremely difficult."[9] These factors were described by the Court as part of the "totality of the circumstances,"[10] indicating that the list was suggestive rather than exhaustive.[11] Let me reiterate that these are the standards that the House Committee Report characterizes as "an aggregate of objective factors" which are to be used in determining Voting Rights Act violations under the revised Section 2.

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[9] id. at 766-769.

[10] id. at 769.

[11] Zimmer v. McKeithen 485 F.2d 1297 (5th Cir. 1973), aff'd on other grounds, Sub. nom., East Carroll Parish School Bd. v. Marshall 424 U.S. 636 (1975), a decision which has loomed large in recent cases, provided a detailed elaboration of the criteria announced in White. Zimmer made it virtually impossible to prove "non-dilution" in an electoral district which lacked proportionality since, in addition to the White criteria, it noted that the fact that elected officials were responsive to minority interests "while . . . significant, . . . is not decisive," and disallowed evidence of "the success of black candidates at the polls" as foreclosing "the possibility of dilution of the black vote." "Such success," the Court continued, "might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations--namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution." Two of three candidates elected in the most recent contest under the system invalidated here by the Court were black.

Using these criteria, it would be difficult to imagine a political entity containing a significant minority population that was not represented proportionately that would not be in violation of the revised Section 2. The argument in its simplest form presumes that a political process "equally open" to minorities will produce proportional results. When faced with a lack of proportional results it is merely assumed that the political process is not "equally open." With such assumptions it is not difficult to find a sociological cause for lack of proportionality. Resort to such "gauzy sociological considerations"[12] can always produce the requisite evidence to support lack of racial proportionality.[13] Given this fact, who can fail to see that on its face the House revision of Section 2 requires racial proportionality. This, I believe, is the proper gloss on the Committee Report's statement that "By amending Section 2 of the Act Congress intends to restore the pre-Bolden understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."[14] The Committee's references to White and its "progeny" render unrealistic its assurances that the revised section 2 will

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[12] City of Mobile v. Bolden 446 U.S. 55, at 75, n. 22.

[13] The extent to which proportionality has become the standard for "vote dilution" cases is indicated by the fact that the typical remedy in cases where "dilution" has been found is to reorder the electoral process to produce racial proportionality. See e.g., Bolden v. City of Mobile 423 F.Supp. 384 (S.D. Ala. 1976), at 402; Lodge v. Buxton 639 F.2d. 1358 (5th Cir. 1981), at 1361. Both of these cases relied on Zimmer.

[14] Supra note 2, at 29-30.

not create a right to proportional representation. The Courts will undoubtedly regard the amendment as an imprimatur for the decisions that have already, in effect, required proportional representation based on race. This was surely not the intention of the Judiciary Committee of the House. But the result will be the same whether intended or not. The present language of Section 2 is, in my opinion, clearly superior for the accomplishment of the objectives of the Voting Rights Act.

The Voting Rights Act of 1965 originally represented an extensive exercise of Congress' enforcement power under the Fifteenth Amendment to proscribe the denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude."[15] The great concern of the framers of the Act was to provide racial minorities with equal access to the ballot. Even the most cursory examination of the debates accompanying passage of the Voting Rights Act reveals this to be its primary objective. And, in terms of this original purpose, there is little doubt that the Act has been remarkably successful. By and large no significant bars remain to registration, voting or to candidacy for office even in the most hostile and recalcitrant areas.

In more recent years, however, emphasis has shifted from the issue of equal access to the ballot for racial minorities to the issue of equal results. The issue is no longer typically conceived

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[15]See South Carolina v. Katzenbach 383 U.S. 301, at 315 (1966).

of in terms of "the right to vote," but in terms of "the right to an effective vote"; no longer in terms of "disfranchisement," but in terms of "dilution." The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results. This is hardly a surprising development. It parallels other demands that have been pressed so assiduously upon the political system, especially in the area of affirmative action, which explicitly uses proportional results as the standard of non-discrimination. The demand for equal results--the so-called "new equality"[16]--is merely the direct reflection of society's ever-quickening concern for the implementation of numerical equality.[17] As Tocqueville reminded us almost one hundred and fifty years ago, "When inequality is the general rule in society, the greatest inequalities attract no attention. When everything is more or less level, the slightest variation is noticed. Hence the more equal men are, the more insatiable will be their longing for equality."[18] The great concern is that at this late date we not allow ourselves in our impatience for results to abandon those principles that have been productive of so much success.

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[16]See Edward Erler, "Public Policy and the 'New Equality'" 8 The Political Science Reviewer 235-262 (1978).

[17]See Eastland and Bennett, Counting By Race (1979).

[18]2 Democracy in America 147 (1945 [originally published in 1840]).

The watershed Supreme Court case in the area of voting rights was Allen v. State Board of Elections,[19] a case involving the remedial scope of Section 5 of the Voting Rights Act. Chief Justice Warren, writing for the majority, came remarkably close to equating "disfranchisement" and vote "dilution." "The right to vote," Warren remarked, "can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See Reynolds v. Sims. . . . Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change [to at-large elections] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[20] As the Chief Justice indicated by his citation to Reynolds, the language of "dilution" stems directly from the reapportionment cases. These cases, of course, did not involve racial questions, but the right of the individual to have an equal vote as a matter of constitutional entitlement. The constitutional standard created by the Court in Reynolds was "one person, one vote." When the question of vote dilution arises in a racial context, however, it no longer involves individual claims, but group claims. The question is whether a racial group has the right to be represented in proportion to its group strength. In the Allen case Warren assumed that the "candidate of [the minority's] choice" would, in the most favorable circumstances, be a member of their own race elected by racial bloc

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[19] 393 U.S. 544 (1969).

[20] id. at 569.

voting. Warren fell short of stating that there was a constitutional or statutory right to the optimum conditions for maximizing the effectiveness of racial bloc voting, but later cases would not be so reticent in this regard. The crucial question that must be resolved is whether vote "dilution" measured in terms of racial proportionality is the constitutional equivalent of disfranchisement.

The Supreme Court in Whitcomb v. Chavis (1971)[21] recognized the intractable problems that necessarily arise in the attempt to litigate group claims. In Whitcomb the Court disallowed a claim of vote dilution and noted that the assertion that "the voting power of ghetto residents may have been 'cancelled out' . . . seems a mere euphemism for political defeat at the polls."[22] The Court recognized that the argument from proportional representation would make every loser's claim cognizable under the equal protection clause because every loser could claim he was not represented by the candidate he voted against. The problem, the Court remarked, was not racial "vote dilution," but the fact that blacks voted "predominately Democratic" in a district typically dominated by the Republican Party. In this instance black Democrats suffered "along with all the other Democrats." As the Court laconically remarked, "As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative

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[21] 403 U.S. 124 (1971).

[22] id. at 153.

voice of their own. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates. . . ."[23] To countenance such a claim would require "some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests."[24] It is clear that not every disadvantage to a political minority or interest is tantamount to disfranchisement. "Most political losers can imagine a context structured more to their benefit, yet few would argue that they possess either a statutory or a constitutional right to an optimal political environment. But when politics and race become thoroughly entwined--when political identity is inextricably linked with racial identity--then such a claim becomes enticing."[25] This is especially true, of course, when the "right to vote" has been transmogrified into "the right to an effective vote," and the effectiveness of that vote is measured in terms of "results."

But the Supreme Court has not always been so reluctant to use proportional representation as its standard of "the right to an effective vote." The most revealing case is United Jewish Organizations v. Carey (1977).[26] In this case, the Court

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[23] id.

[24] id. at 156.

[25] Abigail M. Thernstrom, "The Odd Evolution of the Voting Rights Act" 55 The Public Interest 59-60 (1979); see Edward Erler, "Equal Protection and Personal Rights" 16 Georgia Law Review (1982).

[26] 430 U.S. 144 (1977).

disallowed the claim that reapportionment which was covered by the remedial scope of Section 5 of the Voting Rights Act had to be racially neutral, and, indeed, more than implied that the test of compliance derived from the standard of racial proportionality. Justice White, announcing the judgment of the Court, stated that "Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. . . . neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is . . . [t]he permissible use of racial criteria . . . confined to eliminating the effects of past discriminatory districting or apportionment.[27] Evidently it was not the elimination of discrimination, but ensuring "the opportunity for the election of black representatives"[28] that governed the Court's interpretation. Or as White stated it, "the inquiry under §5 focuses ultimately on 'the position of racial minorities with respect to their effective exercise of the electoral franchise'."[29] And, as Justice White makes abundantly clear, an "effective franchise" results from "a fair allocation of political power between white and non-white voters, . . ." and which "'provide[s] a rough sort of proportional representation in the legislative halls of the State'."[30]

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[27] id. at 161.

[28] id. at 163.

[29] id. at 164 quoting Beer v. U.S. 425 U.S. 130, at 141 (1976).

[30] id. at 168.

The quoted portion of White's statement is from Gaffney v. Cummings (1973). Gaffney involved political party apportionment, but White insists that there is no difference between an apportionment that fairly reflects political party strengths and one that fairly represents racial strengths.[31] Justice Brennan in his concurring opinion expressed some reservations about White's analogy: "I have serious doubts that the Court's acceptance of political party apportionment in Gaffney . . . necessarily applies to apportionment by race. Political affiliation is the keystone of the political trade. Race, ideally, is not."[32] Brennan did agree however--albeit with some reservations--that "Even in the absence of the Voting Rights Act, this preferential policy plausibly could find expression in a state decision to overcome nonwhite disadvantages in voter registration or turnout through redefinition of electoral districts--perhaps, as here, through the application of a numerical rule--in order to achieve a proportional distribution of voting power."[33]

Chief Justice Burger in dissent remarked quite aptly that "the result reached by the Court today in the name of the Voting Rights Act is ironic. . . . Manipulating the racial composition of electoral districts to assure one minority or another its 'deserved' representation will not promote the goal of a racially neutral legislature.

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[31] id.

[32] id. at 171, n. 1.

[33] id. at 170-71 (emphasis added).

On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process."[34] As Burger implies, once political power is conceived of in exclusively racial terms, the pressure to regard interests in those same terms will also become irresistible. One consequence will be the intensification of racial bloc voting. Legislatures, whether local, state, or national, will find it difficult, if not impossible, to find a common ground for the representative process that transcends immediate racial class considerations. The dangers to constitutional government should be manifest.

The plurality decision in City of Mobile v. Bolden was, I believe, a reasonable and timely attempt to forestall this dangerous drift toward an interpretation of the Constitution and the Voting Rights Act as allowing--indeed requiring--proportional representation based on race. The most reasonable and effective way to do this was, in the Court's opinion, to restore the authority of those cases requiring proof of discriminatory purpose as a necessary prerequisite to a claim of voting discrimination. In the absence of such a requirement it is clear that proportionality will inevitably become the standard. It is impossible to determine whether the right to participate equally in the electoral process has been abridged without some reference to the results of that process.

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[34] id. at 186.

Whether it is described as "an aggregate of objective factors" derived from "the context of the challenged standard, practice or procedure."[35] or by some other ingenious sophism, the standard that will ineluctably result as the measure of dilution or participation is proportional representation. This, I believe, is an unassailable conclusion.

The thrust of Justice Stewart's opinion is summarized in this (slightly exaggerated) remark: "The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."[36] At the outset, Stewart addressed the question of the reach of Section 2 of the Voting Rights Act, remarking that "it is apparent that the language of §2 no more than elaborates that of the Fifteenth Amendment, and the sparse legislative history of §2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."[37] And according to Stewart the Supreme Court has consistently "made clear that action

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[35] Supra p. 3.

[36] 446 U.S. 55, at 79.

[37] id. at 60-1. It is true, as the Committee Report points out, that "Pursuant to its authority to enforce the Fourteenth and Fifteenth Amendments, Congress has the power to enact legislation which goes beyond the specific prohibitions of the Fourteenth and Fifteenth Amendments themselves so long as the legislation is appropriate to fulfill the purposes of those constitutional provisions. . . . This includes the power to prohibit voting and electoral practices and procedures which have racially discriminatory effect" (at 31). If the last quoted sentence is meant to characterize the intent of the proposed amendment of Section 2, then this statement must be taken to mean that the Committee expects

by a state that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."[38]

The appellees in Bolden argued that the "effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary."[39] But as Stewart rejoined, the only offense against the Fifteenth Amendment is disfranchisement based on race or color. And since the freedom of blacks to vote in Mobile elections was asserted on all sides, no Constitutional violation could be alleged. "The Fifteenth Amendment does not entail the right to have Negro candidates elected," Stewart remarked, echoing the Court's opinion in Whitcomb, it "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote. . . ."[40]

Stewart was able to draw upon a venerable line of Fifteenth Amendment cases to support this conclusion. The Court has always insisted that a violation of the Fifteenth Amendment rest upon a

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the proposed revision to be--not indeed a clarification--but a change in the standard of intent required by Section 2. As Stewart points out, legislative history makes it clear that not only Section 2 but the Voting Rights Act as a whole was intended to be co-extensive with the Fifteenth Amendment. The Committee's citation of Attorney General Katzenbach's testimony in the 1965 Hearings is particularly egregious. Katzenbach remarked that Section 2 would "reach any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." Katzenbach was speaking here of the right of equal access to the ballot and not, as the Report implies, "vote dilution." As we have seen, the equation of vote dilution and disfranchisement did not occur until some years after the passage of the Voting Rights Act.

[38] id. at 62.

[39] id. at 64.

[40] id. at 65.

showing of discriminatory purpose. But this has not meant, as some have argued, that it is necessary "to find a smoking gun," and that efforts "to establish racial discriminatory purpose or intent are not only futile but irrelevant. . . ."[41] The Court has routinely invalidated laws which were racially neutral on their face but which could clearly be traced to a discriminatory purpose. For example, it struck down the so-called "grandfather clauses" which were pretexts for racial discrimination,[42] racially exclusive political party primaries,[43] and municipal redistricting[44] among other practices, as violative of the Fifteenth Amendment. In none of these instances did the proof of discriminatory purpose entail "futile" motivation analysis of the intent of legislators. When the issue is properly restricted to the question of disfranchisement rather than dilution, "The [Fifteenth] Amendment nullifies sophisticated as well as simpleminded modes of discrimination,"[45] and resort neither to "motivation" analysis nor "gauzy sociological considerations"[46] is necessary to ferret out such instances of discrimination. It is only when the issue concerns the much vaguer question of

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[41] Supra n. 2, at 29.

[42] Guinn v. U.S. 238 U.S. 347 (1915).

[43] Smith v. Allwright 321 U.S. 649 (1944); Terry v. Adams 345 U.S. 461 (1953).

[44] Gomillion v. Lightfoot 364 U.S. 335 (1960).

[45] Lane v. Wilson 307 U.S. 268 (1939).

[46] See supra p. 6.

"dilution" that it is necessary to resort to "proportionality" or "disproportionate impact" as a substitute for "discriminatory purpose."[47]

Stewart found it somewhat more difficult to demonstrate that the Court has always required such stringent standards of discriminatory purpose under the Equal Protection Clause. The most difficult case to reconcile was White v. Regester, the case which was relied upon so heavily by the Committee Report. The best that Stewart was able to do was to interpret White as "strongly indicating that only a purposeful dilution of the plaintiffs' vote would offend the Equal Protection Clause."[48] But Stewart was able to draw upon a solid line of equal protection cases to buttress his argument that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[49] These cases were much more demanding than White in the proof required for discriminatory intent, and it is the authority of these cases that Stewart wished to establish as the bulwark against "the claim, however phrased, that the Constitution somehow guarantees proportional representation."

[47] In addition to the works advocating the standard of "discriminatory impact" cited by the Committee Report (at 29, n. 97), see Michael J. Perry, "The Disproportionate Impact Theory of Racial Discrimination" 125 Univ Pa L. Rev. 540 (1977).

[48] id. at 69 (emphasis added).

[49] id. at 70. See Washington v. Davis 426 U.S. 229, at 242 (1976); Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252, at 264-65 (1977); Personnel Administrator of Mass. v. Feeney 442 U.S. 256 (1979); Wright v. Rockefeller 376 U.S. 52 (1964).

In his concluding remarks, Stewart engaged in a sharp dialectical exchange with Justice Marshall, who dissented. Stewart noted that "Marshall's dissenting opinion . . . appears to be that every 'political group,' or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers."[50] This argument, Stewart implies, results from the conceptual confusion of equating disfranchisement and "dilution." Again echoing Whitcomb, Stewart states that the "right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat."[51]

According to Marshall, the question before the Court could be decided independently of racial issues. He conceived of the matter exclusively in terms of determining whether the "fundamental right" to vote had been "diluted." When a "fundamental right" is in question, Marshall reasoned, the cause of the dilution is immaterial. "Discriminatory impact" is all that is necessary to prove the fact of "dilution." Thus in Marshall's view, Washington v. Davis and its progeny are irrelevant because they did not involve considerations of "fundamental rights."[52]

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[50] id. at 75.

[51] id. at 77.

[52] id. at 104.

But, as Stewart points out, Marshall's attempt to distinguish Bolden from Washington v. Davis is misplaced. If there were no racial claims involved, it would be impossible to make a claim of "vote dilution." After all, at-large elections do not dilute the vote of individuals; the complaint is that they "dilute" the relative strength of one group as compared to--or in proportion to--another group. If there were no group claims there could be no allegations of a constitutional violation. The mere denomination of the right to vote as a "fundamental right" simply does not change this fact. I don't think Stewart's characterization of Marshall's dissent as a justification for proportional representation based on race can be gainsaid.

Overturning the plurality opinion in Bolden will thus be a clear signal to the Courts that Congress has put its imprimatur on the concept of racial proportionality. This, of course, will be a massive subversion of the original intention of the Voting Rights Act, which was to minimize the effects of race on voting rights. The new interpretation of the Voting Rights Act embodied in the proposed amendment to Section 2 would place a premium on racial class considerations.

Nothing could be more alien to the American political tradition than the idea of proportional representation. Proportional representation makes it impossible for the representative process to find a common ground that transcends factionalized interests. Every modern government based on the proportional system is highly fragmented and unstable. The genius of the American system is that

it requires factions and interests to take an enlarged view of their own welfare, to see, as it were, their own interests through the filter of the common good. In the American system, because of its fluid electoral allignments, a representative must represent not only those interests that elect him, but those who vote against him as well. That is to say, he must represent the common interest rather than any particular or narrow interest. This is the genius of a diverse country whose very electoral institutions--particularly the political party structure--militate against the idea of proportional representation. Proportional representation brings narrow, particularized interests to the fore and undermines the necessity of compromise in the interest of the common good.

Majority rule is, of course, the defining characteristic of democratic government. In a diverse democracy, it is almost as difficult to create effective governing majorities as it is to insure that the governing majorities will exercise power in a manner consistent with the rights of minorities. American majorities are typically coalitions of various minorities who find it necessary to compromise their particular interests in order to form a majority. Under these circumstances, only moderate or middle ground political positions can hope to garner majority support, since no one interest will be able to dominate. As soon as a position becomes extreme, either to the right or left, the foundation of the majority coalition itself will be compromised. It is this continuing search for majority consensus that provides the foundation both for effective governing majorities and concern for the

interests and rights of minorities. Majority elections thus force different groups to seek a common ground rather than emphasize their differences. The Courts have in recent years, however, almost routinely held that majority elections--as opposed to plurality elections--harm the interests of minorities because plurality elections make it less likely that minorities can elect candidates of their own choice. Plurality elections, of course, reduce the necessity to seek a common ground and put a premium upon emphasizing differences in interests, whether racial or otherwise.

Nor is it always clear that the interests of racial minorities will be best served by a proportional system. It may only allow the racial minority to become isolated. The interests of minorities are best served when narrow racial issues are subsumed within a larger political context where race does not define political interests. The overwhelming purpose of the Voting Rights Act was to create these conditions, and probably no finer example of legislation serving the common interest can be found. But transforming the Voting Rights Act into a vehicle of proportional representation based upon race will undermine the ground of the common good upon which it rests. Such a transformation will go far towards precluding the possibility of ever creating a common interest or common ground that transcends racial class considerations. Yet it seems to be agreed on all sides that this is a grave danger which should be avoided. In light of this fact, the burden of proof rests with those who wish to change the intent structure of Section 2 to prove beyond possible doubt that the proposed amendment will not--as I believe it will--lead to the establishment of proportional representation based on race.

Senator HATCH. Your statement came in last night, and it is a very fine description of what this matter is all about, but supporters of S. 1992 have argued that the amended version of section 2 contained in their bill claim that it would not lead us inevitably towards a system of proportional representation. Could you respond to that contention?

Dr. ERLER. I think that that belief is mistaken, because obviously the standard that will inevitably be created to test the right to an effective vote, or to test whether minorities have equal access to political processes, will be results, and results can be measured only by the standard of proportional representation.

I might say also that in many Federal court cases the typical remedy—where there has been found to be a violation of equal access to the political process—has required redistricting or some other modification of the electorial process that would produce proportional representation. So I think that, in a certain sense, the courts are already testing the right to an effective vote by the standard of proportional representation.

Senator HATCH. Well, in your opinion, would the legislative adoption of a system of proportional representation be consistent or inconsistent with the system of representation incorporated in the Constitution of the United States?

Dr. ERLER. There is no question that it would be inconsistent. It's the issue of what kinds of majorities are both effective governing majorities and majorities that can exercise power consistent with minority rights. The kinds of majorities that are typically produced in American politics are coalitions of different interests that find it necessary to compromise to form a majority. Every majority is a coalition of minorities. It is precisely this necessity for compromise that is built into the constitutional system of representation. It forces a representative to represent the common interest rather than any particular or narrow interest.

The institution of proportional representation will put a premium upon limited, narrow interests, and I believe it will also necessarily put a premium upon racial class considerations. That, in my opinion, would be antithetical to the system of representation embodied in the Constitution.

Senator HATCH. I think you're well aware that the amended version of section 2 in S. 1992 contains a disclaimer provision with respect to proportional representation. Would you give us your opinion with regard to this disclaimer language and its effect?

Dr. ERLER. Well, I think the disclaimer is unrealistic, in light of what the Court has already done in the area of voting rights. To say that this will not lead to a requirement of proportional representation—and I believe that those who put in that disclaimer may have believed that, but I think the result will inevitably be to erect proportionality as the standard.

For example, the Court no longer speaks of the right to vote but the right to participate equally in the political process. How do you know that someone's right to participate equally in the political process has been diluted without looking at the result? The standard that will be the test of dilution must inevitably be proportionality, expecially since the old argument that equal access to the ballot would necessarily lead to political power for minorities has

been displaced by the proposition that the political process—regardless of equal access—must produce equal results. When the argument moves from equal access—the original purpose of the Voting Rights Act—to equal participation and dilution, it is necessary to resort to the criterion of proportionality. How else can you measure the comparative strengths of groups—or, that is, measure whether there is equal participation for groups—except in proportion to their numbers? The establishment of the standard of proportionality—particularly racial proportionality—will be a massive subversion of the original intention of the Voting Rights Act—which was to minimize the impact of race on voting rights. The amendment of section 2 would, in my opinion, not only legitimate racial claims, but make them necessary.

The language of dilution stems directly, as you know, from the reapportionment cases, which were premised upon the equal protection clause of the 14th amendment. These cases created the standard of one person, one vote. The attempt to use the notion of dilution as a test for group voting strength, I think, is completely misplaced; it's a mistake to speak of dilution in the way in which the House Report, for example, speaks of dilution and the way many people here today have spoken of dilution. There is no analogy between racial group voting strength and individual voting strength. To insist upon this analogy, as the proponents of the revision of section 2 do, is necessarily to insist upon the requirement of proportional representation.

Senator HATCH. OK, thank you.

Senator East? Senator, I wonder, could you ask your questions and then close out the committee hearing for me?

Senator EAST. Well, I'll tell you, all I wanted to do was to thank him and thank you, and I will ask no questions.

Senator HATCH. Well, I don't want to limit you, because you have a lot of good questions.

Senator EAST. No, I know you don't, and I appreciate your solicitude, but I'm fine, really.

Senator HATCH. OK.

Senator EAST. First, I'd like to thank you for coming, and I agree with Senator Hatch, the quality of the testimony and the written statement, which we've had a chance to see, is excellent. We both regret—I know toward the tail end of the hearings, things get a little crowded, but it's always a pleasure to have a very distinguished North Carolinian before our committee, so I'd like to thank you as a Senator from North Carolina, let alone as a member of the Judiciary Committee, for coming and for assisting us in this very important effort.

Second, I'd like to thank the chairman of this committee for, first of all, his distinguished leadership, which is always unfailing, and the quality of his hearings in terms of openness and candor and allowing us not only to have our word but maybe to have too much of our word, and I appreciate his allowing me to be here and those of us who are not members of the subcommittee to participate in it.

And I thank you for the invitation. I hope I haven't worn out my invitation.

Senator HATCH. Oh, no, you haven't, Senator East. Thank you.

I'd like to also compliment all witnesses. I've been really proud of the efforts made by every witness who has appeared before the committee during the last couple of days. I haven't always agreed with all witnesses, but I've been proud of the people who have come in, and I think the testimony has, for the most part, been very enlightening.

I want to particularly compliment Mr. McDonald. I have a lot of respect for you, listening to you this morning. I do disagree with you on a number of items, but I think you represented your position very well.

And, Mayor, it's been a real pleasure having you, and any and all other witnesses.

We are very grateful for this, and I think it is definitely helping us.

I hate to tell you this, but next week we're going to have hearings Monday, Wednesday, and Thursday, and we are trying to keep to our schedule. It's a difficult schedule, and it's very, very hard for me to keep to it, but we're going to try to do that, and hopefully finish this set of hearings before the end of February.

And I think in the next hearing—I just want to give everybody notice—that I am going to enforce this 10-minute rule. I've tried to be as reasonable as I can be about it, but I think the only way to do it is just to have a hard and fast rule, and I just hope nobody will think I'm trying to foreclose either side from giving their testimony.

Written testimony is therefore going to be particularly important in making the completed record, and I do want to leave time for questions; but I hope we will be able to shorten the total times for these hearings while we build, I think, the best record ever built on the Voting Rights Act.

So with that, we'll recess until next Monday.

[Whereupon, at 1:40 p.m., the hearing was recessed, to reconvene Monday, February 1, at 9 a.m.]

VOTING RIGHTS ACT

MONDAY, FEBRUARY 1, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:04 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin Hatch (chairman of the subcommittee) presiding.

Present: Senators Kennedy and East.

Staff present: Stephen Markman, chief counsel; Claire Greif, clerk; Prof. Laurens Walker; and William Lucius, counsel.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The subcommittee will be in order.

Ladies and gentlemen, this marks the third day of hearings by the Subcommittee on the Constitution on the Voting Rights Act. The main focus of the first 2 days has been the issue of changing the definition of "discrimination" in the context of section 2 of the act and the 15th amendment, from an intentional and purposeful act of bigotry into the fact alone of racial imbalance of an elected, representative body.

Today, we will focus more extensively upon the administration of the Voting Rights Act and the problems involved with such administration. Although we were originally scheduled to have with us the Assistant Attorney General of the United States for Civil Rights, Mr. Bradford Reynolds, we have had to put off his testimony for 1 or 2 weeks.

At the risk of being repetitive—and on an issue of this magnitude, I am not much concerned about that—I would like to summarize my own response to the testimony on section 2 for the first 2 days of the hearings. I would expect that some of my colleagues on this committee would disagree with my observations, but I am comfortable that my observations can withstand scrutiny.

First, I do not believe that the *Mobile* v. *Bolden* case represents a departure from the law existing prior to the case. I do not believe that there is any section 2 case or any 15th amendment case where the Supreme Court did not require a finding of purposeful discrimination. This law, indeed, predates the Voting Rights Act substantially. The *White* v. *Regester* case, about which we have heard a great deal in the past few days, does not contain any contrary holding. *White* was a 14th amendment case and, as the Supreme Court

made clear in *Mobile,* there was a finding of intentional discrimination in that instance.

Second, even if the *Mobile* case did represent a change in the constitutional course, which I do not believe it did, it is the current law of the land. To attempt to overcome *Mobile* statutorily raises serious constitutional questions, many of them similar to those raised in the context of legislation that Congress is considering to overturn the *Roe* v. *Wade* decision statutorily.

Third, even if the *Mobile* case did represent a change in constitutional course, which again I do not believe it did, the *Mobile* policy is the right policy. There should be a requirement of an intent to discriminate before individuals or communities are considered to be civil rights violators or even branded racists. This is a matter of due process, a matter of fundamental fairness, and a matter of maintaining the traditional notion of what discrimination and civil rights are all about.

Fourth, the so-called results test in section 2 will inevitably move this country in the direction of proportional representation by race. There is no standard for identifying discrimination under the results test on any other basis than proportional representation. While proponents of the test may seek to obscure this fact with descriptions of the standard as one insuring, "equal opportunity to participate in the electoral process," or such, this inevitably boils down to nothing more than proportional representation.

Fifth, the supposed "disclaimer" provision in section 2 is, as the Supreme Court described it in *Mobile,* purely an illusory disclaimer. To say that lack of proportional representation, in and of itself, is not evidence of a violation is not to say very much. It is simply to say that an additional scintilla of evidence is necessary.

According to the House report, such requirement can be met by a countless number of "objective" factors of discrimination, including an at-large system of government, the existence of racially polarized voting, majority vote requirements, prohibitions on single-shot voting, some history of discrimination, or numbered posts.

Other factors mentioned by the civil rights community include racially disparate registration figures, staggered terms, a history of dual school systems, registration purging requirements, reregistration requirements, inconvenient registration locations and hours, impediments to third party and independent candidacies, low numbers of minority registration officials, disparity of public services in various neighborhoods, a history of English-only ballots, et cetera, et cetera.

Sixth, the intent test does not and never has required "smoking gun" evidence or confessions of discrimination. In case after case, the Supreme Court has stated explicitly that circumstantial and indirect evidence would be satisfactory evidence and that the totality of circumstances must be considered.

Seventh, this is not an impossible standard. It is the traditional standard for equal protection cases, and it is the traditional standard for school busing cases. It is a standard that has been satisfied before and after the *Mobile* case. In two recent cases, *Escambia County* and *Lodge* v. *Buxton,* it has been satisfied, and it has been satisfied without confessions of discrimination and without a "smoking gun."

Finally, given the existence of lack of proportional representation and some further scintilla of evidence, I am unsure that such evidence is even rebuttable by a defendant. In *Mobile*, for example, it was considered irrelevant by the plaintiffs and, by the lower courts, overruled in *Mobile* that there had been no intent to discriminate by *Mobile* and that there had been strong nonracial justifications for the at-large municipal structure.

So, as you can see, this is no simple matter. It is an important matter, and I think that it is very difficult to argue with the points that have been made, that I have reiterated here this morning.

So, ladies and gentleman, I welcome all of our witnesses to the subcommittee this morning, and I look forward to each of our witness' thoughts on the administering of the Voting Rights Act.

We are very pleased to begin with our first witness, Hon. M. Caldwell Butler, our U.S. Representative from the State of Virginia, who is, himself, in his own right, an excellent attorney. Congressman Butler.

STATEMENT OF HON. M. CALDWELL BUTLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. BUTLER. Thank you for the opportunity to discuss the amendment of the Voting Rights Act. I also appreciate your summary of the testimony to date. I wish we had had the benefit of your wisdom when the deliberations were taking place in the House Judiciary Committee.

Senator HATCH. Thank you.

Mr. BUTLER. Maybe the problems would not be so difficult today.

On October 5, the House passed legislation to amend the Voting Rights Act. While many have praised this legislation as both reasonable and equitable, it is, in my judgment, an excessive response to the problem of securing voting rights and reflects cynicism substantiated by neither the record of progress which has been made under the act nor the good-faith efforts of the vast majority of public officials to comply with the spirit and the letter of the law.

I will address two major issues which have emerged as a consequence of this action by the House. First, what is a fair mechanism to permit political subdivisions to "bail out" from the act's special provisions? And, second, in actions under section 2 of the Voting Rights Act, what should be the burden of proof to establish that the right to vote has been denied or abridged?

THE PURPOSE OF BAILOUT

The Supreme Court recognized the importance of bailout in the *Katzenbach* case. "Acknowledging the possibility of overbreadth," the opinion states, "the act of 1965 provides for termination of special statutory coverge at the beheast of States and political subdivisions in which the danger of substantial voting discrimination has not materialized," acknowledging, then, the possibility of overbreadth.

So then, for openers, a bailout provision should permit political subdivisions which have complied with the letter and the spirit of the law to terminate their coverge under the special provisions. Second, a bailout provision should operate as an incentive for polit-

ical subdivisions which have not been in full compliance with the law to advance the voting opportunities of minortiy group citizens.

A bailout provision based on stringent, yet achievable, requirements can create such an incentive. Enchancing the political participation of minority group citizens becomes a political subdivision's goal, and satisfying the requirements for bailout becomes the vehicle for attaining that goal.

THE IMPOSSIBLE BAILOUT

In my view, the legislation which passed the House neglects these purposes and makes a mockery of the idea of a reasonable bailout. The legislation would establish conditions for bailout which would be impossible to achieve and effectively extends forever the special provisions of the Voting Rights Act on the vast majority of States and political subdivisions currently covered by them.

A review of the bailout provision reveals over 10 jurisdictional requirements which must be satisfied in order for a political subdivision to bail out. The ability of the petitioning political subdivision to bail out, therefore, depends upon its ability to present many facts, garnered from a wide variety of sources, which document 10 years of exemplary conduct under the act.

In order to judge these facts properly, the court should have access to the people and the circumstances which shape the unique electoral affairs of the locality. Indeed, it would appear to be one of the bases of due process that there should be some reasonable relationship between the facts to be determined and the location of the forum to determine them. In fact, our Federal court system, partly through statute and partly through case law, has developed the doctrine of foram non conveniens, which provides for trail in the most convenient place.

Under both the proposed legislation and the existing law, the U.S. District Court for the District of Columbia had sole jurisdiction to hear declaratory judgment actions seeking bailout. It seems incongruous to vest one court with this responsibility to hear the hundreds of cases which would ensue. The crowded docket of the district court for the District of Columbia simply does not have the flexibility to absorb such a large number of cases.

There are numerous other problems created by maintaining the venue of the district court. Consider the costs to the political subdivision seeking bailout. It must hire a Washington lawyer, and has the expense and inconvenience of bringing witnesses from the localities. For the small locality seeking bailout, these expenses could be prohibitive, and it would certainly not be the wisest use of their limited resources.

Consider also the interests of a minority group voter who wishes to challenge the petition for bailout. The opportunity for such an aggrieved person to assert these rights is obstructed if he can only do so in the district court for the District of Columbia.

Those who support retaining the jurisdiction of the district court for the District of Columbia over bailout suits contend that there is a need for uniform interpretation of the law relating to bailout, and that courts outside the District of Columbia cannot be trusted to make unprejudicial decisions about voting rights cases.

Although these arguments fail to persuade me, it was the view which prevailed in the House of Representatives, over my strenuous objection. So I would suggest, Mr. Chairman, that there is a middle ground you may wish to consider.

U.S. magistrates have become an integral part of the Federal judiciary. If you are unwilling to shift venue for bailout to the U.S. District Court in the geographical area in question, provision should be made to use local magistrates to hear the evidence.

This would involve amending the bill before you to require the chief judge of the district court for the District of Columbia to request the assistance of local courts by designating the local U.S. magistrate to hear the evidence on the motion to bail out. The final decision to grant bailout, as in the current law, would be with the district court for the District of Columbia.

There would be advantages to using local Federal magistrates: easy and inexpensive access to the courts by the political subdivision seeking bailout and any aggrieved person as well; reductions in the burden on the district court; and uniform application of the law. I hope you will keep this possibility in mind.

There are other technical flaws in this legislation which further diminish the usefulness of the bailout provision. Mr. Chairman, I will mention only a few of these, but I do request that my entire statement be included in the record.

Senator HATCH. Without objection, it will be included in its entirety at the conclusion of your oral presentation.

Mr. BUTLER. Thank you very much.

Objections interposed by the Attorney General under section 5, one of the criteria for bailout, are not an accurate index of discrimination. They do not indicate improper conduct, impure motives, or failure to comply with the Voting Rights Act.

There are essentially no Justice Department guidelines to assure that submissions are reviewed by consistent standards, thus giving upper level bureaucrats extensive jurisdiction and discretion in deciding the merits of each proposed change. As such, objections can be imposed for a variety of reasons, including the failure of the submitting political subdivision to provide sufficient information, as well as the determination by the Attorney General that the change would have an unfavorable impact upon the political interests of minority group citizens.

In addition, when an objection is interposed, frequently a political subdivision will accede immediately and submit a new plan which meets with the Attorney General's approval and therefore supersedes the initial objection. Nevertheless, a single objection would bar bailout for 10 years under the proposed bill, and if this legislation were enacted, that alone would preclude the States of Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia from bailing out before 1990 or later.

Similar problems exist with respect to the requirement that a political subdivision show that no Federal examiners have been assigned to it. Under section 6 of the act, the Attorney General may, nearly at his will, assign examiners to a political subdivision.

Where once examiners were used extensively to list eligible voters, more recently they have been used only periodically in conjunction with Federal observers to monitor the conduct of elections.

The examiners receive complaints of possible discrimination, and the observers watch for possible misconduct. In this regard, it should be noted that Federal examiners must be assigned before Federal observers may be used, and that, in itself, is an incentive for the use of examiners.

The designation of Federal examiners and observers to monitor elections is a precaution; it is not a determination that discrimination has occurred and in fact may be done because minority group citizens are turning out at the polls in large numbers.

While the findings of Federal Examiners may be relevant to a decision to grant bailout, the mere fact that they were assigned is circumstantial and by no means should be an absolute bar to bailout.

Among the additional conditions for bailout is the requirement that a political subdivision demonstrate that is has taken constructive efforts to promote the political participation of minority group citizens. Although the idea of constructive efforts is admirable, the provision as written is pretty poor. A political subdivision would be required to prove that it had, and I quote, "eliminated voting procedures and methods of election which inhibit or dilute equal access to the political process," as well as, "intimidation and harassment" of persons exercising their right to vote.

As stated, this legislation requires that the court determine that the political subdivision has eliminated something, the existence of which has not been established. While it is reasonable that public officials should be responsible for remedying misconduct which has been found to have occurred, it is ridiculous to require that they prove that they have eliminated what has not been established to have existed in the first place.

In light of the tremendous progress which has been made since the act's passage, it is inappropriate and unfair for the opportunity to bail out to be effectively precluded by Congress setting standards for bailout which are impossible to achieve. As the preceding discussion would tend to suggest and a careful review of the legislation makes clear, the proposed legislation was not formulated with a genuine interest in establishing a functional bailout provision.

The Supreme Court upheld the constitutionality of the Voting Rights Act because, among other things, it provided a "bearable" burden of proof for bailout. The proposed bailout provision clearly exceeds the burden which the Court deemed bearable. A meaningful bailout provision would strengthen the Voting Rights Act by being a constructive force, beyond 1982, for advancing the voting rights of minority group citizens. I am hopeful the committee will consider the purposes of bailout in a more thorough, deliberate, and rational manner than was done in the House so that we might pass legislation which accomplishes this objective.

SECTION 2: INTENT OR EFFECT

The most significant change approved by the House went through largely unnoticed. This amendment is addressed to section 2 of the act and would establish an "effects" test as the single standard to judge discrimination in voting rights litigation.

While the importance and potential impact of this basic change cannot be underestimated, the failure of the House to consider it carefully cannot be overstated. In my judgment, what has taken place is simply a knee-jerk response to the Supreme Court's decision in *Mobile* v. *Bolden,* which would lead dangerously toward establishing a precedent for proportional representation and should be stricken from the legislation.

From its inception, the Votings Rights Act has embodied two standards of judging discrimination: the "effect" test in section 5 and the "intent" test in section 2. Under the preclearance provisions of section 5, the Department of Justice reviews the proposed changes in voting procedures in order to determine that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote."

Section 5 has been administered to prevent, at a minimum, a retrogression of the voting power of minority group citizens and admittedly has been a form of affirmative action for the political interests of minority group citizens. The use of the "effect" test has been fundamental to the success of this extraordinary remedy in section 5. In fact, 90 percent of the objections interposed by the Department of Justice under section 5 have been based on a determination of the effect rather than the purpose or intent.

Although the use of the "effect" test gives the Department of Justice broad discretion to determine what constitutes a fair or discriminatory voting practice, this discretion is checked by two factors: First, section 5 is limited in its application geographically; and, second, in those areas to which section 5 applies, its purview is limited to changes in voting procedures and is applied therefore only prospectively.

Section 2, on the other hand, is a permanent provision which applies nationwide and provides recourse against laws or actions that are beyond the scope of section 5. Section 2 has been interpreted to be restatement of the 15th amendment under which a private right of action exists to challenge existing laws.

In cases which have involved claims of denial of equal protection or of voting rights, such as *Washington* v. *Davis* and *Mobile* v. *Bolden,* the courts have consistently held that a government act which is racially neutral on its face is not unconstitutional solely because it has racially disproportionate effects, and they have required that intent to discriminate must be shown.

Although the intent or "smoking gun" test is a difficult standard to prove, it is not unbearable. In requiring that intent be shown, the courts have permitted as evidence of intent, effects which can be traced to a racially discriminatory purpose. As such, the courts have permitted something short of smoke to prove that the gun was fired. Intent is difficult, but not impossible, to prove.

The legislation passed by the House of Representatives amends section 2 to establish an "effect" test as the single standard to judge discrimination in voting rights litigation, thereby nullifying the body of law the courts have developed concerning 14th and 15th amendment claims regarding voting rights. Proponents of this legislation have expressed their view that effect, in and of itself, should suffice to prove a violation of the act. They presume that all effects which are adverse to the political interests of minority

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group citizens are rooted in some impure motive. I do not believe such a presumption to be valid.

One need only to review the discretion the "effect" test has given the Department of Justice in enforcing section 5 to appreciate the travesty it would make of politics throughout the Nation if adopted as the single standard for judging discrimination in voting rights litigation.

The "effect" test would make determining discrimination a numbers game. The "effect" test would shift the focus for determining discrimination from the votes of individuals being equal to the voting strength of groups being equivalent. Consequently, existing laws and political systems could be challenged ex post facto and required to be changed for failing to statistically maximize the voting impact of minority groups.

Specifically, every at-large electoral system in the country in which minority group candidates were not elected in proportion to their numbers would be suspected of being discriminatory. In this respect, it should be noted that the 1979 Municipal Year Book estimated that nearly two-thirds of all municipalities between 25,000 and 500,000 people conduct elections in this manner. The *Mobile* case is an example. The city's at-large electoral system, which had been used for nearly 70 years, was challenged as being discriminatory, although there was no evidence that it had been established or maintained in order to deny or abridge the right to vote.

The kind of affirmative manipulation of voting procedures which the "effect" test would require is far beyond the original intent of the act, and in my judgment, is a step toward mandating proportional representation.

Although the House bill states that the fact that minority group citizens have not been elected in proportion to their numbers does not, in and of itself, constitute a violation of the act, such a disclaimer has no real relevance to the laws or procedures which would be changed subsequent to the adoption of the "effect" test.

Consequently, State and local subdivisions and local officials would be required to study prospective voting procedures to determine their effect and adopt only those which statistically maxitime—I emphasize statistically maximize—the voting impact of each minority group within the electorate.

It is hard to imagine any State districting plan, whether presently existing or under consideration, short of proportional representation, which would not be vulnerable to challenge under this standard. In this regard, it suggests that other factors such as contiguity, compactness, and respect for natural boundaries would be of secondary importance in drawing district lines, doing violence to extensive precedents which have developed over the years.

CONCLUSION

Although I have been critical of the House-passed legislation, I remain an advocate of a strong Federal role to assure that no citizen is denied the voting guarantees of the 15th amendment. The changes I propose to make in the legislation, modifying the bailout provision and eliminating the amendment to section 2, would not

gut the act or give a license to discriminate to those of impure motive. I would not tolerate nor stand still for that.

It is all to easy for this issue to be construed as black and white: if you supported the House-passed bill, you are an advocate of civil rights; if you oppose the House-passed bill, you are a racist. I am hopeful that before we complete consideration of this legislation, we can rid ourselves of these divisive distinctions. Only then can we have a meangingful dialog in which alternatives are considered on their merit so that we might fashion, in this year 1982, the most effective legislation to protest the right to vote.

Senator HATCH. Thank you, Congressman Butler, for a very lucid statement. We appreciate your being with us today and would like to thank you for coming.

[The prepared statement of Hon. M. Caldwell Butler follows:]

PREPARED STATEMENT OF HON. M. CALDWELL BUTLER

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

I AM PLEASED TO BE HERE TODAY TO DISCUSS LEGISLATION TO AMEND THE VOTING RIGHTS ACT.

I APPRECIATE THE OPPORTUNITY TO SHARE MY VIEWS WITH YOU AND HOPE THEY MIGHT BE USEFUL IN YOUR CONSIDERATION OF THIS HISTORIC LEGISLATION.

ON OCTOBER 5, THE HOUSE OF REPRESENTATIVES PASSED LEGISLATION TO AMEND THE VOTING RIGHTS ACT. WHILE MANY HAVE PRAISED THIS LEGISLATION AS BOTH REASONABLE AND EQUITABLE IT IS, IN MY JUDGMENT, AN EXCESSIVE RESPONSE TO THE PROBLEM OF SECURING VOTING RIGHTS AND REFLECTS CYNICISM SUBSTANTIATED BY NEITHER THE RECORD OF PROGRESS WHICH HAS BEEN MADE UNDER THE ACT NOR THE GOOD FAITH EFFORTS OF THE VAST MAJORITY OF PUBLIC OFFICIALS TO COMPLY WITH THE SPIRIT AND THE LETTER OF THE LAW.

I WILL ADDRESS TWO MAJOR ISSUES WHICH HAVE EMERGED AS A CONSEQUENCE OF THIS ACTION BY THE HOUSE: FIRST, WHAT IS A FAIR MECHANISM TO PERMIT POLITICAL SUBDIVISIONS TO "BAILOUT" FROM THE ACT'S SPECIAL PROVISIONS?; AND SECOND, IN ACTIONS UNDER SECTION 2 OF THE VOTING RIGHTS ACT, WHAT SHOULD BE THE BURDEN OF PROOF TO ESTABLISH THE THE RIGHT TO VOTE HAS BEEN DENIED OR ABRIDGED?

THE SUPREME COURT RECOGNIZED THE IMPORTANCE OF BAILOUT IN SOUTH CAROLINA V. KATZENBACH BY STATING: " . . . ACKNOWLEDGING THE POSSIBILITY OF OVERBREADTH, THE ACT OF 1965 PROVIDES FOR TERMINATION OF SPECIAL STATUTORY COVERAGE AT THE BEHEST OF STATES AND POLITICAL SUBDIVISIONS IN WHICH THE DANGER OF SUBSTANTIAL VOTING DISCRIMINATION HAS NOT MATERIALIZED . . ."

FOR OPENERS THEN, A BAILOUT PROVISION SHOULD PERMIT POLITICAL SUBDIVISIONS WHICH HAVE COMPLIED WITH THE LETTER AND THE SPIRIT OF THE LAW TO TERMINATE THEIR COVERAGE UNDER THE SPECIAL PROVISIONS. SECOND, A BAILOUT PROVISION SHOULD OPERATE AS AN INCENTIVE FOR POLITICAL SUBDIVISIONS, WHICH HAVE NOT BEEN IN FULL CONFORMANCE WITH THE LAW, TO ADVANCE THE VOTING OPPORTUNITIES OF MINORITY GROUP CITIZENS. A BAILOUT PROVISION, BASED ON STRINGENT, YET ACHIEVABLE, REQUIREMENTS CAN CREATE SUCH AN INCENTIVE. ENHANCING THE POLITICAL PARTICIPATION OF MINORITY GROUP CITIZENS BECOMES A POLITICAL SUBDIVISION'S GOAL, AND SATISFYING THE REQUIREMENTS FOR BAILOUT BECOMES THE VEHICLE FOR ATTAINING THAT GOAL.

IN MY VIEW, THE LEGISLATION WHICH PASSED THE HOUSE NEGLECTS THESE PURPOSES AND MAKES A MOCKERY OF THE IDEA OF A REASONABLE BAILOUT. THE LEGISLATION WOULD ESTABLISH CONDITIONS FOR BAILOUT WHICH WOULD BE IMPOSSIBLE TO ACHIEVE, AND EFFECTIVELY EXTEND FOREVER, THE SPECIAL PROVISIONS OF THE VOTING RIGHTS

ACT ON THE VAST MAJORITY OF STATES AND POLITICAL SUBDIVISIONS CURRENTLY COVERED BY THEM.

A CAREFUL REVIEW OF THE BAILOUT PROVISION REVEALS OVER TEN JURISDICTIONAL REQUIREMENTS WHICH MUST BE SATISFIED IN ORDER FOR A POLITICAL SUBDIVISION TO BAILOUT. THE ABILITY OF THE PETITIONING POLITICAL SUBDIVISION TO BAILOUT, THEREFORE, DEPENDS UPON ITS ABILITY TO PRESENT MANY FACTS, GARNERED FROM A WIDE VARIETY OF SOURCES, WHICH DOCUMENT TEN YEARS OF EXEMPLARY CONDUCT UNDER THE ACT. IN ORDER TO JUDGE THESE FACTS PROPERLY, THE COURT SHOULD HAVE ACCESS TO THE PEOPLE AND THE CIRCUMSTANCES WHICH SHAPE THE UNIQUE ELECTORAL AFFAIRS OF THE LOCALITY. INDEED, IT WOULD APPEAR TO BE ONE OF THE BASES OF DUE PROCESS THAT THERE SHOULD BE SOME REASONABLE RELATIONSHIP BETWEEN THE FACTS TO BE DETERMINED AND THE LOCATION OF THE FORUM TO DETERMINE THEM. IN FACT, OUR FEDERAL COURT SYSTEM, PARTLY THROUGH STATUTE, AND PARTLY THROUGH CASE LAW, HAS DEVELOPED THE DOCTRINE OF FORAM NON CONVENIENS WHICH PROVIDES ALMOST FOR TRIAL IN THE MOST CONVENIENT PLACE.

UNDER BOTH THE PROPOSED LEGISLATION, AND THE EXISTING LAW, THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA HAS SOLE JURISDICTION TO HEAR DECLARATORY JUDGMENT ACTIONS SEEKING BAILOUT. IF, AS THE PROPONENTS OF THIS

LEGISLATION CONTEND, 25 PERCENT OF ALL POLITICAL SUBDIVISIONS CURRENTLY COVERED BY THE SPECIAL PROVISIONS WOULD BE ELIGIBLE TO BAILOUT IF THE LEGISLATION IS ENACTED, IT SEEMS INCONGRUOUS TO VEST ONE COURT WITH THIS RESPONSIBILITY TO HEAR THE HUNDREDS OF CASES WHICH WOULD ENSUE. THE CROWDED DOCKET OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA SIMPLY DOES NOT HAVE THE FLEXIBILITY TO ABSORB SUCH A LARGE NUMBER OF CASES. TO ARGUE THAT DECLARATORY JUDGMENT SUITS BE HEARD ONLY IN WASHINGTON IS TO ARGUE FOR DELAYED JUSTICE.

THERE ARE NUMEROUS OTHER PROBLEMS CREATED BY MAINTAINING THE VENUE OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OVER BAILOUT. CONSIDER THE COSTS TO THE POLITICAL SUBDIVISION SEEKING BAILOUT. THERE WOULD BE LEGAL FEES FOR AN ATTORNEY APPRISED OF THE LOCAL SITUATION AS WELL AS FOR A WASHINGTON LAWYER LICENSED TO LITIGATE IN THE DISTRICT OF COLUMBIA. THERE WOULD BE THE COST FOR REPRESENTATIVES OF THE POLITICAL SUBDIVISION TO TRAVEL AND STAY IN WASHINGTON, IN ADDITION TO THE EXPENSE AND INCONVENIENCE OF BRINGING WITNESSES FROM THE LOCALITY. MOREOVER, THE FEDERAL GOVERNMENT BRINGS TO THESE CASES A TREMENDOUS RESOURCE ADVANTAGE WHICH COULD BE OVERCOME ONLY BY FURTHER EXPENSE TO THE POLITICAL SUBDIVISION. FOR THE SMALL LOCALITY SEEKING TO BAILOUT, THESE EXPENSES COULD

BE PROHIBITIVE, CERTAINLY NOT THE WISEST USE OF LIMITED RESOURCES.

CONSIDER ALSO THE INTERESTS OF A MINORITY GROUP VOTER WHO WISHES TO CHALLENGE THE PETITION FOR BAILOUT. BEAR IN MIND THAT THIS LEGISLATION WOULD PERMIT ANY AGGRIEVED PERSON TO INTERVENE IN THE BAILOUT SUIT AT ANY TIME, AND THAT ANY AGGRIEVED PERSON MAY PETITION TO REOPEN THE CASE WITHIN TEN YEARS AFTER BAILOUT HAS BEEN GRANTED. THE OPPORTUNITY FOR SUCH AN AGGRIEVED PERSON TO ASSERT THESE RIGHTS IS OBSTRUCTED IF HE CAN ONLY DO SO IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

IN MY JUDGMENT, THE PROMISE OF BAILOUT IS MADE HOLLOW BY PREVENTING REASONABLE ACCESS TO THE COURTS. THOSE WHO SUPPORT RETAINING THE JURISDICTION OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OVER BAILOUT SUITS CONTEND THERE IS A NEED FOR UNIFORM INTERPRETATION OF THE LAW RELATING TO BAILOUT AND THAT COURTS OUTSIDE OF THE DISTRICT OF COLUMBIA CANNOT BE TRUSTED TO MAKE UNPREJUDICIAL DECISIONS ABOUT VOTING RIGHTS CASES. ALTHOUGH THESE ARGUMENTS FAIL TO PERSUADE ME, IT IS THE VIEW WHICH PREVAILED IN THE HOUSE OF REPRESENTATIVES OVER MY STRENUOUS OBJECTION.

THERE IS A MIDDLE GROUND WHICH YOU MAY WISH TO CONSIDER.

THE FEDERAL MAGISTRATE ACT OF 1968, AMENDED IN 1976 AND 1979, ESTABLISHED THE UNITED STATES MAGISTRATE SYSTEM. AMONG THE PRINCIPLE OBJECTIVES OF THE MAGISTRATE SYSTEM IS TO INCREASE THE EFFICIENCY OF THE FEDERAL JUDICIARY BY RELIEVING DISTRICT COURTS OF SOME OF THEIR BURDENS, WHILE AT THE SAME TIME, PROVIDING A HIGH STANDARD OF JUSTICE AT THE POINT OF FIRST CONTACT, FOR MANY INDIVIDUALS, WITH THE COURTS. THE JURISDICTION OF MAGISTRATES IS THAT OF THE DISTRICT COURT ITSELF, DELEGATED TO THE MAGISTRATE BY JUDGES OF THE COURT.

UNITED STATES MAGISTRATES HAVE BECOME AN INTEGRAL PART OF THE FEDERAL JUDICIARY. IF YOU ARE UNWILLING TO SHIFT VENUE FOR BAILOUT TO U.S. DISTRICT COURTS IN THE GEOGRAPHICAL AREA IN QUESTION, PROVISION SHOULD BE MADE TO USE LOCAL MAGISTRATES TO HEAR THE EVIDENCE.

THIS WOULD INVOLVE AMENDING H.R. 3112, AS IT PASSED THE HOUSE, TO REQUIRE THE CHIEF JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA TO REQUEST THE ASSISTANCE OF THE LOCAL DISTRICT COURT BY DESIGNATING THE LOCAL UNITED STATES MAGISTRATE TO HEAR THE EVIDENCE ON THE MOTION TO BAILOUT. THE MAGISTRATE WOULD REPORT THE FINDINGS TOGETHER WITH RECOMMENDATIONS TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. THE COURT COULD ACCEPT, REJECT, OR MODIFY THE

MAGISTRATE'S FINDINGS OR COULD RECOMMIT THE MATTER TO THE MAGISTRATE WITH INSTRUCTIONS. THE FINAL DECISION TO GRANT BAILOUT, AS IN THE CURRENT LAW, WOULD BE WITH THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

THERE WOULD BE ADVANTAGES TO UTILIZING FEDERAL MAGISTRATES IN THIS MANNER: EASY AND INEXPENSIVE ACCESS TO THE COURTS BY THE POLITICAL SUBDIVISION SEEKING BAILOUT AND ANY AGGRIEVED PERSON AS WELL; REDUCTIONS IN THE BURDEN ON THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; AND UNIFORM APPLICATION OF THE LAW. I HOPE YOU WILL KEEP THIS POSSIBILITY IN MIND AS A POSSIBLE COMPROMISE.

OTHER CONCEPTUAL AND TECHNICAL FLAWS IN THIS LEGISLATION FURTHER DIMINISH THE USEFULNESS OF THE BAILOUT PROVISION. FOR EXAMPLE, THE PROPOSED LEGISLATION WOULD ESTABLISH THREE CRITERIA FOR BAILOUT BASED ON COMPLIANCE WITH SECTION 5. THESE REQUIREMENTS INCLUDE: PRECLEARING ALL CHANGES IN VOTING PROCEDURES BEFORE THEY ARE ENFORCED; REPEALING ALL CHANGES TO WHICH THE ATTORNEY GENERAL HAS OBJECTED; AND DEMONSTRATING THAT THE ATTORNEY GENERAL HAS ENTERED NO OBJECTION TO A PROPOSED CHANGE IN VOTING PROCEDURES.

FROM THE OUTSET, IT SHOULD BE NOTED THAT 100 PERCENT COMPLIANCE WITH SECTION 5 IS NOT A REALISTIC EXPECTATION. A VETERAN OF THE VOTING SECTION OF THE DEPARTMENT OF JUSTICE,

SPEAKING BEFORE THE AMERICAN POLITICAL SCIENCE ASSOCIATION, STATED, AND I QUOTE: "FIRST, NO MATTER HOW MANY CHANGES AN OFFICIAL SUBMITS TO THE ATTORNEY GENERAL, A STUDENT OF SECTION 5 CAN ALWAYS FIND ANOTHER CHANGE THAT HAS NOT BEEN SUBMITTED . . . SECOND, NO MATTER HOW WELL AN ELECTION ADMINISTRATOR PLANS IN ADVANCE OF AN ELECTION, THERE WILL BE CHANGES THAT MUST BE IMPLEMENTED BEFORE THEY CAN BE PRECLEARED."

OBJECTIONS INTERPOSED BY THE ATTORNEY GENERAL UNDER SECTION 5 ARE NOT AN ACCURATE INDEX OF DISCRIMINATION; THEY DO NOT INDICATE IMPROPER CONDUCT, IMPURE MOTIVES, OR FAILURE TO COMPLY WITH THE VOTING RIGHTS ACT. THERE ARE ESSENTIALLY NO GUIDELINES TO ASSURE THAT SUBMISSIONS ARE REVIEWED BY CONSISTENT STANDARDS WHICH GIVES UPPER LEVEL BUREAUCRATS EXTENSIVE DISCRETION IN DECIDING THE MERITS OF EACH PROPOSED CHANGE. AS SUCH, OBJECTIONS CAN BE INTERPOSED FOR A VARIETY OF REASONS, INCLUDING: THE FAILURE OF THE SUBMITTING POLITICAL SUBDIVISION TO PROVIDE SUFFICIENT INFORMATION ABOUT THE PROPOSED CHANGE; AS WELL AS, THE DETERMINATION BY THE ATTORNEY GENERAL THAT THE CHANGE WOULD HAVE AN UNFAVORABLE IMPACT UPON THE POLITICAL INTERESTS OF MINORITY GROUP CITIZENS. IN ADDITION, WHEN AN OBJECTION IS INTERPOSED, FREQUENTLY A POLITICAL SUBDIVISION WILL ACCEDE IMMEDIATELY AND SUBMIT A NEW PLAN WHICH MEETS WITH THE ATTORNEY GENERAL'S APPROVAL

AND THEREFORE SUPERCEDES THE INITIAL OBJECTION. NONETHELESS, A SINGLE OBJECTION WOULD BAR BAILOUT FOR TEN YEARS, AND IF THIS LEGISLATION WERE ENACTED, THAT ALONE, WOULD PRECLUDE THE STATES OF ALABAMA, ARIZONA, GEORGIA, LOUISIANA, MISSISSIPPI, SOUTH CAROLINA, TEXAS, AND VIRGINIA FROM BAILING OUT BEFORE 1990.

OTHER REQUIREMENTS OF THE BAILOUT PROVISIONS ARE ALSO POORLY CONCEIVED. FOR EXAMPLE, BAILOUT WOULD BE DENIED TO A POLITICAL SUBDIVISION WHICH ENTERED INTO A CONSENT DECREE, TO RESOLVE A DISPUTED VOTING PRACTICE. A CONSENT DECREE, UNLIKE AN ADJUDICATED DECISION, DOES NOT DETERMINE RESPONSIBILITY FOR WRONG DOING, AND IS FREQUENTLY ENTERED INTO VOLUNTARILY TO AVOID COSTLY LITIGATION. THE CONSEQUENCES OF IMPOSING SUCH A REQUIREMENT, WOULD BE TO DISCOURAGE PUBLIC OFFICIALS FROM RESOLVING DISPUTED VOTING PRACTICES THROUGH VOLUNTARY AND INFORMAL CONCILIATION. THERE WOULD BE NO ADVANTAGE FOR THEM TO DO SO IF IN THE FUTURE IT PREVENTED THE BAILOUT OF THE POLITICAL SUBDIVISION THEY SERVE. AS SUCH, THIS REQUIREMENT WOULD INCREASE THE LIKELIHOOD THAT LITIGATION WOULD BE USED TO RECONCILE DISPUTES OVER VOTING PRACTICES AND PROCEDURES WHICH WOULD OTHERWISE BE RESOLVED OUT OF COURT.

SIMILAR PROBLEMS EXIST WITH RESPECT TO THE REQUIREMENT THAT A POLITICAL SUBDIVISION SHOW THAT NO FEDERAL EXAMINERS

HAVE BEEN ASSIGNED TO IT. UNDER SECTION 6 OF THE ACT, THE ATTORNEY GENERAL MAY, NEARLY AT HIS WILL, ASSIGN EXAMINERS TO A POLITICAL SUBDIVISION. WHERE ONCE EXAMINERS WERE USED EXTENSIVELY TO LIST ELIGIBLE VOTERS, MORE RECENTLY THEY HAVE BEEN USED ONLY PERIODICALLY IN CONJUNCTION WITH FEDERAL OBSERVERS TO MONITOR THE CONDUCT OF ELECTIONS; THE EXAMINERS RECEIVE COMPLAINTS OF POSSIBLE DISCRIMINATION AND THE OBSERVERS WATCH FOR POSSIBLE MISCONDUCT AT THE POLLING PLACE. IN THIS REGARD, IT SHOULD BE NOTED THAT FEDERAL EXAMINERS MUST BE ASSIGNED BEFORE FEDERAL OBSERVERS MAY BE USED, AND THAT IN ITSELF IS AN INCENTIVE FOR THEIR USE.

THE DESIGNATION OF FEDERAL EXAMINERS AND OBSERVERS TO MONITOR ELECTIONS IS A PRECAUTION; IT IS NOT A DETERMINATION THAT DISCRIMINATION HAS OCCURRED, AND IN FACT MAY BE DONE BECAUSE MINORITY GROUP CITIZENS ARE TURNING OUT AT THE POLLS IN LARGE NUMBERS. WHILE THE FINDINGS OF FEDERAL EXAMINERS MAY BE RELEVANT TO A DECISION TO GRANT BAILOUT, THE MERE FACT THAT THEY WERE ASSIGNED IS CIRCUMSTANTIAL AND BY NO MEANS SHOULD BE AN ABSOLUTE BAR TO BAILOUT.

AMONG THE ADDITIONAL CONDITIONS FOR BAILOUT IS THE REQUIREMENT THAT A POLITICAL SUBDIVISION DEMONSTRATE THAT IT HAS TAKEN CONSTRUCTIVE EFFORTS TO PROMOTE THE POLITICAL PARTICIPATION OF MINORITY GROUP CITIZENS. ALTHOUGH THE IDEA

IS ADMIRABLE, THE PROVISION, AS WRITTEN, IS SPECIOUS. A POLITICAL SUBDIVISION WOULD BE REQUIRED TO PROVE THAT IT HAD "ELIMINATED VOTING PROCEDURES AND METHODS OF ELECTION WHICH INHIBIT OF DILUTE EQUAL ACCESS TO THE POLITICAL PROCESS," AS WELL AS, "INTIMIDATION AND HARASSMENT" OF PERSONS EXERCISING THEIR RIGHT TO VOTE. AS STATED, THIS LEGISLATION REQUIRES THAT THE COURT DETERMINE THAT THE POLITICAL SUBDIVISION HAS ELIMINATED SOMETHING, THE EXISTANCE OF WHICH HAS NOT BEEN ESTABLISHED. WHILE IT IS REASONABLE THAT PUBLIC OFFICIALS SHOULD BE RESPONSIBLE FOR REMEDYING MISCONDUCT WHICH HAS BEEN FOUND TO HAVE OCCURRED, IT IS RIDICULOUS TO REQUIRE THAT THEY PROVE THEY HAVE ELIMINATED WHAT IS NOT ESTABLISHED TO HAVE EXISTED.

FINALLY, THE POLITICAL SUBDIVISION MUST PRESENT "EVIDENCE OF MINORITY PARTICIPATION" TO ASSIST THE COURT IN MAKING ITS DETERMINATION TO GRANT BAILOUT. THE LEGISLATION FAILS TO DEFINE THE AMOUNT OF EVIDENCE WHICH IS REQUIRED, THE BOUNDS BY WHICH STATISTICAL MEASURES OF "PARTICIPATION" ARE DETERMINED TO BE "GOOD" OR "BAD," OR THE MANNER IN WHICH THE COURT SHOULD USE THE INFORMATION TO "ASSIST" IN ITS DISPOSITION OF THE CASE. LIKE THE CONDITIONS FOR BAILOUT WHICH PRECEDED IT, THE STANDARDS FOR SATISFYING THIS REQUIREMENT COULD BE INTERPRETED IN NUMEROUS WAYS AND THEREFORE WOULD NOT PROVIDE

RELIABLE GUIDELINES TO ASSIST PUBLIC OFFICIALS TO FORMULATE POLICIES WHICH COMPLY WITH THE ACT AND CONTRIBUTE TO PROMOTING THE POLITICAL INTERESTS OF MINORITY GROUP CITIZENS.

IN LIGHT OF THE TREMENDOUS PROGRESS WHICH HAS BEEN MADE SINCE THE ACT'S PASSAGE, IT IS INAPPROPRIATE AND UNFAIR FOR THE OPPORTUNITY TO BAILOUT TO BE EFFECTIVELY PRECLUDED BY CONGRESS SETTING STANDARDS FOR BAILOUT WHICH ARE IMPOSSIBLE TO ACHEIVE. AS THE PRECEDING DISCUSSION WOULD SUGGEST, AND A CAREFUL REVIEW OF THE LEGISLATION MAKES CLEAR, THE PROPOSED LEGISLATION WAS NOT FORMULATED WITH A GENUINE INTEREST IN ESTABLISHING A FUNCTIONAL BAILOUT PROVISION. THE SUPREME COURT UPHELD THE CONSTITUTIONALITY OF THE VOTING RIGHTS ACT BECAUSE, AMONG OTHER THINGS, IT PROVIDED A "BEARABLE" BURDEN OF PROOF TO BAILOUT; THE PROPOSED BAILOUT PROVISION CLEARLY EXCEEDS THE BURDEN WHICH THE COURT DEEMED "BEARABLE." A MEANINGFUL BAILOUT PROVISION WOULD STRENGTHEN THE VOTING RIGHTS ACT BY BEING A CONSTRUCTIVE FORCE, BEYOND 1982, FOR ADVANCING THE VOTING RIGHTS OF MINORITY GROUP CITIZENS. I AM HOPEFUL THIS COMMITTEE WILL CONSIDER THE PURPOSES OF BAILOUT IN A MORE THOROUGH, DELIBERATE, AND RATIONAL MANNER THAN WAS DONE IN THE HOUSE SO THAT WE MIGHT PASS LEGISLATION WHICH ACCOMPLISHES THIS OBJECTIVE.

THE MOST SIGNIFICANT CHANGE APPROVED BY THE HOUSE WENT LARGELY UNNOTICED. THIS AMENDMENT IS ADDRESSED TO SECTION 2 OF THE ACT AND WOULD ESTABLISH AN "EFFECT" TEST AS THE SINGLE STANDARD TO JUDGE DISCRIMINATION IN VOTING RIGHTS LITIGATION. WHILE THE IMPORTANCE AND POTENTIAL IMPACT OF THIS CHANGE CANNOT BE UNDERESTIMATED, THE FAILURE OF THE HOUSE TO CONSIDER IT CAREFULLY CANNOT BE OVERSTATED. ALTHOUGH OVER ONE-HUNDRED WITNESSES PARTICIPATED IN THE HOUSE JUDICIARY COMMITTEE HEARINGS, ONLY THREE PERSONS TESTIFIED ABOUT THIS CHANGE IN EXISTING LAW; EACH, I MIGHT ADD, ADVOCATED THE "EFFECTS" TEST. ON THE FLOOR, AFTER MINIMAL DISCUSSION, THE AMENDMENT WAS PASSED BY A VOICE VOTE. HAD THE MEMBERS OF THE HOUSE BEEN BETTER INFORMED OF THE IMPORTANCE OF THIS AMENDMENT, I DO NOT BELIEVE THAT IT WOULD HAVE PASSED WITHOUT CONTROVERSY. IN MY JUDGMENT, THIS IS A KNEE-JERK RESPONSE TO THE SUPREME COURT'S DECISION IN CITY OF MOBILE V. BOLDEN (1980), WOULD LEAD DANGEROUSLY TOWARD ESTABLISHING A PRECEDENT FOR PROPORTIONAL REPRESENTATION, AND SHOULD BE STRICKEN FROM THE LEGISLATION.

FROM ITS INCEPTION, THE VOTING RIGHTS ACT HAS EMBODIED TWO STANDARDS FOR JUDGING DISCRIMINATION: THE "EFFECT" TEST IN SECTION 5 AND THE "INTENT" TEST IN SECTION 2. UNDER THE PRECLEARANCE PROVISIONS OF SECTION 5 THE DEPARTMENT OF

JUSTICE REVIEWS PROPOSED CHANGES IN VOTING PROCEDURES IN ORDER TO DETERMINE THAT THE CHANGE "DOES NOT HAVE THE PURPOSE AND WILL NOT HAVE THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE." SECTION 5 HAS BEEN ADMINISTERED TO PREVENT, AT A MINIMUM, A RETROGRESSION OF THE VOTING POWER OF MINORITY GROUP CITIZENS AND ADMITTEDLY HAS BEEN A FORM OF AFFIRMATIVE ACTION FOR THE POLITICAL INTERESTS OF MINORITY GROUP CITIZENS; THE USE OF THE "EFFECT" TEST HAS BEEN FUNDMENTAL TO THE SUCCESS OF THIS EXTRAORDINARY REMEDY. IN FACT, 90 PERCENT OF THE OBJECTIONS INTERPOSED BY THE DEPARTMENT OF JUSTICE UNDER SECTION 5 HAVE BEEN BASED ON A DETERMINATION OF "EFFECT" RATHER THAN "PURPOSE" OR "INTENT."

ALTHOUGH THE USE OF THE "EFFECT" TEST GIVES THE DEPARTMENT OF JUSTICE BROAD DISCRETION TO DETERMINE WHAT CONSTITUTES A FAIR OR A DISCRIMINATORY VOTING PRACTICE, THIS DISCRETION IS CHECKED BY TWO FACTORS: FIRST, SECTION 5 IS LIMITED IN ITS APPLICATION GEOGRAPHICALLY; AND SECOND, IN THOSE AREAS TO WHICH SECTION 5 APPLIES, ITS PURVIEW IS LIMITED TO CHANGES IN VOTING PROCEDURES AND THEREFORE IS APPLIED ONLY PROSPECTIVELY.

AS MEMBERS ARE AWARE, SECTION 2 IS A PERMANENT PROVISION WHICH APPLIES NATIONWIDE AND PROVIDES RECOURSE AGAINST LAWS OR ACTIONS THAT ARE BEYOND THE SCOPE OF SECTION 5. SECTION 2 HAS BEEN INTERPRETED TO BE A RESTATEMENT OF THE FIFTEENTH

AMENDMENT UNDER WHICH A PRIVATE RIGHT OF ACTION EXISTS TO CHALLENGE EXISTING LAWS. IN CASES WHICH HAVE INVOLVED CLAIMS OF DENIAL OF EQUAL PROTECTION OR OF VOTING RIGHTS, SUCH AS WASHINGTON V. DAVIS OR MOBILE V. BOLDEN, THE COURTS HAVE CONSISTENTLY HELD THAT A GOVERNMENT ACT, WHICH IS RACIALLY NEUTRAL ON ITS FACE, IS NOT UNCONSTITUTIONAL SOLELY BECAUSE IT HAS RACIALLY DISPROPORTIONATE EFFECTS, AND HAVE REQUIRED THAT "INTENT" TO DISCRIMINATE BE SHOWN. ALTHOUGH THE "INTENT" OR "SMOKING GUN" TEST IS A DIFFICULT STANDARD OF PROOF, IT IS NOT UNBEARABLE. IN REQUIRING THAT "INTENT" BE SHOWN, THE COURTS HAVE PERMITTED AS EVIDENCE OF "INTENT," "EFFECTS" WHICH CAN BE TRACED TO A RACIALLY DISCRIMINATORY PURPOSE. AS SUCH, THE COURTS HAVE PERMITTED SOMETHING SHORT OF SMOKE TO PROVE THE GUN WAS FIRED, THEREFORE, INTENT IS DIFFICULT BUT NOT IMPOSSIBLE TO PROVE.

THE LEGISLATION PASSED BY THE HOUSE OF REPRESENTATIVES AMENDS SECTION 2 TO ESTABLISH AN "EFFECT" TEST AS THE SINGLE STANDARD TO JUDGE DISCRIMINATION IN VOTING RIGHTS LITIGATION, THEREBY NULLIFYING THE BODY OF LAW THE COURTS HAVE DEVELOPED CONCERNING FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS REGARDING VOTING RIGHTS. PROPONENTS OF THIS LEGISLATION HAVE EXPRESSED THEIR VIEW THAT EFFECT, IN AND OF ITSELF, SHOULD SUFFICE TO PROVE A VIOLATION OF THE ACT. THEY PRESUME THAT ALL AFFECTS

WHICH ARE ADVERSE TO THE POLITICAL INTERESTS OF MINORITY GROUP CITIZENS, ARE ROOTED IN SOME IMPURE MOTIVE. I DO NOT BELIEVE SUCH A PRESUMPTION TO BE VALID.

ONE NEED ONLY REVIEW THE DISCRETION THE "EFFECT" TEST HAS GIVEN THE DEPARTMENT OF JUSTICE IN ENFORCING SECTION 5, TO APPRECIATE THE TRAVESTY IT WOULD MAKE OF POLITICS THROUGHOUT THE NATION IF ADOPTED AS THE SINGLE STANDARD FOR JUDGING DISCRIMINATION IN VOTING RIGHTS LITIGATION.

THE "EFFECT" TEST WOULD MAKE DETERMINING DISCRIMINATION A NUMBERS GAME. THE "EFFECT" TEST WOULD SHIFT THE FOCUS FOR DETERMINING DISCRIMINATION FROM THE VOTES OF INDIVIDUALS BEING EQUAL TO THE VOTING STRENGTH OF GROUPS BEING EQUIVALENT. CONSEQUENTLY, EXISTING LAWS AND POLITICAL SYSTEMS COULD BE CHALLENGED EX POST FACTO AND REQUIRED TO BE CHANGED FOR FAILING TO STATISTICALLY MAXIMIZE THE VOTING IMPACT OF MINORITY GROUPS. SPECIFICALLY, EVERY AT-LARGE ELECTORAL SYSTEM IN THE COUNTRY IN WHICH MINORITY GROUP CANDIDATES WERE NOT ELECTED IN PROPORTION TO THEIR NUMBERS WOULD BE SUSPECT OF BEING DISCRIMINATORY. IN THIS RESPECT, IT SHOULD BE NOTED THAT THE 1979 MUNICIPAL YEAR BOOK ESTIMATED THAT NEARLY TWO-THIRDS OF ALL MUNICIPALITIES BETWEEN 25,000 AND 500,000 PEOPLE CONDUCT ELECTIONS IN THIS MANNER. THE MOBILE CASE IS AN EXAMPLE: THE CITY'S AT-LARGE ELECTORAL SYSTEM,

WHICH HAD BEEN USED FOR NEARLY 70 YEARS, WAS CHALLENGED AS BEING DISCRIMINATORY ALTHOUGH THERE WAS NO EVIDENCE THAT IT HAD BEEN ESTABLISHED OR MAINTAINED IN ORDER TO DENY OR ABRIDGE THE RIGHT TO VOTE.

THE KIND OF AFFIRMATIVE MANIPULATION OF VOTING PROCEDURES WHICH THE "EFFECT" TEST WOULD REQUIRE IS FAR BEYOND THE ORIGINAL INTENT OF THE ACT, AND IN MY JUDGMENT, IS A STEP TOWARDS MANDATING PROPORTIONAL REPRESENTATION.

IN THE AMENDED FORM SECTION 2 WOULD STATE: "NO VOTING QUALIFICATION OR PREREQUISITE TO VOTING, OR STANDARD, PRACTICE OR PROCEDURE SHALL BE IMPOSED OR APPLIED BY ANY STATE OR POLITICAL SUBDIVISION IN A MANNER WHICH RESULTS IN A DENIAL OR ABRIDGEMENT OF THE RIGHT OF ANY CITIZEN OF THE UNITED STATES TO VOTE ON ACCOUNT OF RACE OR COLOR, OR IN CONTRAVENTION OF THE GUARANTEE SET FORTH IN SECTION 4(F)(2) OF THIS ACT. THE FACT THAT MEMBERS OF A MINORITY GROUP HAVE NOT BEEN ELECTED IN NUMBERS EQUAL TO THE GROUP'S PROPORTION OF THE POPULATION SHALL NOT, IN AND OF ITSELF, CONSTITUTE A VIOLATION OF THIS SECTION."

ALTHOUGH THE LEGISLATION STATES THAT THE FACT THAT MINORITY GROUP CITIZENS HAVE NOT BEEN ELECTED IN PROPORTION TO THEIR NUMBERS DOES NOT IN AND OF ITSELF CONSTITUTE A VIOLATION OF THE ACT, SUCH A DISCLAIMER HAS NO RELEVANCE TO

LAWS OR PROCEDURES WHICH WOULD BE CHANGED SUBSEQUENT TO THE ADOPTION OF THE "EFFECT" TEST. CONSEQUENTLY, STATE AND LOCAL OFFICIALS WOULD BE REQUIRED TO STUDY PROSPECTIVE VOTING PROCEDURES TO DETERMINE THEIR "EFFECT" AND ADOPT ONLY THOSE WHICH STATISTICALLY MAXIMIZE THE VOTING IMPACT OF EACH MINORITY GROUP WITHIN THE ELECTORATE. IT IS HARD TO IMAGINE ANY STATE DISTRICTING PLAN, WHETHER PRESENTLY EXISTING OR UNDER CONSIDERATION, SHORT OF PROPORTIONAL REPRESENTATION, WHICH WOULD NOT BE VULNERABLE TO CHALLENGE UNDER THIS STANDARD. IN THIS REGARD, IT SUGGESTS THAT OTHER FACTORS SUCH AS CONTIGUITY, COMPACTNESS, AND RESPECT FOR NATURAL BOUNDARIES WOULD BE OF SECONDARY IMPORTANCE IN DRAWING DISTRICT LINES, DOING VIOLENCE TO EXTENSIVE PRECEDENTS WHICH HAVE DEVELOPED OVER THE YEARS.

ALTHOUGH I HAVE BEEN CRITICAL OF THE HOUSE-PASSED LEGISLATION, I REMAIN AN ADVOCATE OF A STRONG FEDERAL ROLE TO ASSURE NO CITIZEN IS DENIED THE VOTING GUARANTEES OF THE FIFTEENTH AMENDMENT. THE CHANGES I PROPOSE MAKING IN THE LEGISLATION, MODIFYING THE BAILOUT PROVISION AND ELMINATING THE AMENDMENT TO SECTION 2, WOULD NOT GUT THE ACT, OR GIVE A LICENSE TO DISCRIMINATE TO THOSE OF IMPURE MOTIVE; I WOULD NOT TOLERATE THAT. IT IS ALL TOO EASY FOR THIS ISSUE TO BE CONSTRUED AS BLACK AND WHITE: IF YOU SUPPORT THE HOUSE-

PASSED BILL, YOU ARE AN ADVOCATE OF CIVIL RIGHTS; AND IF YOU OPPOSE THE HOUSE-PASSED BILL, YOU ARE A RACIST. I AM HOPEFUL THAT BEFORE WE COMPLETE CONSIDERATION OF LEGISLATION TO AMEND THE VOTING RIGHTS ACT, WE CAN RID OURSELVES OF THESE DIVISIVE DISTINCTIONS. ONLY THEN, CAN WE HAVE MEANINGFUL DIALOGUE IN WHICH ALTERNATIVES ARE CONSIDERED ON THEIR MERITS SO THAT WE MIGHT FASHION THE MOST EFFECTIVE LEGISLATION TO PROTECT THE RIGHT TO VOTE FOR 1982 AND BEYOND.

THANK YOU FOR YOUR TIME.

Senator HATCH. Our second witness today will be Prof. Susan MacManus of the Department of Political Science at the University of Houston. Professor MacManus has written extensively on the subject of State and local government, including a number of studies on the implications for minorities of various structures of municipal government. We are very happy to have you here, Professor MacManus.

Now, if I can, other than Members of Congress, we are going to limit you to 10 minutes. The green light means you have 10 minutes; the yellow means you have one left. Red means I am going to interrupt you and we will stop. But we will put all full statements in the record so that your complete statement will be placed in it. We would particularly appreciate summaries if you could provide them.

Thank you, Professor. Go ahead.

STATEMENT OF PROF. SUSAN A. MacMANUS, UNIVERSITY OF HOUSTON

Ms. MACMANUS. Thank you very much for the opportunity to share my views and to speak on behalf of the many local governments that have to meet the letter of this law.

The Voting Rights Act is one of the most important pieces of legislation ever passed by Congress. Certainly all of the statistics show a dramatic increase in the participation of blacks and Hispanics in the electoral system. For this reason, I would like to advocate that an extension be made nationwide.

One thing that is important for you as policymakers to be aware of is that many governments covered by the act now that are fully in compliance with the spirit of the law cannot demonstrate their compliance because the Justice Department's application of it has been many times arbitrary and conflicting.

I have, as an academician, studied the impact of various electoral systems on the participation and representation of various minority groups—blacks, Hispanics, and women. I have also studied the taxing, spending, and service delivery patterns of State and local governments, particularly as they impact on minority citizens. As a consultant, I have advised six governments in the State of Texas how to prepare their document for the Justice Department and the courts to demonstrate compliance with the Voting Rights Act.

On the basis of these experiences, I would like to point out what I consider to be some of the more difficult things confronting local governments in improving compliance. In my prepared testimony, I start out with some of the data collection difficulties, but I would like to go immediately to the real heart of the matter, and that is the difficulty in proving that electoral changes do not dilute minority vote. I think this is the single most important and difficult task confronting local governments.

One reason is that the concepts used by the Justice Department have never been defined in any sort of clear and concise manner, particularly concepts such as racial polarization and bloc voting. It is almost impossible for a local government to figure out what exactly these terms mean, even though they are expected to come up with statistics of this manner in their efforts to prove compliance with the act.

WHAT IS RACIAL POLARIZATION?

One test that is often used to determine whether the minority vote has been or will be diluted is racial polarization. This, technically, occurs when citizens of one racial group uniformly vote for one candidate and citizens of another racial group uniformly vote for another. While this sounds simple enough, it really is very difficult to measure.

For example, in calculating racial polarization, a government selects only those precincts that are 100 percent black or 100 percent white; that is, racially homogeneous precincts. But in reality almost no such precincts exist, and where they do, they probably do not represent either of the populations. For example, an exclusively white precinct is very likely to be a highly affluent suburban neighborhood which is unrepresentative of the white population of the local government as a whole.

Once you select these racially homogeneous precincts, you than look at the percentage of votes cast for each candidate, and if the same candidate receives a high percentage of votes in precincts of one racial group and a low percentage in precincts of another racial group, this in effect may be called racial polarization.

Of course, the basic purpose of the test is to determine whether race is the primary and exclusive determinant of individual voting decisions across time in any given community. Now, this measure has severe shortcomings.

First, what do you do, and this is particularly relevant to my State, when you have communities where there are several signficant minority groups within the same population and one of those groups is geographically dispersed? In our case, in Texas, this typically is the Hispanic population.

Second, the racial polarization measure is almost impossible to apply meaningfully when you have several candidates running for the same office.

Third, nobody has ever said exactly what constitutes severe racial polarization. So we have, then, several questions that have never been answered about how to calculate racial polarization scores which, as we have already pointed out, is a very basic piece of data that local governments have been expected to supply to the Justice Department.

IS RACIAL BLOC VOTING THE DESIRED EFFECT?

Another even more basic issue is whether racial bloc voting is the desired effect. Is it the intent of the Voting Rights Act to produce electoral systems that reward racially segregated residential patterns? That, of course, is a question that the Congress must answer.

As the act has been applied thus far, the Justice Department has generally regarded as dilutive any system that produces a legislative body whose members do not reflect the general makeup of the population. In other words, proportional representation has been the basic test of effect, rather than the responsiveness of elected officials, regardless of their race or ethnicity.

If proportional representation is what Congress intends to be the ultimate test of effect, then it ought to be spelled out in the legislation and not left to the discretion of the Justice Department. But before you make that determination, I think it is important to point out again the difficulties that governments have had in this regard.

For example, what happens when proportional representation is the effects test? What happens is that many governments that have been under this act, in order to pass preclearance, have had to do one of three things, or even all three of them.

First, they have had to change their electoral system to single-member districts which, as I will show later in the testimony, severely handicaps Hispanics in the Southwest.

Second, they have been asked to increase the size of their legislative body. I know a number of governments have had to increase the size of their city councils.

Or, third, they have been asked to "pack" certain districts so that minorities can be elected in proportion to the population.

Now, these remedies, especially in areas where there are several minorities and one is more geographically dispersed than the other, are very simplistic and shortsighted.

WHAT HAPPENED IN HOUSTON

I think the best way to demonstrate what I am talking about is to give you a recent experience in Harris County, Tex. The county's population of 2.4 million is 20 percent black, 15 percent Hispanic, and the remainder white. During redistricting discussion, prominent blacks in the community were tremendously divided on whether a largely minority precinct, defined in terms of blacks, should be created or whether blacks would have more influence if their votes were divided among several precincts.

One faction of blacks, led by several State representatives, the three black Houston City Council members, a U.S. marshal and others, argued for spreading influence among three commissioners rather than having a single black "figurehead" commissioner.

State Representative Craig Washington, spokesperson for the group, pointed out that three votes are needed to accomplish anything substantive. As he said, "As long as we have 25 percent of the vote in any one district, we are going to be the balance of power. For that reason, it is better for the black community to have voting impact on three commissioners than to be lumped together in one precinct and elect a black to sit at the table and watch the papers fly up and down." Washington argued that packing all blacks in one district was "not in the best long-term interests of the community."

The other faction of the black community disagreed vehemently. It was led by James Phillips, president of the Harris County Council of Organizations, considered to be the most politically potent black group in Houston. Phillips argued that since blacks make up 20 percent of the county's population, at least one of the five commissioners should be black; i.e., the proportional representation argument.

At a meeting of the commissioners court, the two factions clashed. Phillips accused Representative Washington's group of having "engaged in the worst form of backroom politics to determine the future of blacks in Harris County government."

Washington responded by calling Phillips "a racist" and told the commissioners' court that Phillips "doesn't believe that you as white people have served black people."

Meanwhile, the deputy director of the Texas League of United Latin American Citizens, Johnny Mata, told the commissioners' court that "there was a 'feeling' among Mexican-Americans that they were being neglected." He went on record as opposing the formation of a black district.

The commissioner's court finally adopted the plan creating one black district, presumably to meet the Justice Department's test or predisposition toward proportional representation, even though Representative Washington's group urged the Justice Department to disapprove this plan as being out of compliance with the Voting Rights Act.

Now, this account, unfortunately, in my experiences of working with local governments, is not an isolated example. It is typical of the problems of implementing the act as currently written.

TYPICAL PROBLEMS IN IMPLEMENTATION

What it demonstrates is that: One, single-member district systems may be more effective in providing proportional representation to minorities, specifically black minorities, than they are in providing programmatic representation. As we know, programmatic or policy representation is dependent upon building majority voting coalitions among members of a legislative body, and the mere election of a single minority or several minority representatives does not always guarantee that member's effectiveness in achieving policy results.

Second, this example shows that often a specific minority community disagrees on what constitutes effective representation, whether it is race or ethnicity of the representative or whether it is voting behavior of the representative.

Third, it shows that single-member district systems with their predisposition toward proportional representation, benefit blacks but rarely benefit Hispanics, who are more geographically dispersed. To work for Mexican-Americans, the size of the legislative body has often been enlarged. Of couse, the question here is whether such a remedy should be made by the Federal Government.

Finally, this example shows that the remedy decided upon by the Justice Department is often a political decision based upon its predisposition to certain governmental structures or redistricting schemes.

Now, what does this mean for the extension of the Voting Rights Act and the effects test and bailout and all of those things? Well, what it means is that local governments will continue to have a difficult time showing that they meet the letter of the law. The bailout provisions as proposed by the House are written in such a way that the Justice Department will have a great deal of latitude in interpreting congressional intent.

For example, the Justice Department will decide whether a government has made a constructive effort to increase minority representation. But the key question that remains is, what is the ultimate measure of increased minority participation going to be?

Bailout provisions that can be realistically met by local governments with histories of compliance are very important for this Congress to establish because, without them, many local governments will continue to avoid making changes that could greatly benefit their minority populations, both in economic and programmatic terms.

Changes such as annexation or consolidation which would expand the tax base of the jurisdiction and bring about savings from economies of scale and service provision are not now viable alternatives for many governments in high growth areas of the country covered by the act. Many local governments do not even consider these because of the Justice Department's past use of proportional representation as the ultimate test of effect. They fear that any change in population, no matter how small, will prevent clearance by the Justice Department and result in major alterations and aberrations of their governmental structures.

But even if proportional representation remains the ultimate test, many local governments feel they would benefit from a redefinition of preclearance because, right now, under the current application, a government's legislative body has to enact a change and then submit it.

Many local officials feel it would be helpful if they could simply go ahead and submit proposed changes for approval prior to adoption.

These are just some of the difficulties that local governments have had in proving compliance with the act. Also, I urge you to more clearly lay out the evidentiary standards that are required of local governments to prove compliance.

QUESTIONS

Senator HATCH. Thank you. We are grateful that you stayed within the 10-minute rule also. It allows us a little bit of time for questions.

Could you elaborate upon your notion that the standard used by the Justice Department under section 5 places a premium upon racial isolation and racial segregation?

Ms. MACMANUS. Yes; in every one of the six governments that I have been involved with, which are listed here—Austin, Houston, Lubbock, Port Arthur, Abilene, and Texas City—this has always been one of the statistics that we have been asked to furnish, and I as a social scientist have tried to help local governments demonstrate this. As I pointed out in constructing racial polarization scores, the premium is put on identifying racially homogenous precincts and using that as the test. The bottom-line inference is that racial polarization, or having people in racially segregated precincts, is the optimal solution or the ideal, which I find very hard to accept as a citizen.

Senator HATCH. Basically, what you seem to be saying is that we are insuring what may in reality be comfortable racial political ghettos.

Ms. MACMANUS. Exactly. When you put such a premium on a test such as bloc voting scores and racial polarization scores, one can infer nothing else but that that is desired.

Senator HATCH. So those who are proposing this change in section 2 actually may be doing a lot of harm to minority voters in this country.

Ms. MACMANUS. I think you are absolutely correct. As a person who has worked with Texas governments, I think the one distressing thing about discussions that have gone on in the Congress about this act so far is the seeming unwillingess to include Hispanics, because they have totally different kinds of residential patterns. So far, in the applications of the act, they have been greatly diluted in their effects, because the major concentration has been on blacks and not Hispanics.

Senator HATCH. Well, there is a lot of complaint about that from an examination of the OFCCP or the EEOC, that any time you use a system of racial quotas—they may not call it that, but that is what they effectively become—one racial group becomes pitted against another. In the end, somebody has got to lose, and in this case it has been, according to some analysts, Hispanics.

Ms. MACMANUS. Let me make one other comment about that. It seems that the Justice Department has used as one of their common strategies to "produce a minority district" to lump blacks and Hispanics together. Those of us who have studied the voting patterns of both groups observe that many times Hispanics are much better served by being placed in a district with liberal whites than they are being placed in a district with blacks, because the two groups tend not to vote alike, at least in local government elections.

Senator HATCH. I think that is probably true. What does it mean when you say that, under section 5, a vote is diluted? If I may clari-

fy this question: Can this happen to an individual or can it happen only to a racial group? In fact, what is an undiluted vote?

Ms. MACMANUS. That is very difficult to show, and that is the point I am trying to make. Local governments, which bear the brunt of having to prove compliance, and they may be very much in agreement in the spirit of the act, just cannot prove it the way the law is stated now.

Senator HATCH. That seems to be a continual theme in these hearings. The effects standard is a nebulous and undefined philosophical concept that has become even more obscured by the approach taken by the House of Representatives. Would you agree with that?

Ms. MACMANUS. I think that the way it is written now, it needs to be clarified. No government, the way it is written now, will be able to get out from under the act.

Senator HATCH. In your experience, have you found that covered jurisdictions are generally trying to comply with the law?

Ms. MACMANUS. Yes; I have.

Senator HATCH. How well can the officials of these jurisdictions fully understand that law? In fact, how does someone like yourself fully understand it?

Ms. MACMANUS. Well, as a social scientist, when a city or a government will call up and ask me for assistance, I generally will work for a government that I consider to be highly discriminatory and apparently so. I will not personally serve as a consultant.

Consequently, the cities that I have worked for I felt very confident about. The procedure I use is to go in and look at the voting patterns, talk with members of the community, look at the distribution of city services and funds, and so on, and the voting behavior of local officials on that legislative body giving out the money. In most of those cases, I have found, upon taking them on, that one of their high priorities was to serve the people of their community.

Senator HATCH. Can you elaborate upon the reasons for your uncertainties about what racial bloc voting really is? For instance, what is racially polarized voting? How do we identify it? What should its legal and constitutional significance be?

Ms. MACMANUS. Well, as I mentioned in my testimony, it is very difficult to decide or to determine, as a social scientist helping governments prepare statistics, exactly what is meant by racial voting and bloc voting and what is severe.

For example, sometimes in the cases that I have been involved with, I have tried to use a more stringent standard of, for instance, 90 percent or 10 percent; and other times, because I could not get any of the "racially homogeneous" precincts, I had to drop it down to a 70–30 kind of a standard.

But is it very difficult to come up with a consistent definition of what racial polarization is and how you measure it. Again, I say that the hardest part is calculating the scores for areas where you have both groups and you cannot identify homogeneous precincts, particularly for Hispanics.

Senator HATCH. In your opinion, are at-large electoral systems per se unfair or generally unfair to racial minorities? Do they automatically minimize minority representation?

Ms. MACMANUS. I think that you cannot say that any system uniformly produces equitable representation and that there are different situations.

In the case of Texas governments, I have found generally that because of the geographically disperse nature of Hispanics, the mixed systems tend to benefit them, and other scholars have also found that.

In other parts of the country, it may be that the at-large systems produce a different result. You cannot unilaterially say, in every case, that one particular electoral scheme is going to produce equitable representation for every minority group. Of course, the only thing that would really do that is something that people have talked about for years, a true proportional representation system, which I do not think will ever be a viable alternative in this country.

Senator HATCH. How can an ethnic community, say, such as the Hispanic community in San Antonio, which is a population majority, ever be discriminated against by an at-large system?

Ms. MACMANUS. Well, I do not thing that you can find that this will be the case, in fact. If you look at certain cities such as Atlanta that changed to a single-member district system at one time, when the blacks became the majority population, suddenly there was discussion of changing back to the at-large system.

It has always been a problem citing the proper balance in these kinds of things. The bottom line again is that electorial system do not operate uniformly in all jurisidictions.

Senator HATCH. What is a minority district, in your opinion? On what evidence does the Justice Department made a determination to categorize a district as a minority district?

Ms. MACMANUS. Again, I have not been able to get any clear standard. This is the frustration that governments go through. In one sense, you are asked to "pack" a district. I mean, in one particular case, a minority district is said to be 75 percent. Then, in another case, they turned around and said no, a minority district is 60 percent. There is no clear standard about what a minority district is, what the racial composition is to be.

Senator HATCH. Does this bill help us to define a standard for the determination of "minority district" status, or does it cloud the issue even further?

Ms. MACMANUS. I think it clouds the issue even more.

Senator HATCH. And, in the end, who suffers?

Ms. MACMANUS. In the end, it is the responsible local governments, which I found the majority are. They are the ones who have difficulty in making decisions that would really benefit their community as a whole.

Senator HATCH. In terms of effective political power, which approach is more beneficial for minorities, the proportional representation scheme which insures one minority candidate election, or the leveraging strategy which gives the minority a balance of power in, say, two districts or more?

Ms. MACMANUS. Well, being a public policy person, I tend to agree with the responsiveness measure. To me, what counts is what is delivered. As a citizen, I expect that my tax dollars result in serv-

ices back, regardless of the color of the individual who is making the decision.

Senator HATCH. So you would recommend the leveraging strategy?

Ms. MACMANUS. Yes. I personnally advocate more of an emphasis on the responsiveness measure, the end product.

Senator HATCH. Let us take a black community. Wouldn't they be disserved by restricting themselves to a system where only blacks were permitted to represent blacks in America?

Ms. MACMANUS. I think that is a very dangerous thing that is happening. We have seen in the commentary surrounding the discussion of this act the inference that the only person that can represent you is a person of your own color. I mean, I certainly know a lot of whites who do not represent my personal viewpoints, and I am sure you do, too.

Senator HATCH. I know quite a few.

What about, in the case of black people, if they are segregated into special voting districts, would't they be even more isolated, even more estranged, and even less a part of their communities in this country; wouldn't they have even more difficulties as a result of this type of legislation?

Ms. MACMANUS. Exactly, particularly if they only make up in the range of the 20 percent, if they are only going to get one representative or so by packing a district.

Senator HATCH. I read the editorials by some of the newspapers here in the East, and they seem to say, that, this legislation is a wonderful idea; let's just pass it. It passed by a 300-and-some-odd vote in the House; why give any consideration to the section 2 problems? These journalists simply seem to ignore the problems posed by passage of section 2.

I have not seen much responsible reporting on what we have actually been holding these hearings about. There has been some, but there has not been a lot which focussed on the arguments of people, like yourself, who are concerned about civil rights and who are concerned about these issues. Few mention what you really are saying here in front of this committee.

Ms. MACMANUS. It is particularly true again. I keep going back to the same topic of where you have governments in the country such as those in the Southwest, where you have two minority groups side by side. The voting patterns are different; the residential patterns are different; and yet the discussion seems to be only related to the act as it applies to one or the other. But what happens when you have the act apply to both simultaneously in the same jurisdiction?

Senator HATCH. Well, it seems important to me, and I am not meaning to criticize anybody in the media, but I think that the thrust of this committee's hearings has been to suggest that if it were up to us, we would simply extend that act.

The most important point in this section 2 issue is that, oddly enough, even Members of the House who have voted for this bill are coming in saying yes, it really is a significant issue, even though they only had 1 day of hearings in the House on the section 2 matter. Would you agree that the section 2 issues are extremely important in this matter?

Ms. MACMANUS. Yes, and they are very complex. They are very important and very complex.

Senator HATCH. What bothers me is that so many people who are writing about this issue do not seem to address its complexities. Nor do they mention how the proposed bill could, to borrow a term, turn around to bite those whom we are really all trying to help. This bothers me.

On page 11 of your statement, you state that the decision of whether or not we should pursue the theory of proportional representation should be made by elected officials and not by lawyers in the Department of Justice. While I agree with you that this is too important an issue to be decided by bureaucrats, isn't it a fact that in many cases the decisions on preclearance are made by persons who have absolutely no legal training or legal expertise at all?

Ms. MACMANUS. I am not really familiar with that particular side of it.

Senator HATCH. All right.

Well, thank you so much. We have appreciated your coming in and sharing your testimony with us.

Ms. MACMANUS. Thank you for the opportunity.

[The prepared statement of Professor MacManus follows:]

Prepared Statement of Professor Susan A. MacManus

Meeting Requirements of the Voting Rights Act:
A Look at the Practical Difficulties Faced by Local Governments

The Voting Rights Act is one of the most important pieces of legislation ever passed by Congress. It has brought about a dramatic increase in the participation of blacks and Hispanics in the electoral system. Without question, it should be extended nationwide. But in the legislation extending the Act, Congress should be more explicit in what constitutes non-compliance with the Act. For those political subdivisions now covered by the Act, compliance is difficult to prove. Many governments, fully in compliance with the spirit of the law, cannot demonstrate compliance with the letter of the law. The provisions are not detailed enough, and governments which are genuinely supportive of the law, find it extremely frustrating.

I have been invited to give testimony because of my experiences as an academician and a consultant to numerous cities in Texas. As an academician, I have studied the impact of electoral systems on the participation and representation of various minority groups (blacks, Hispanics, women).[1] I have also studied the taxing, spending, and service delivery patterns of state and local governments, particularly their impact on minority citizens.[2] As a consultant, I have advised and assisted cities

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[1]Susan A. MacManus, "Council Member Election Procedures and Minority Representation: Are They Related?" Social Science Quarterly 59 (June, 1978): 153-161; "Mexican-Americans in City Politics: Participation, Representation, and Policy Preferences," with Carol A. Cassel, The Urban Interest (Spring, 1982); "Policy Responsiveness to the Black Electorate: Programmatic v. Symbolic Representation," with Charles S. Bullock, III, American Politics Quarterly 9 (July, 1981): 357-368; and "The Equitability of Female Representation on American City Councils," paper presented at the American Political Science Association annual meeting, 1976.

[2]Susan A. MacManus, Revenue Patterns in U.S. Cities and Suburbs (New York: Praeger, 1978); "Expanding the Tax Base: Does Annexation Make A Difference?" with Robert D. Thomas, The Urban Interest 1 (Fall, 1979): 15-28; "The Impacts of Local Government Tax Structures on Women: Inefficiencies and Inequalities," with Nikki R. Van Hightower, The Social Science Journal 14 (April, 1977): 103-116; The Impact of Federal Aid on the City of Houston, Case Studies of the Impact of Federal Aid on Major Cities, No. 2 NTIS Order No. PB80-159221, Washington, D.C.: U.S. Department of Labor, 1980; "Citizens' Views of Growth in Houston," Texas Business Review 55 (July/August, 1981): 166-171.

in preparing documents for the Justice Department and the courts to demonstrate compliance with the Voting Rights Act.[3]

In this testimony, I shall point out some shortcomings of the Justice Department's implementation of the Voting Rights Act. I will also comment on the impacts these shortcomings will have on the effects standard and the bail-out provisions of the House version of the extension if they are not clarified. My purpose is not to argue for or against those provisions but to urge Congress--should it adopt the provisions--to give them clearer definitions.

Data Collection Difficulties

One of the first problems local governments face in demonstrating compliance with the Act is in collecting population information. Specifically, local governments have difficulty determining voting age population by race and language minority. This data is important in calculating voter registration rates (percent of eligible voters registering). It is also used in meeting the preclearance requirement that changes involving redistricting, annexation, change of electoral system, etc. must be accompanied by documents showing minority distribution before and after the change.

Voting age population may seem easy enough to calculate, but it really is not. First, for smaller areas, block level statistics are not available from the Census Bureau. Second, the population data on Hispanics include illegal immigrants, which makes the data less accurate for districting purposes. Third, the data get old quickly, especially for rapidly growing areas such as the Sunbelt. The further removed in time from the Census, the more open to challenge the voting age population figures are. To obtain more recent population counts, local governments often hire demographic consultants to, in effect, conduct a census. But then the courts, or the Justice Department, may challenge these new population figures as not being "objective."

Difficulties in Proving That Electoral Changes Do Not Dilute the Minority Vote

The single most difficult task confronting local governments covered under the Act is proving that electoral-related changes do not dilute

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[3] Austin, Houston. Lubbock, Port Arthur, Abilene, Texas City.

the minority vote. There are two reasons. One is that concepts such as "racial polarization" and "bloc voting" are not clearly defined. Another reason is the inconsistency in standards used to measure voting effectiveness. Is effectiveness measured in terms of a group's vote (bloc vote) or an individual's vote? Is effectiveness measured by an elected official's race or ethnicity, or by that official's responsiveness to the needs of an individual or group? The courts have leaned toward the responsiveness measure whereas the Justice Department has leaned toward the proportional representation measure. As we shall see, even minorities within the same community cannot always agree on how to measure effectiveness.

What is Racial Polarization? One test to determine whether the minority vote has been or will be diluted is racial polarization. Racial polarization occurs when citizens of one racial group uniformly vote for one candidate and citizens of another racial group uniformly vote for another candidate. Although this sounds simple enough, problems arise in calculating this measure.

Technically, in calculating racial polarization, one selects only those precincts that are 100 percent black (in terms of registered voters) and 100 percent white--i.e., racially-homogeneous precincts. But, in reality, almost no such precincts exist. Where they do, they probably do not represent either the white or black population in the jurisdiction. (For example, an exclusively white precinct is likely to be a highly affluent, suburban neighborhood.) Once racially homogeneous precincts are selected, one looks at percentage of votes cast for each candidate in each precinct. If the same candidate receives a high percentage of votes in precincts of one racial group and a low percentage in precincts of another racial group, and this disparity persists in several electoral contests, one may conclude that racial polarization is occurring. The purpose of the test is to determine whether race is the primary and exclusive determinant of individual voting decisions across time in a given community.

This measure has severe shortcomings. First, it does not apply to areas where there are several significant minority groups within the population (e.g., the Sunbelt with its substantial black and Hispanic

populations). Second, the measure is almost impossible to apply meaningfully where several candidates are running for the same office. Third, no one has agreed upon a definition of "severe polarization."

In summary, many critical questions remain unanswered about the calculation and use of the racial polarization measure:

(1) How does one measure racial polarization in multi-candidate races?

(2) How does one measure racial polarization if one cannot isolate minorities in racially homogeneous precincts? Specifically, how does one measure the voting patterns of Mexican-Americans scattered throughout the population?

(3) How does one measure racial polarization where the population has several significant minority groups and they don't vote the same way in a large number of electoral contests?

(4) What level of racial polarization is "highly significant"?

Is Racial Bloc Voting the Desired Effect? An even more basic issue is whether racial bloc voting is the desired effect. Is the intent of the Voting Rights Act to produce electoral systems that reward racially segregated residential patterns? That is a question that you, the Congress, must answer.

As the Act has been applied thus far, the Justice Department has generally regarded as dilutive any system that produces a legislative body whose members don't reflect the general make-up of the population. In other words, proportional representation has been the basic test of effect rather than the responsiveness of elected officials, regardless of their race or ethnicity. If proportional representation is what Congress intends to be the ultimate test of effect, then it ought to be spelled out in the legislation--not left to the discretion of the Justice Department. But before you make that determination, it is important to consider what the ramifications of proportional representation have been thus far.

What Happens When Proportional Representation is the Effects Test?

In implementing the Voting Rights Act, the Justice Department has generally regarded as non-dilutive electoral systems in which minorities are elected to public office in proportion to their numbers. Consequently, in order to pass preclearance for any type of electoral change (from precinct boundaries to annexation), many local governments have been required to: (a) change their electoral system to single member districts; (b) increase the size of their legislative body; or (c) "pack" certain districts so that minorities are elected in proportion to the population. These "remedies"--especially in areas where there are several minorities and one is more geographically dispersed than another--are too simplistic and shortsighted.

Perhaps the best way to demonstrate what I am talking about is to give you a recent example. It involved the redrawing of districts from which the four Harris County, Texas commissioners are elected. (Harris County has a population of 2.4 million, of which 20 percent is black, 15 percent Hispanic, and the remainder white.) During the redistricting discussions, prominent blacks in the community were greatly divided on whether a largely minority precinct (defined in terms of blacks) should be created or whether blacks would have more influence if their votes were divided among several precincts (a leveraging strategy).

One faction of blacks, led by several state representatives, the three black Houston City Council members, a U.S. Marshall and others, argued for spreading influence among three commissioners rather than having a single black "figurehead" commissioner. State Representative Craig Washington, spokesperson for the group, pointed out that three votes are needed to accomplish anything substantive. "As long as we have 25 percent of the vote in any one district we are going to be the balance of power. For that reason it is better for the black community to have voting impact on three commissioners than to be lumped together in one precinct and elect a black to sit at the table and watch the papers fly up and down,"

he said.[4] Washington argued that packing all the blacks in one district was "not in the best long-term interests of the community."[5]

The other faction of the black community disagreed vehemently. It was led by James Phillips, president of the Harris County Council of Organizations, which is recognized as the most politically potent black group in Houston. Phillips argued that since blacks make up 20 percent of the county's population, at least one of the five commissioners should be black (the proportional representation argument).

At a meeting of the Commissioners' Court, the two factions clashed. Phillips accused Representative Washington's group of having "engaged in the worst form of back-room politics to determine the future of blacks in Harris County government."[6] Washington responded by calling Phillips "a racist" and told the Commissioners' Court that Phillips "doesn't believe that you as white people have served black people."[7]

Meanwhile, the deputy director of the Texas League of United Latin American Citizens, Johnny Mata, told the Commissioners' Court that "there was a 'feeling' among Mexican-Americans that they were being neglected."[8] He went on record as opposing the formation of a black district.

The Court finally adopted the plan creating one black district (presumably to meet the Justice Department's predisposition toward proportional representation) but Representive Washington's group urged the Justice Department to disapprove the plan as being out of compliance with the Voting Rights Act.[9]

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[4]Bill Coulter, "Bass Backs Washington on Precincts," Houston Post, October 28, 1981.

[5]Pete Brewton, "Black Faction Opposes Minority Precinct Plan," Houston Chronicle, October 28, 1981.

[6]Pete Brewton, "Two Local Black Leaders Clash Over Minority Commissioner Precinct," Houston Chronicle, November 3, 1981.

[7]Pete Brewton, "Two Local Black Leaders Clash Over Minority Commissioner Precinct," Houston Chronicle, November 3, 1981.

[8]Bill Coulter, "Plan for Black Commissioner Seat Debated," Houston Post, November 3, 1981.

[9]Chronicle Washington Bureau, "Black Activists Oppose County Precinct Plan," Houston Chronicle, January 13, 1982.

This account, unfortunately, is not an isolated example. And it is typical of the problems of implementing the Act as currently written. What it demonstrates is that:

(1) Single-member district systems are more effective in providing proportional representation to minorities than they are in providing programmatic representation. Programmatic representation is dependent upon the building of majority voting coalitions among members of a legislative body. The mere election of a minority representative does not always guarantee that member's effectiveness in achieving policy results.[10]

(2) Often a specific minority community disagrees on what constitutes effective representation (race or ethnicity of a representative or voting behavior of a representative).

(3) Single-member district systems (with their predisposition toward proportional representation) benefit blacks but rarely benefit Hispanics who are more often geographically dispersed.[11] To work for Mexican-Americans, the size of the legislative body generally has to be enlarged.[12] And the question then is whether such a remedy should be made by the federal government.

(4) The remedy decided upon by the Justice Department is often a political decision based upon its predisposition to certain governmental structures or redistricting schemes.

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[10] See Susan Welch and Albert K. Karnig, "The Impact of Black Elected Officials on Urban Social Expenditures," Policy Studies Journal 7 (Summer, 1979): 707-713.

[11] See Albert K. Karnig and Susan Welch, "Sex and Ethnic Differences in Municipal Representation," Social Science Quarterly 60 (December, 1979): 465-481.

[12] See Delbert Taebel, "Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics," Social Science Quarterly 59 (June, 1978): 142-153.

Proving Eligibility for Bail Out. Local governments will have difficulty proving they are eligible to bail out from under the preclearance requirements of the Act. The bail-out provisions, as proposed by the House, are written in such a way that the Justice Department will have a great deal of latitude in interpreting Congressional intent. For example, the Justice Department will decide whether a government has made a constructive effort to increase minority participation. But the key question, which Congress should answer, is what will be the ultimate measure of "increased minority participation"?

Bail-out provisions that can realistically be met by local governments with histories of compliance are very important to establish. Without them, many local governments will continue to avoid making changes that could greatly benefit their minority populations--economically and programmatically. Changes such as annexation or consolidation which would expand the tax base of the jurisdiction and bring about savings from economies of scale in service provision are not, now, viable alternatives in many high growth areas covered by the Act. Many local governments do not even consider these changes because of the Justice Department's past use of proportional representation as the ultimate test of effect. They fear any change in the population, no matter how small, will prevent clearance by the Justice Department and result in major alterations of their governmental structure.

But even if proportional representation remains the ultimate test, many local governments feel they would benefit from a redefinition of preclearance. Under the current definition, a government's legislative body has to enact the change and then submit it to the Justice Department for approval. Many local officials are of the opinion that it would be more logical, and helpful, to submit proposed changes to the Justice Department for approval prior to formal adoption. They feel that this would reduce the incidences and costs of litigation for them as well as for the federal government.

These are just some of the difficulties local governments have experienced in recent years in trying to demonstrate that their electoral systems do not dilute the votes of their minority citizens and that they are

in compliance with the Voting Rights Act. These problems will intensify if the effects test and the bail-out provisions are not more clearly delineated by Congress. As the House version to extend the Act now reads, the difficulties of demonstrating compliance will be greater than ever.

A Plea for Clarification

In closing, I urge you to more clearly lay out the evidentiary standards required of local governments to prove compliance with the Act. Most critical is a clarification of what will trigger the effects standard when an existing electoral structure or procedure is challenged. Will it be proportional representation? Or will it be responsiveness as measured by the distribution of goods and services and the openness of the system to minority participation (measured by registration rates, voter turnout, access to legislative hearings, appointments to boards and commissions, etc.)? This is a decision for elected representatives of the people, not lawyers in the Justice Department.

Likewise, the language of the bail-out provisions should be tightened to make it easier for those with a history of compliance to get out from under coverage of the Act. As it now stands, the Act unfairly costs the taxpayers of these conscientious governments (and the nation's taxpayers as a whole) a great deal of time and money which could more equitably and efficiently be spent in bringing governments with traditions of discrimination into compliance.

Clearer standards would also nullify the argument that to extend the Act nationwide would dilute its enforcement. Voting discrimination is voting discrimination regardless of where it is found. Regional distinctions in the application of the Act parallel the old de facto/de jure distinctions once used to "justify" housing and educational discrimination among non-southern governments. These regional distinctions in the voting rights area are equally arbitrary, offensive, and inappropriate.

In sum, local governments have great difficulty demonstrating compliance with the Act. They need Congress to clarify its intent, rather than leaving interpretation to the Justice Department.

Senator HATCH. Our next witness will be Mr. Joaquin Avila of the Mexican-American Legal Defense Fund. He joins Ms. Vilma Martinez, who testified before this subcommittee last week as a representative of the same organization.

Mr. Avila, we are happy to have you with us here today.

STATEMENT OF JOAQUIN G. AVILA, ASSOCIATE COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Mr. AVILA. Thank you very much, Senator Hatch. My name is Joaquin Avila, and I am with the Mexican-American Legal Defense and Educational Fund.

I want to thank the subcommittee for giving our organization this additional opportunity to come forward and express our concerns about the extension of the reauthorization of the Voting Rights Act.

It was very interesting to hear the previous witness discuss some of the political realities and racial realities in the State of Texas. For a moment, I did not recognize that she was in fact describing the State of Texas.

What I would like to do, as part of my testimony, is to focus on two issues. One is to discuss the administrative track record with respect to enforcing section 5 and the Voting Rights Act and then, second, to focus on an issue which this subcommittee has found to be significantly important and which is considered to be significantly important, and that is the issue of section 2 of the Voting Rights Act.

With respect to the present administration's efforts to enforce the Voting Rights Act, we can only find one word to describe that, and that is "dismal." We as an organization, along with other private civil rights organizations, have had to take the lead not only to enforce administratively the Department of Justice section 5 preclearance provisions but also to take the lead, the affirmative lead, to challenge election structures that discriminate against Hispanics in Texas.

The Department of Justice has not joined a single lawsuit. The Department of Justice, under this present administration, has not even begun to investigate all of the redistrictings which have occurred after the 1980 census; did not initiate any litigation to require all of these political subdivisions to submit their redistricting plans in a timely fashion so that they could get the appropriate preclearance.

In addition to that, our organization, along with several other organizations, has had to take the lead to require political subdivisions to submit election changes for section 5 preclearance. This is a task that is exclusively relegated to the Department of Justice to enforce, and we have found that the Department of Justice is simply not doing its task.

Perhaps the most egregious thing that we have found in terms of the Department of Justice's insensitivity to the protection of Hispanics' civil rights and voting rights, very specifically, has been the recent reversal of position in the *Lockhart* v. *U.S.* case, where the city of Lockhart, in 1973, adopted a home-rule charter that adopted

a numbered place system, staggered terms, which discriminated against Hispanic voting strength.

The Department of Justice issued a letter of objection objecting to those particular election changes. The city of Lockhart, pursuant to section 5 of the Voting Rights Act, filed a section 5 declaratory judgment action seeking preclearance. At the trial stage, the Department of Justice agreed with the positions that were being advanced by the minority intervenors represented by MALDEF. Basically, that position was that these proposed changes had a discriminatory effect. The Department of Justice agreed with that.

The city of Lockhart subsequently appealed. We opposed that appeal. Just about a couple of weeks ago, we found that the Department of Justice is in fact agreeing that the changes no longer have a discriminatory effect.

I submit to this committee that there has been no material change with respect to the plight of Hispanics in the city of Lockhart. We feel that this is the height of insensitivity from the Department of Justice with respect to the only lawsuit that the Department of Justice has participated in to protect Hispanic voting rights. They have changed their position.

The second part of this administrative track record deals with trying to get input into the administrative process before the Department of Justice. We have tried on many occasions to set up appointments to meet Mr. Bradford Reynolds to try to discuss important redistricting changes, changes that we felt needed our input.

Senator HATCH. He is not meeting with you?

Mr. AVILA. No, he is not.

There were changes that we wanted to make and input that we wanted to give with respect to Bexar County, with respect to some of the congressional redistrictings. We tried to set up appointments in January.

So what has happened is that, several years ago, our slogan, our catchword, was trying to get minorities access to the political process. Now, as a result of this present administration's insensitivity, we have changed that slogan to trying to get access to Mr. Reynolds' office.

Senator HATCH. You have not had any access to his office?

Mr. AVILA. We have not had an appointment. We have tried to set up appointments to discuss redistricting plans for Bexar County. We have tried to set up appointments to discuss redistricting for congressional districts. In fact, just last week, the Department of Justice issued a letter of objection concerning some congressional districts in south Texas. It did not cover the areas that we were specifically concerned with, and it is too late now for us to have input into that process.

Senator HATCH. It is not too late for us to do something about that, so let's see if we can help you in the future. Let me offer the help that my staff or I can give to you in these areas. I would like to hear from you. Of course, we are going to bring this up, but I would like to hear from you with regard to any future unresponsiveness with regards to their meeting with you on reasonably requested occasions. Please keep in touch with us on that point, will you?

Mr. AVILA. Thank you.

What I would like to shift my attention to now is the discussion concerning section 2 and to discuss the devastating blow that the *City of Mobile* case has had in our dilution cases. It is a setback. The decision clearly requires a discriminatory intent.

Now, I understand that the chairman and the administration have certain views about whether section 2 should be amended or not, but we are here to present our views on why the results test should be incorporated.

Basically, we are not trying to reverse the Supreme Court decision. The *Mobile* decision would still be in effect. It would be a constitutional standard. All we are requesting is that there be an additional supplemental statutory remedy available so that we can effectively try to dismantle many of the discriminatory election structures that we have very well documented in our testimony before the House and the testimony that we have presented before this subcommittee.

Let us make no bones about it. The *Mobile* decision does require discriminatory intent, and that discriminatory intent has been described by Justice Stevens as an investigation into the subjective motivation into the decisionmaking process. Not only that; Congressman Butler described the intent standard as a very rigorous standard, as requiring a "smoking gun," and in fact that "smoking gun" analogy becomes even more compelling when one realizes or examines that the Supreme Court adopted the evidentiary standards in the *Personnel Administrators* v. *Fini* case which specifically held that persons or minorities challenging discriminatory election structures would have to show that the decisionmakers adopted a particular change because of its adverse effects on minority voting strength, not in spite of it. So we have to examine the subjective motivations of the various decisionmakers.

The reason we support the results standard is that, first of all, a subjective intent for the intent standard as defined by *Mobile* would be very stringent. It has discouraged litigation already. It has prevented us from becoming involved in cases where we feel that there is a clear discriminatory impact.

When the previous witness discussed that, really, there were no concentrations of Hispanics across the State of Texas, I take issue with that position. I also take issue with the fact that it is very difficult to identify or define racially polarized voting. You talk to the minority communities in Texas. They know what racially polarized voting is. They know what it is when a person goes out to vote, a Hispanic goes out to vote and tries to get access into the city council, and yet the city council is not responsive to the particularized needs of the Mexican-American community and has not paved any streets or provided any kind of municipal services to certain areas.

They know what racially polarized voting is when the political opposition, such as in the city of Lockhart, takes our newspaper ads a couple of weeks before the elections and paints the minority candidates seeking election as being radicals in order to bring out the white Anglo vote.

They know that racially polarized voting is, so I suggest that if there is any doubt in the professor's mind as to where in fact racially polarized voting exists and whether in fact Hispanics are geo-

graphically dispersed throughout the State of Texas, I invite the professor to examine her census statistics.

Now, what are are asking for in terms of incorporating a section 2 results test? We are asking merely a return to the *White* v. *Regester* standards. A return to the *White* v. *Regester* standards will not result in proportional representation.

In our extensive litigation in the Southwest, we have not had occasion or a single instance where a Federal court there required proportional representation as a remedy. A return to the *White* v. *Regester* standard will not in fact result in proportional representation.

In fact, the focus of our litigation has always been in preserving or avoiding any fragmentation or any dilution of Hispanic minority voting strength. It has not been to guarantee the election of a particular minority candidate. In fact, in Texas, as I am sure the professor will certainly verify, you have legislative districts in south Texas that contain 60 to 70 to 80 percent Hispanic population, and at least three of those districts are represented by Anglo candidates.

So we are not talking about guaranteeing the election of a particular minority or Hispanic candidate. We are talking about avoiding any fragmentation of a cohesive minority voting community.

I understand that the subcommittee has some concerns about racially polarized voting and how that, by itself, coupled with disproportionate impact, would somehow trigger an immediate violation of section 2.

Well, if we return to the *White* v. *Regester* standards, we have to examine more than that. I cannot think of a single instance, and perhaps the professor might be able to enlighten me on this, but I cannot think of a single instance where a court has invalidated a redistricting or an at-large election scheme merely because there was a disproportionate impact and you had racially polarized voting.

No, the standard under *White* v. *Regester* was more complex than that. It dealt with a variety of issues, issues that are very specifically mentioned in the committee report. So we do not feel that a return to the *White* v. *Regester* standards will result in some of the problems that are being articulated by the witnesses and by the subcommittee.

Another point I would like to make with respect to section 2 is that it will certainly not open up the doors to an extensive amount of litigation. It we return to the *White* v. *Regester* standard, you will see that the previous track record in that particular legal standard with respect to the number of lawsuits that have been filed is really very low. In Texas alone, we are talking about maybe five or six lawsuits that were filed from 1973 to about 1980 dealing with dilution issues.

So, in summary, I think it is very important to point out that the Hispanic community suffers, and continues to suffer, from extensive voting discrimination in Texas and parts of the Southwest. Hispanic organizations such as MALDEF need a remedy. We cannot rely on the Department of Justice to enforce the Voting Rights Act. We cannot rely on the Civil Rights Division to go in

and prevent political subdivisions from enforcing election changes that had not been precleared.

We need a remedy. We need something to eliminate this voting discrimination. It has been too long. We can wait no longer. We need to go forward. We want the Senate to pass S. 1992 without any amendments.

Thank you.

Senator HATCH. Thank you, Mr. Avila.

In the *Mobile* case, the Court's statement that section 2 represented a codification of the 15th amendment went uncontradicted, even by the dissent of Mr. Justice Marshall. Indeed, I believe that even the administration's brief in support of Justice Marshall's position stated that, section 2 represents Congress articulation of the 15th amendment. Now, would you agree with this?

Mr. AVILA. That it represents Congress articulation?

Senator HATCH. No, that it represents the 15th amendment.

Mr. AVILA. Whether it does or not is beside the point. The point is that Congress, through the necessary and proper clause to section 2 or through the enabling clause of the 14th and 15th amendments, can in fact pass legislation which would require something more than what the 15th amendment requires.

There are arguments both pro and con as to whether section 2, at that particular point, represented an exact codification of the standards of the 15th amendment as they are now being interpreted by the *Mobile* decision.

Senator HATCH. I do not know of any commentator or authority, however, who would state otherwise than that it represents a codification of the 15th amendment.

Mr. AVILA. Well, at that particular time, it tracked the language of the 15th amendment and, subsequent to that, the Supreme Court very seriously circumscribed the substantive scope of the 15th amendment. To say at this point that section 2 is only to be applied as far as the substantive scope of the 15th amendment now, as it is being interpreted by the Supreme Court, would be to impose an interpretation which did not exist at the time of enacting section 2.

Senator HATCH. You would agree, though, that it is at least based on section 2 of the 15th amendment?

Mr. AVILA. Yes, I would.

Senator HATCH. OK. Are you aware that there was considerable discussion preceding the addition of the language coverage provisions prior to the 1975 proceeding, as to whether or not Hispanics or Puerto Ricans were a race or a color pursuant to the 15th amendment. There was considerable opposition by many Hispanics to the "race" or "color" description. That is why the 14th amendment, not the 15th amendment, was established as the constitutional foundation of the bilingual coverage provisions. Are you familiar with that debate?

Mr. AVILA. Yes.

Senator HATCH. All right. What, then, is the relevance of the change from intent to results in section 2 for the Hispanic community. They have never been covered by the 15th amendment, according to the arguments that have already been made, from the standpoint of race or color.

Mr. AVILA. Well, section 2 was amended in 1975, based on the 14th amendment, to incorporate Hispanics and the language minorities, and what that basically means is that, at this particular point, we are seeking an expansion of rights that have been given to us by Congress.

Senator HATCH. But section 2 was never amended.

Mr. AVILA. I am sorry?

Senator HATCH. Section 2 was not amended at that time.

Mr. AVILA. In 1975? Yes, it was, sir. It was amended to incorporate the language minority communities in the Southwest.

Senator HATCH. Yes, but not to change the definition of race or color to apply to Hispanics.

Mr. AVILA. No, not with respect to the change from race to color, but section 2 was substantively amended to include Hispanic and other language minorities, and it was based on the 14th amendment.

Really, Senator, it does not matter to us whether you are going to base a results test—when you are talking about local minority communities in Texas trying to change an obviously discriminatory election, really, they do not have an understanding of whether it should be under the 15th amendment or the 14th amendment or what. They want a remedy. They need a remedy, a remedy that we are seeking that is clearly not unconstitutional; in fact, a remedy under section 2 that would proscribe the kinds of discriminatory actions and effects that we are seeking to correct.

Senator HATCH. That may be a minor difference to you, but it is a pretty important difference to a lot of other people.

Mr. AVILA. Under the enabling clause under the 14th amendment, you could clearly pass the statute to amend section 2 to incorporate a results test for Hispanics.

Senator HATCH. I do not want to disagree with you, but I must.

Mr. AVILA. All right.

Senator HATCH. I do not think it is quite that clear, and that is one of the real problems of this particular issue here. As I say, it is a difficult issue for everybody. I think sometimes we tend to try to make the issue appear simplistic, when it really is not.

Let me continue. You complain in your statement that Hispanic strength in Texas' 23d District has declined by 1.5 percent. Now, do you really think that that is an example of dilution? Let me give you an illustration. Is it really possible to insure that minority voting strength does not decline in any district? If the State had adopted your proposal, for instance, your proposed plan for a 61-percent Hispanic 23d District, wouldn't that have caused minority retrogression elsewhere?

Mr. AVILA. Not under the standards that have been defined by the Department of Justice. The reason I mentioned that in my written testimony is that the Department of Justice has certain standards which they have articulated over the past in terms of administering section 5. One of those standards is that minority districts, or districts that have a substantial minority population, will not result in a retrogression of minority or Hispanic voting strength.

What has happened in that particular 23d Congressional District is that there is a retrogression of 1.5 percent, and it is violating

their own standard. Not only that; they have an additional standard, the standard under *Wilkes* v. *U.S.*, a Federal district court case in Washington, D.C., a section 5 declaratory judgment case. That section 5 case specifically held that when you are comparing retrogression, when you are trying to determine the discriminatory impact of a previously enacted plan and a proposed plan, you cannot look at the old plan, if it is severely malapportioned, to determine whether there is retrogression or not. Rather, the requirement is that you examine fairly apportioned single-member district plans in order to measure retrogression.

The Department of Justice violated the *Wilkes* standard with respect to that 23d Congressional District as well as the retrogression standard. In addition to that, it did not allow us an opportunity to speak to Mr. Bradford Reynolds.

Senator HATCH. Where are those standards? Where is retrogression defined?

Mr. AVILA. Retrogression is defined by *Beer* v. *U.S.*, a Supreme Court case that specifically held that you cannot have a retrogression of minority population or minority voting strength.

Senator HATCH. But you have argued that the Justice Department should apply the rules set up by the District Court in *Wilkes County* instead of the Supreme Court in *Beer Wilkes* requires comparison against a "fairly drawn redistricting plan." Doesn't the *Beer* decision just beg that question?

Mr. AVILA. No, it does not. The two cases are not in opposition.

Senator HATCH. What is a fairly drawn redistricting plan?

Mr. AVILA. A fairly drawn redistricting plan, at least as it was interpreted in the *Wilkes* case in Washington, D.C., a section 5 declaratory judgment action, specifically held that a fairly drawn redistricting plan shall be used to formulate an opinion concerning a retrogression analysis. You cannot use a severely malapportioned previous plan.

Beer v. *U.S.* did not address itself to a previously existing severely malapportioned redistricting plan. In fact, Wilkes County adopted the Beer standard in trying to formulate whether a retrogression in fact exists when you have a severely malapportioned redistricting plan. You cannot do that. You have to base it on a fairly drawn redistricting plan, and that forms the basis for determining whether, there is retrogression or not. These are not our standards. These are standards that have been formulated by the Department of Justice.

Senator HATCH. Of course, then, you still need to address the question: Which is a fairly drawn redistricting plan? You know, that is an important question.

Mr. AVILA. A fairly drawn redistricting plan means a plan that will not dilute the minority voting strength. What the Department of Justice has often used in the past, and again, you will find this in the record, is a percentage point of population figure of 65 percent in formulating districts from which to determine whether there is any retrogression or not. It is not our standard. We did not go up to the Department of Justice to suggest this standard.

Senator HATCH. But it does look as if you are making a circular set of reasoning that really goes right back to how do you define dilution. Is it 1.5-percent dilution? When you draft a redistricting

plan that allows just a single-member district and you form a 61-percent minority population in that district and you take some of this number away from other districts, does that dilute the other districts? There are so many questions remaining here, that it is unbelievable.

Mr. AVILA. We are talking about different standards, Senator.

Senator HATCH. I see.

Mr. AVILA. Under one standard, we are talking about the constitutional standard of dilution. That is an entirely different standard. I cited, and my written testimony will bear this out, the 23d Congressional District as an instance of insensitivity by the present administration and their inconsistent applications of section 5 standards—not constitutional standards, section 5 standards—and these are standards that they have developed over the years in administering section 5.

So we are talking about apples and oranges. We are talking about, on the one hand, you cannot equate a retrogression, a slight retrogression, as constituting a constitutional violation. On the other hand, you can do so when there is an unlawful retrogression as defined by *Beer* and as defined by *Wilkes*.

Senator HATCH. You say the amended section 2 will supplement the protections of the 14th and 15th amendments. In the absence of the extraordinary circumstances found in *South Carolina* v. *Katzenbach*, where does Congress get the constitutional power to supplement these amendments, in your opinion?

Mr. AVILA. Well, the documentation for racial and Hispanic voting discrimination is there. Some of that documentation has been very extensively documented by U.S. Commission on Civil Rights reports that have been presented to Congress over the years and have been presented in the House hearings to document that voting discrimination is not just located in Texas or the Southwest. You find it in other places.

In fact, one of the cases that I cite in my written testimony deals with a legislative redistricting challenge to the Illinois redistricting plan which discriminated against Hispanics in Cook County. So the evidence is there. In terms of trying to tell whether there is sufficient evidence, there is. I mean, you look at all these U.S. Commission on Civil Rights reports, you look at all the testimony that was presented.

In addition to that, this is no different from 1970 when there was a nationwide ban on literacy tests. Congress did not know, for every little political subdivision, whether their literacy tests discriminated against Hispanics or against blacks. They did not have that evidence for every political subdivision across the United States.

Similarly, section 2 should warrant the same kind of consideration as was warranted for the abandonment of the literacy tests in 1970. We are asking that these consideration be similarly applied to section 2.

So, first of all, the evidence is there. Second, we are asking that the same treatment be accorded as was accorded to the literacy test ban, the national ban, in 1970.

Senator HATCH. My 10 minutes are up. We will turn to Senator Kennedy. Let's use this light so we all know where we are.

Senator KENNEDY. I want to welcome you here before the committee and thank you for your extremely cogent analysis of the legislation and also its practical application to voting patterns, particularly in Texas and on other areas of significant Hispanic population. It is a real service to this committee, and it is going to be enormously valuable as the Members of the Senate review these hearings and begin the debate on the issue.

I was interested in our assessment of the Department of Justice's position in reversing its position in the preclearance case of Lockhart, Tex. You referred to it in your testimony and also in the other publications which you have released today.

As I understand it, your position, and not only your position but that of those who have been following that particular case, is that you are saying that at the same time the Attorney General was getting the headlines for objecting to one Texas reapportionment plan, he was reversing the position that the Department had taken in this case in its objection and during the trial. Is that correct?

Mr. AVILA. Yes; that is correct, Sentor. The immediate effect of this reversal of position, the political effect and the reality of it, will be to send a message to Hispanic communities in Texas that a even if you get the Department of Justice to file a lawsuit to protect your rights, even if that happens, which has not happened, they may, on appeal, subsequently abandon you, and that is why the Hispanic organizations are no longer trustful of the Department of Justice in this area.

Senator KENNEDY. Has that happened before over your review of the history where the Justice Department has abandoned these cases after these preliminary findings have been held? I mean, what has been the pattern of the history?

Mr. AVILA. The pattern in the past has been one of maintaining a consistent position.

Senator KENNEDY. Has that been under Republican as well as Democratic regimes?

Mr. AVILA. That has been our experience, except with this present administration.

Senator KENNEDY. So that is quite a significant departure?

Mr. AVILA. It is a significant departure, not only——

Senator KENNEDY. These cases are complicated and you can, I am sure, spend a lot of time arguing sort of factual aspects of the particular cases, but what I am trying to do is at least gain an insight as to the value that we ought to place on the assurances given to this committee by the Attorney General and the Justice Department about its strong commitment on voting rights. I think we are entitled to look not only at their words but to their actions.

These observations and these reflections which you make here, as somebody who is spending the better part of his life on these kinds of cases and analyzing these cases, are extremely important, as is your assessment, in helping us to make some judgment about the value of the Justice Department's commitment on voting rights.

Now, what remedy do you have if the Attorney General, any Attorney General, this Attorney General, starts withdrawing objections entered by previous Attorneys General even where there has been no substantial change in the circumstances? Supposing this

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Attorney General starts withdrawing objections on a wholesale basis? Do we need more protection in section 5 so that you cannot reduce the discretion?

Mr. AVILA. What would happen is that, under the present law, we would have no recourse other than to challenge under the Constitution. As *Mobile* has interpreted the Constitution, we would have to show a subjective motivation, a subjective intent, in the decisionmaking process in order to invalidate many of these discriminatory election structures that were previously objected to.

To put it quite simply, it would be impossible to do that for all of the 84 letters of objection that have been issued in Texas.

Senator KENNEDY. So what conclusion should one of the leading attorneys, again, in the voting rights cases affecting significant numbers of American citizens who are Hispanic in tradition draw? How are you characterizing the performance of this Department on these issues involving the most basic and fundamental rights of all? I think you had used the words "insensitive" and dismal"? Am I reading those words correctly?

Mr. AVILA. Yes, sir, you are. Right now, as an organization representing Hispanic voting interests in the Southwest, we have difficulty even just getting physical access to the Civil Rights Division, much less trying to get access for minorities to the political process.

Senator KENNEDY. What do you mean by that?

Mr. AVILA. I mean that, as in my previous testimony, we have requested appointments to meet with Mr. Bradford Reynolds to voice our concerns concerning redistricting plans in very important parts of Texas as well as the present congressional redistricting plan that was objected to.

The Department of Justice did not object to the districts that we were primarily concerned with that in fact are in litigation at this moment. We are asking, at a minimum, if anything, that we can tell the minority communities in southwest Texas that we have access, access to Mr. Bradford Reynolds' office. I cannot do that.

Senator KENNEDY. What do you mean, you cannot? He will not see you?

Mr. AVILA. We have been unsuccessful in getting appointments with Mr. Bradford Reynolds.

Senator KENNEDY. And how long have you tried?

Mr. AVILA. We have tried since the end of December to get an appointment with Mr. Reynolds.

Senator KENNEDY. What does he say, anyway? What is his excuse?

Mr. AVILA. Well, we have not spoken to him directly. The word that we get from his staff is that he is too busy.

Senator KENNEDY. That is an intolerable situation. If you do not mind, I think there would be a number of us in the Senate, on this committee as well as some of our other colleagues, that will——

Senator HATCH. I have already offered, Senator Kennedy. So we will follow up on that, you and I together, perhaps.

Mr. AVILA. I would welcome that.

Senator HATCH. All right.

Senator KENNEDY. But I think it must send a signal. I think that they are talking about an administration that is supposedly caring

about this, that comes in and talks about their strong commitment on voting rights, talks about the extension of it and commitment to it, and then we find, when we look beyond the rhetoric, both your assessment of its performance and the intolerable situation of refusing to listen to your arguments and your intercession.

Now, you have reviewed, or have you reviewed, in the earlier part of your testimony, what would be the effect on the Hispanic community if we were to change what has been the longstanding and historic pattern of the effects test in this legislation. It is a matter of some difference in the committee, but my own assessment is that there was really a dual test during the period when the great numbers of cases were being tried and the greatest progress was being made. And now there is an attempt to narrow that definition in ways which I think would have an extremely adverse effect on the real ability for citizens in this Nation to participate in the voting process of this Nation.

I am interested in your addressing that issue—it is going to be a major matter of debate—from the constituency you represent. Why is an effects test needed, and what is your own assessment of the past both legislative history and holdings?

Mr. AVILA. Basically, Senator, we have presented an extensive documentation of voting discrimination in Texas and the Southwest. The only remedy that we had available to us to challenge changes that are not covered under section 5 of the Voting Rights Act in covered jurisdictions and at-large redistricting plans in noncovered jurisdictions, was to challenge it under the *White* v. *Regester* standard, and that standard provided for an examination of the totality of the circumstances to determine whether in fact minorities were being effectively excluded from the political process.

Under that standard, there was expensive litigation. There was an extensive amount of preparation that was involved in those cases. In some of those cases, we were able to win and to dismantle discriminatory election structures.

As a result of the *City of Mobile* decision and as a result of trying to incorporate a subjective intent standard into voting rights litigation, our only message to the Hispanic community that we have in the Southwest is that we can no longer bring these lawsuits.

We have to tell that to our people; our constituents in Beeville, Tex., for instance. In Bee County and the city of Beeville, you have close to 50 percent Hispanic population. The reason you do not have significant minority representation in the city council of Beeville is because of racially polarized voting. In addition to that, when you have racially polarizing voting, you have a lower eligible voter population, lower registration rates for Hispanics, and there is discrimination in that instance, when the city council and the elected officials continue to ignore the needs of Hispanics.

So what do we tell people that come from Beeville saying, "Can you please represent us?" We have to tell them no, we cannot, because unless we get some very direct evidence of discriminatory intent, we cannot help you. And that is what the message is going to be if we do not have a proposed amendment to section 2.

Senator KENNEDY. Are you really saying that if they accept the effects test, you are going to say to every one of those communities, because there is not a certain percentage of minority on that coun-

cil, that you are going to open up every election and at-large election in evey community through the Southwest and in some of the major urban areas?

Mr. AVILA. That just simply is not going to be the case.

Senator KENNEDY. Well, it is alleged by a lot of those who are opposing the Voting Rights Act. They are raising this as a strawman, quite frankly, and I have listened to it day in and day out in this committee. I have heard from the practicing attorneys that that will not be the case, but I want you to nail it one more time. It seems that it keeps popping up again.

Mr. AVILA. It is not the case. For example, under *White* v. *Regester,* we only had anywhere from 6 to 10 lawsuits that involved dilution issues prior to Mobile. A return to the *White* v. *Regester* totality-of-the-circumstances standard will not mean that every time you have a disproportionate impact and racially polarized voting it will invalidate the entire process.

You have to show, in addition to those factors, other factors where *White* v. *Regester* was found very significant, such as the history of voting discrimination, other features of the electoral system that operate to discriminate against Hispanics. In fact, *White* v. *Regester* did not delve into the subjective intent of the decisionmakers when they decided to adopt at-large election structures for their multimember districts. So Mobile represents a substantive and radical departure from preexisting law.

Senator HATCH. Your time has expired, Senator Kennedy.

Senator East?

Senator EAST. Thank you, Senator Hatch.

I will try to make this as brief as I can, just to probe a little bit on some of the theoretical points here that I find intriguing in this whole discussion of minority voting position in the American electoral process.

Sometimes I think it helps to back up a little bit and look at the theoretical foundations of the documents that are the basis for our discussion.

Now, concerning the 1965 Voting Rights Act, on which we are currently debating the possibility of its extension and new dimensions to it, what do you understand the 15th amendment to mean? The 15th amendment says, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The right to vote, access to the vote, the ballot box.

What it does not say is the right to hold office which, interestingly, is the idea that in the debate over the 15th amendment was rejected. Now, we are told in section 2 that Congress shall have the power to enforce this article by appropriation legislation. That is the basis of our power to do what the Cognress did in 1965 and for us to continue this process in what we are doing now.

I do not think there is any dispute about the 15th amendment regarding the right of individuals to vote irrespective of race, color, or previous condition of servitude; no question about that. We have the power to guarantee that.

But it looks to me—again, I just want to get your reaction to this brief analysis—like a mauling of the 15th amendment in terms of the theoretical premise it embraces, to begin to say now that it

guarantees the right to hold office; that it guarantees effects, results. It seems to, as we proceed down this treacherous new theoretical path guarantee the rights of not only minorities, be they Mexican American or black or whatever, but perhaps different kinds of racial and ethnic groups, the right to hold office, the right to have a proportional base.

I think it is a tortured reading of the 15th amendment to suggest that it would only guarantee a "minority" proportion, because it says all citizens. I presume that would mean white, black, anyone, shall not be denied. If we so read the 15th amendment to make it basically applicable as an affirmative action program to certain racial or ethnic groups, I think that is a perversion of it. It does a great disservice to it. And it is not racist to arrive at this conclusion.

To get back to my point, is not the intent of the 15th amendment to guarantee the right of each and every American to have access to the polls, to register and to vote, and to see his vote cast and made to count? But you cannot leap from that very sound premise of the 15th amendment into the current water, constitutional water, troubled water, where you are guaranteeing results and the right to hold office.

I would just appreciate your response to that. What do you read the 15th amendment to be guaranteeing? If we mean it to do more than I have at least suggested that it means, ought we not to amend the Constitution whereby we guarantee effects; we guarantee right to hold office; we guarantee, where there is a certain proportion of a racial or ethnic minority in a particular area, that they have the right to hold office?

And that is an intriguing proposition because then, I think, it flies in the face of one of the most fundamental tenets of democratic political theory, the need to build consensus, to build consensus among racial and ethnic and religious groupings, the healing process, the harmony.

I was noting the other day to a witness here, and I have been reading more about it, that Mayor Bradley in California is beginning the quest for governorship, and it looks like he has an excellent chance, and I noted he is reaching out beyond, of course, what one would expect in terms of blacks or Mexican-American support and into the white community and, indeed, the white business community, what may be considered one of the most traditional strongholds of conservative strength, so to speak, and this shows his appreciation of the need to build coalitions in politics.

I think this proportional representation, this effects test, this guarantee, is going to fragment and polarize and eliminate harmony in American politics. All of it goes back to what I think again is a misreading of the 15th amendment, which is the right of each and every one of us to register and vote. But we certainly ought not to read it to guarantee the right of particular ethnic, religious, or racial groupings to hold office. What do you think of it?

Mr. AVILA. Well, I do not think our position has ever been to have a guaranteed minority seat in any elected body. Our organization interprets the 15th amendment—we used to, anyway, prior to *Mobile*—as not only touching upon physical access to the polls but also to incumbent situations where you have an election structure

that dilutes or minimizes the impact of minority voting strength when the minimization or dilution of that vote is based on racially polarized voting and is based on a history of voting discrimination and discrimination within a political subdivision.

Now, what we are attempting to do with the amendment to section 2 is not to incorporate a proportional representation standard. It is merely designed to incorporate an effects standard, and that effects standard was what the law was prior to *Mobile*. *White* v. *Regester* did not incorporate a proportional representation standard. None of the cases that were involved in Texas or other jurisdictions with which I am familar even had incorporated within their remedy the notion of a proportional representation scheme. Rather, the focus was on avoiding the fragmentation of a cohesive minority voting community in the context of racially polarized voting.

So the amendment to section 2 would not raise the notion that we are seeking to guarantee minority seats. In fact, all of our litigation in the Southwest has never used that as a basic premise. The premise has always been to try to preserve or protect the integrity of a cohesive minority voting community in the context of racially polarized voting.

In fact, when you examine some of the legislative districts in Texas, in south Texas, where you have Hispanic populations approaching 60, 70, 80 percent in a given legislative district, you have three Anglo legislators there who are representating the needs of the Hispanic community. Otherwise, they would not get elected.

So we are not talking about guaranteeing the right of minorities to be elected; we are talking about minorities having an impact into the political process and to make sure that impact is not being diminished because of racist concerns.

For that reason, our interpretation of the 15th amendment does not incorporate a notion that there is a right to proportional representation. The 15th amendment, in our opinion, prior to the *Mobile* decision, applied not only to those denying the physical access to the political process but also avoiding unconstitutional dilution of the minority vote.

The Supreme Court in *Mobile* restricted that reading of the 15th amendment. However, under section 2 of the 15th amendment, clearly you can amend section 2 of the Voting Rights Act to include an effects standard which would merely reimpose, which is all it would do, the standards, the evidentiary standards that were in effect in *Mobile*.

We have it in *White* v. *Regester*. We have a track record that we can look at. There is a substantial body of precedent that courts can look at. Those courts did not talk about a right to proportional representation. They focused their attention on minority voting strength.

Senator EAST. A couple of thoughts in response to that. There have been some witnesses here on Friday, I believe it was, or Thursday, that I thought were convincing that, as a practical matter, with an effects test, unless one can come up with a really hard set of criteria, it is going to be proportional representation.

You, yourself, are saying it will guarantee, quote, an impact of minority voting strength, a very vague notion that, as a practical matter, would cloak, to me, a proportional representation.

Getting back to the 15th amendment, are we saying, conversely, that you will guarantee the impact of majority voting strength? Why not? You certainly could not read the 15th amendment to ensure only undiluted minority voting strength. I presume that if, in a given area, you had 60 percent white population and 40 percent minority, any change of any way, shape, or from in the election process that diluted the 60 to 58, 57, would be a violation. It would have to be because you are violating the 15th amendment, because you would be then discriminating on the basis of your own effects test.

To put it otherwise, if you move away from an intent test, the intent to discriminate based upon race and to deny the individual the right to vote, you have violated the 15th amendment. That is what I think we are saying. That is what I would say and what I think the drafters were saying. I think that is what the 1965 Voting Rights Act was supposedly saying.

Now we have, through the evolution of this over a period of some years, found ourselves in this room today talking about getting rid of intent, effects test, guaranteeing minority impact. I find it, in terms of my understanding of the 15th amendment, in any fair, equitable reading of it, an Alice-in-Wonderland world of constitutional law, spun out, not surprisingly, by lawyers involved in these cases who, like any good lawyer, be he defense or prosecution, always like to skew the law to make it easier for him to win, even though it might, frankly, cut constitutional corners.

I think we are cutting constitutional corners here. All of a sudden, intent is a bad thing. Most of the tort law and criminal law in the Anglo-American tradition is based upon intent—intent to do harm, intent to discriminate on the race, color, or previous condition of servitude. All of a sudden we are told intent is hard to prove. Intent is always hard to prove. Prosecution attorneys would love to hear it said, "In any situation of criminal law, intent is too hard to prove. Let's do away with it."

I will cease and desist. I greatly appreciate your coming, and I think you have given some very compelling and articulate testimony, but obviously I am deeply troubled over what I think is a very radical departure from a very sound premise of the 15th amendment, namely guaranteeing the right of each and every American to have access to the polls and to vote without respect to race, color, or previous condition of servitude.

But when we get into this troubled water of guaranteeing result and effect, we not only have to apply it to minorities; we have to apply it to majorities. We are into the whole world of proportional representation; maybe religious, ethnic, racial, I do not know. It flies in the face of the whole Madisonian concept of building concensus politics in America.

All of it is done in the name of improving racial harmony and ethnic harmony and religious harmony. I submit it will fragment it and put us, in certain urban scenes, at each other's throats because we will have districts, no more at-large elections, strictly districts based upon, yes, you guessed it, race, be it white or black or Mexican-American. What do you do? You run in those districts and, frankly, you demagog a little bit in those districts. Why? There is no obligation to go out to the whole electorate of that city or that

constituency and appeal to a broad base and to pull together that concensus.

That is the whole Madisonian model of the United States Constitution, and I think it is the spirit of the 15th amendment. So I think we have a fundamental theoretical problem here, and I just wanted to back off a little bit and get your reflections on it if you think I am tracking along some erroneous constitutional lines. We have to get back to some first principles now and then in discussion of legislation, and that is what I would like to focus upon.

Senator HATCH. Senator, your time has expired.

Senator Kennedy, do you have any further questions?

Senator KENNEDY. If the Senator wants to finish that thought, I would be glad to have him do so.

Senator EAST. No, that is fine, thank you. Go right ahead.

Senator KENNEDY. Do you ever find a court in any of the cases that you have reviewed that has required quotas or proportional representation, in your research?

Mr. AVILA. No, I have not.

Senator KENNEDY. Even in using the standard prior to the *Mobile* case?

Mr. AVILA. No, I have not.

Senator KENNEDY. Do you know any of the other attorneys that you have worked with over a period of years that have ever been able to find that? As far as I am concerned, we are propping up a lot of straw men around, straw men and straw women, and knocking them all down.

We have seen that it may serve some useful purpose, but in terms of trying to find out what the position of your organization is and what your analysis of the case is, what is the case law and what have been the holdings by distinguished jurists who have been wrestling with these issues over periods of years and are intimately aware both of the 14th and 15th amendments and their significance, Judge Wisdom and others who are profound scholars in this area, it just does not stand up, and we just have not seen the patterns which allegedly would take place if we saw a return to the test prior to the *Bolden* case.

I am just trying to find out whether you are really advocating something different from what the standard was prior to the *Bolden* case. Are you?

Mr. AVILA. No, we are not.

Senator KENNEDY. You are not. And under that standard, prior to the *Bolden* case, we did not have these cases of required quotas or proportional representation, did we?

Mr. AVILA. No, we did not.

Senator KENNEDY. Quite to the contrary, as I understand the case which you have been referring to in your earlier testimony, which was the *White* v. *Regester* case, and in that case, by a unanimous court, I understand, it says, "To sustain such claims, it is not enough that a racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and elections were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the dis-

trict to participate in the political process and to elect legislators of their choice."

Now, the House of Representatives has very clearly stated that the *White* holding is the standard for the bill. Now, is there anything in the *White* holding that would require proportional representation, according to your understanding of it?

Mr. AVILA. My understanding of *White* v. *Regester*—and we were involved in that litigation—is that it does not require proportional representation either at the liability phase of the lawsuit or at the remedy phase of the lawsuit.

Senator KENNEDY. And is it your understanding that if the plaintiffs are just able to show that there is not proportional representation, that is sufficient to win?

Mr. AVILA. No, it is not, not even under the proposed amendment to section 2. It would not be. We would have to show a totality of the circumstances in order to prevail.

Senator KENNEDY. Well, that is my understanding both of the *White* holding, and it is my understanding of the principal supporters of the House bill, and it is the understanding of Senator Mathias and myself in terms of the prime supporters of this legislation.

No matter how those who try to misrepresent and distort both the language and the purpose, if they would agree that that is a fair and just result, we would welcome their intervention to help us to achieve that fair and just result; but all they do is, rather than state that that is both the willingness and purpose of those that support it, try to, I find, distort the position.

Last week Representative Hyde testified that it was unreasonable to require a State legislature's enactment to remain under section 5 until every county in the State was eligible to get out under bailout. Would you comment on this in terms of the relationship between the State government of Texas and the counties within Texas?

Mr. AVILA. Yes. Under the proposed bailout provision, the State of Texas would not be able to bail out unless all of its counties in fact met all of the bailout criteria. It is not an unfair requirement.

The State of Texas regulates the election process, the State of Texas has the authority to correct these abuses, and the State of Texas would have an additional incentive to make sure that all of its political subdivisions complied with the bailout provisions in order to effectively, itself, bail out from the Voting Rights Act.

So it is not an unnecessary or a very stringent requirement. It is something where you have the State responsible for the actions of its individual political subdivisions. The State has delegated a lot of this authority to the cities and counties, but it still has the primary authority for regulating the election process, and that is what we are talking about.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Kennedy.

Mr. East, do you have any other questions.

Senator EAST. No.

Senator HATCH. Well, thank you, Mr. Avila. We appreciate your taking the time to be here, and we will certainly notify the Justice

Department that we would like responsiveness shown you and your organization.

Senator KENNEDY. Could I just ask, could you give us a brief note on that, your understanding of the legislative history of the test, the effects tests, and file a memorandum?

Senator HATCH. Yes, I would like to have that, too.

Senator KENNEDY. Could you file an additional memorandum with your testimony?

Mr. AVILA. Yes.

Senator KENNEDY. I do not want to burden you, but I think it would be very helpful if you could file a memorandum on both your understanding and the understanding of your organization on the test of title 2 and how it changes with *Bolden* and what its implications would be for the Hispanic community, and perhaps some examples. I think that would be very helpful.

Mr. AVILA. Yes.

Senator HATCH. Thank you, Mr. Avila. We appreciate your testimony.

Mr. AVILA. I want to thank the committee for given me this opportunity, and there is still time, however, with respect to the redistricting of the Bexar County Commissioner precincts, to talk to Mr. Brad Reynolds, and we want to have that input into that process.

Senator HATCH. All right. We will see what we can do for you.

[The prepared statement of Joaquin G. Avila follows:]

Prepared Statement of Joaquin G. Avila

Mr. Chairman, Members of the Subcommittee, my name is Joaquin G. Avila. I am Associate Counsel for the San Antonio, Texas, office of the Mexican American Legal Defense and Educational Fund. In addition, I am the Director of Political Access Litigation for MALDEF. As related in previous testimony by our President and General Counsel, Vilma S. Martinez, MALDEF has been at the forefront of protecting the voting rights of Hispanics in the South and Midwest. MALDEF has been involved in extensive voting rights litigation since 1969. MALDEF has substantial experience in lawsuits challenging discriminatory at-large election schemes, gerrymandered redistricting plans, unconstitutional malapportioned districts, and actions to enforce the Section 5 preclearance provisions of the Voting Rights Act.[1]

In this testimony I would like to focus on issues which are in serious dispute before the Subcommittee as it deliberates the re-authorization of the Voting Rights Act. According to Senator Hatch's opening statement, he is committed to an intent standard in Section 2. As one who has been litigating voting dilution cases since 1974, I must take issue with the Chairman's position and reiterate that under the intent standard, Hispanic citizens are categorically denied meaningful access to the courts that they are promised under the Voting Rights Act.[2]

MALDEF supports the incorporation of a results evidentiary test for establishing a violation of Section 2 of the Voting Rights Act, as well as supporting the bailout provisions of S. 1992. In

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1. See e.g., LULAC v. Corpus Christi Independent School District, Civ. Act. No. CA-74 C95 (S.D. Tex.) (at-large election challenge); White v. Regester, 412 U.S. 755 (1973) (challenge to multimember legislative districts); Garcia v. Upham, Civ. Act. No. P-81-49-CA (E.D. Tex.) (challenge to congressional districts in Texas); Rodriguez v. Clements, Civ. Act. No. 3-81-1946-R(N.D. Tex) (challenge to Texas Senate and House Districts;; Rybicki v. St. Bd. of Elections, Nos. 81 C6030, 6052, 6093 (E.D. Ill.) (challenge to Illinois Senate and House Districts in Cook County, Illinois); Ramos v. Koebig, 638 F.2d 846 (5th Cir. 1981) (Section 5 case).

2. There was no reference to the bilingual election requirements in S. 1992 in the Chairman's opening remarks. For an extended presentation concerning the necessity of bilingual elections see the written testimony presented by Vilma S. Martinez, before the Subcommittee on January 27, 1982, pp 27-36. See also testimony presented by Joaquin G. Avila before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committe, U.S. House of Representatives on June 5, 1981 at pp. 60-72.

addition to presenting MALDEF's reasons for support of S.1992, this testimony will also discuss the track record of President Ronald Reagan's Administration in the area of protecting the voting rights of Hispanics in the South and Midwest. This track record will place in proper perspective why MALDEF supports the amended Section 2 in S.1992.

THE ADMINISTRATION'S RECORD

There is only one word which can describe this record: dismal. Under the Reagan Administration, there has not been a single case filed by the Civil Rights Division to enforce the Voting Rights Act or to eliminate discriminatory election structures affecting Hispanic voting strength. Instead civil rights organizations have had to take the lead. Even in these instances, the Civil Rights Division has not seen fit to intervene or even participate as amicus curiae.

The following is a description of cases which have been initiated on behalf of the Hispanic community where there was no involvement by the Department of Justice:

1. Rybicki v. State Bd. of Elections, Civ. Act. Nos. 81 C 6030,6052,6093 (E.D. Ill. 1981). This case involved a challenge to the Senate and House Districts for Illinois. The Hispanic community represented by MALDEF intervened. As a result of the intervention, the case was settled with respect to Cook County. This settlement created a 71 percent Hispanic District for Commission House District 20, a 63 percent Hispanic District for Commission House District No. 9, a 50 percent Hispanic District for Commission House District No. 10, as well as 56 percent Hispanic District for Commission Senate District No. 5.

2. Garcia v. Upham, Civ. Act. No. P-81-49-CA CE.D. Tex. 1981). This is a challenge filed by MALDEF against the 23rd Congressional District in Texas. This District could have contained a 62 percent Hispanic population. Instead, the Legislature excluded predominantly Hispanic areas and included Anglo areas, thereby limiting the Hispanic population concentration to only 53 percent. Presently this case is under advisement.

3. Rodriquez v. Clements, Civ. Act. No. 3-81-1946-R (N.D. Tex. 1982). This is a challenge filed by the Republican Party against the Texas Senate and House Districts. MALDEF intervened challenging House Districts in West

Texas, El Paso County, Lubbock County, and Dallas County, as well as Senate Districts in Harris County, Bexar County, and South-central Texas. As a result of letters of objection issued by the United States Attorney General, new districts will have to be formulated. The Department of Justice was ordered by the Court to enter an appearance as amicus curiae.

4. Serna v. Keyes, Civ. Act. No. 6810089 (N.D. Tex. 1981). This challenge filed by minority organizations alleges that the redistricting plan for county commissioner precincts was adopted pursuant to a discriminatory intent.[3]

5. Garza v. Havel, Civ. Act. No. SA 81-CA-671 (W. D. Tex. 1981). Legal Aid filed this action against the Gonzales Independent School District because of the maintenance of an at-large election system. This system has resulted in no minority representation on the school board in a district which contains a 60 percent minority population.

6. Alonzo v. Jones, Civ. Act. No. C-81-227 (S.D. Tex. 1981). Legal Aid filed this action against the Corpus Christi City Council. The electoral scheme consists of four residency districts and three numbered places. All of these positions are elected pursuant to an at-large election scheme. According to the 1980 Census, there is a 46 percent Mexican American population; yet there is no Hispanic representation on the city council. Recent studies indicate that severe patterns of racially polarized voting exist in councilmanic elections.[4]

7. Rendon v. Bowman, Civ. Act. No. 5-81-157 (N.D. Tex 1981). This one person one vote lawsuit was filed

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[3] In Texas, counties are governed by a County Commissioners Court. The Court consists of a County Judge elected at-large and four county commissioners each elected from a commissioner precinct. Art. 5, Section 18, Texas Constitution.

[4] Dr. Fred Cervantes, Political Science Department, Corpus Christi University. Dr. Cervantes' study evaluated the correlations between the percent of Spanish-surname persons within a voting precinct and the margin of votes in the precinct received by a given candidate. These correlations are a valid statistical method known as Pierson correlations and are expressed as a numerical R factor. High positive R factors indicate strong support in the Hispanic community while low or negative factors indicate little support in the Hispanic community and strong support in the Anglo community. A value of 1.0 indicates a perfect correlation. For the city council run-off in 1981, for Place 1, Luna received a +.950 R value, and the Anglo candidate received a -.950 R value. For place 6, the Anglo candidate received a -.940 R value, while Cavazos received a +940 R value. In both instances, the Anglo candidate won.

by the Southwest Voter Registration Education Project because the malapportioned commissioner precincts worked to the disadvantage of the Hispanic community in Hockley County, Texas.

These cases clearly demonstrate that voting rights issues are of major concern to the Hispanic community. Yet the Civil Rights Division has not even filed a single suit in the Southwest or the Midwest to protect Hispanic voting rights.

In the area of enforcing Section 5 of the Act, the Civil Rights Division also has a dismal record. Private lawsuits had to be filed in Gaines County, Texas, Villalva v. Townsend, Civ. Act. No. CA-5-81-158 (N.D. Tex. 1982), and Lamb County, Texas, Posada v. Lamb County, Civ. Act. No. CA-5-82-7 (N.D. Tex. 1981) to enjoin the implementation of redistricting plans for commissioner precincts enacted in the early 1970's.

The Department of Justice under this Administration has issued only five letters of objection under Section 5 in Texas. The first was issued in June, 1981 and objected to the reduction of polling places in the Burleson County Hospital District. The second, issued on January 22, 1982, involved a redistricting plan for the Uvalde County Commissioner Precincts. The third and fourth letters invalidated two congressional districts in South Texas.

While the Department was doing its job in issuing these objections, it was failing to do its job when it approved other discriminatory election changes. For example, the Department of Justice did not object to the 23rd Congressional district. Currently, the 23rd Congressional district ranges from Webb County to Bexar County. This area encompasses South-central Texas, which contains a significant Hispanic population.

The 23rd Congressional District in Bexar County circumvents the predominantly Hispanic areas of San Antonio. The effect of this circumvention is to limit the impact of Hispanic voting strength. The District contains a 53 percent Hispanic population and a 40.1 percent Hispanic voter registration rate. Extensive evidence concerning the existence of racially polarized voting was provided to the Department of Justice. Moreover the figures provided by the State of Texas demonstrated that there was a 1.5 percent

retrogression of Hispanic voting strength between the newly enacted 23rd Congressional District and the pre-existing district. Such a retrogression is in clear violation of Beer v. U.S., 425 U.S. 130 (1976) which held that a new election change should not diminish the impact of the minority voting strength contained in the previous election system.[5] In view of this clear violation of the retrogression principle, there is simply no justification for not objecting to this Congressional District, especially when other alternatives were presented to the Legislature which would have created a 61 percent Hispanic District thereby satisfying the retrogression principle.

The failures of the Department of Justice to object to the 23rd Congressional District also violated the standard established by the United States District Court for the District of Columbia in Wilkes County, Ga. v. U.S., 450 F. Supp. 1171 (D.C. 1978), aff'd, 439 U.S. 999. In Wilkes, the Court held that severely malapportioned redistricting plans could not be used as a basis for determining the retrogressive effect of a newly enacted redistricting plan. Instead, the new redistricting plan must be compared with options consisting of fairly drawn redistricting plans.[6] In the case of Texas, the pre-existing congressional districts were severely malapportioned. According to Wilkes, the basis for determining the retrogressive effect of the new plan would be a fairly drawn redistricting plan. Such a plan was presented to the Legislature. The plan provided for 61 percent Hispanic population for the 23rd Congressional District. Yet the Department of Justice ignored this standard in evaluating the discriminatory effect of the 23rd Congressional District.

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5. Beer v. U.S., 425 U.S. at 141 ("In other words, the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

6. The Department of Justice has relied upon Wilkes in evaluating the discriminatory effect of redistricting plans. See Letter of Objection, Barbour County Commission, Alabama, July 21, 1981.

The Department's insensitivity to Hispanic and minority voting strength is not limited only to congressional districts. For example in the City of Edna, Jackson County, Texas, the Department of Justice approved a districting scheme which packed minorities into one district while reducing their impact in the other districts. Minorities in Edna constitute about 44 percent of the city's population. To minimize the impact of the minority voting community, the City Council created a 98.2 percent minority district. Over the strenuous objections of the Hispanic community, the Department of Justice approved the plan.[7]

The Department of Justice also approved the consolidation of voting precincts for the San Antonio River Authority and the Edwards Underground Water District for the January 17, 1981 elections. Evidence was presented to the Department of Justice that these consolidations would have a discriminatory impact on Hispanic voting strength. This evidence consisted of demonstrating a lower Hispanic voter turnout. Also, the Department was aware that public transporation was inconvenient for Hispanics in the consolidated voting precincts. Since there was no public transportation serving these Hispanic areas, elderly citizens would have to walk several miles in the middle of winter. Despite this evidence, the Department approved the consolidation over the objections of the Hispanic community.[8]

Presently, there are two redistricting plans which MALDEF has objected to in comments to the Department. In Bexar County, MALDEF is challenging the commissioner precinct plan because of the failure of the Commissioners' Court to create two districts which have a 65 percent Hispanic population. The proposed plan has only one district with a 65 percent Hispanic population. The second district only has a 59 percent Hispanic population and a 48 percent Hispanic voter registration rate. Since there are strong patterns of racially

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7. MALDEF submitted a comment on behalf of the Hispanic community objecting to the proposed plan. See Comment dated February 5, 1981, D.O.J. File No. D5812-13.

8. See MALDEF Comment dated January 27, 1981. D.O.J. File Nos. D 5319 and D 5320.

polarized voting in Bexar County, Hispanic voting strength is clearly diluted. If the Department of Justice follows the Wilkes standard, a letter of objection should be issued.

The other redistricting plan involves the Calhoun County, Texas, Commissioner Precincts. The County contains a 33.9 percent Hispanic population. Yet the Commissioners Court created a district consisting only of a 53.6 percent Hispanic population. The Hispanic voter registration rate in this district is well below 50 percent. Since racially polarized voting exists, the impact of the Hispanic voting strength will always be diluted. As with Bexar County, if the Department applies Wilkes, a letter of objection should issue. However, we are not optimistic since the Department did not apply the Wilkes standard in evaluating the 23rd Congressional District. Both of these redistricting plans have been opposed by members of the Hispanic community.[9]

With respect to eliminating discriminatory election structures the present Administration has not developed any track record in the South and Midwest. As noted in recent surveys, Hispanics continue to be underrepresented on Texas school boards and city councils. In 1980, Hispanics accounted for 6.7 percent or 496 of the 7428 Texas school board members and 5.7 percent or 278 of the 4902 council members.[10] Moreover, there are a substantial number of counties in Texas with significant Hispanic populations which have no Hispanic representation:

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[9] See MALDEF comments dated January 27, 1982, and October 13, 1982. In addition with respect to Bexar County, MALDEF had to file suit to prevent the county from implementing an election change which had not received the necessary Section 5 preclearance. Ramirez v. Bustamente, Civ. Act. No. SA-81-CA-695 (W.D. Tex.). The Department of Justice is not participating in this lawsuit either.

[10] Texas School Directory 1979-1980, Texas Education Agency, Austin, Texas, October 1979. Texas-23 Edition-State Directory 1980: The Comprehensive Guide to the Decision Makers in Texas Government, Austin, Texas, 1980.

County	Hispanic Population
Goliad	35.6 %
McMullen	34.5 %
Calhoun	34.0 %
Terry	34.9 %
Floyd	33.9 %
Parmer	32.7 %
Live Oak	32.0 %
Reagan	31.5 %
Gaines	30.6 %
Glasscock	28.8 %
Gonzales	28.8 %

This paucity of minority elected officials should have at least triggered an investigation concerning the causes of this complete lack of representation. The Administration has not investigated the matter.

Another area where the Administration has not adequately enforced the Section 5 preclearance provisions is in requiring covered jurisdictions to submit their election changes for approval. As previously noted, lawsuits had to be filed in Gaines and Lamb counties to require changes affecting Commissioner Precinct boundaries which had been enacted in the early 1970's. The Department of Justice relies on voluntary compliance and private enforcement to assure that all election changes are submitted for Section 5 review. Yet this process is inadequate. A simple change in the regulations could accomplish a greater degree of compliance with the Act.

For example the regulations could require the chief election officer to certify under oath that all applicable election changes have been submitted for approval. Failure to comply with this regulation would result in further action by the Department of Justice. In this manner, at least the problem jurisdictions could be identified. Once these covered jurisdictions are identified, private parties could also initiate action to secure compliance with the Section 5 preclearance provisions.

The Reagan Administration has also failed to correct the delays in the reporting of election changes in their periodic notice of submissions. For example, in their notice dated January 16, 1982, there were election changes reported for the first time which were submitted as early as December 22, 1981. Thus citizens are not aware of the submission of election changes until well into

the 60 day time period. Such a shortenting of the time period for commenting on a proposed election change does not afford the public an adequate opportunity t· submit their views to the Department of Justice.

Perhaps the most egregious instance of the Administration's insensitivity to protecting Hispanic voting strength from any discriminatory election structures is the reversal of position in a Section 5 declaratory judgment action involving the City of Lockhart, Texas. Under Section 5, a covered jurisdiction may elect to file a declaratory judgment action seeking preclearance of election changes objected to by the Attorney General. 42 U.S.C Sec. 1973c.

Lockhart contains a 55 percent minority population. Despite this overwhelming percentage, minorities have historically been excluded from the City Council. No minority candidate had ever won election to the Board of Commissioners before 1973 and the only minority elected to the Council since a 1973 City Charter change owed his success to an unusual fragmentation of the vote for Anglo candidates. Since minorities could not elect candidates of any race who would serve their minority interests, the members of the City Council ignored the particularized needs of the minority community. Racially polarized voting patterns characterized city council elections.

The City of Lockhart in 1973 adopted a House Rule Charter providing for at-large elections with a numbered post provision and staggered terms for councilmanic candidates. The Attorney General on September 14, 1979, interposed an objection to the Charter provisions. Shortly thereafter the City of Lockhart filed its declaratory judgement action. During the trial court proceedings, the Department of Justice agreed with the minority intervenors that the proposed changes in the election system had a discriminatory effect. This position was consistent with the letter of objection issued on September 14, 1979.

The District Court held that the proposed election changes had a discriminatory effect on minority voting strength. The dissent concluded otherwise. On appeal to the United States Supreme Court, the Department of Justice supports the views expressed by the dissent. Such a reversal of position in

view of the Department's evidentiary presentation during trial and the issuance of a letter of objection clearly demonstrates this Administration's inconsistency and insensitivity to protecting the voting rights of Hispanics.

In summary, this Administration's record in the voting rights area is discouraging at best. The Hispanic community cannot rely on the Department of Justice to enforce their rights under the Voting Rights Act. For this reason, the Hispanic community needs an amended Section 2 to correct the abuses which the present Administration to date has not seen fit to challenge.

SECTION 2

The proposed amendment to Section 2 in S.1992 would incorporate a discriminatory results test to establish a violation of the statute. Such an incorporation is necessary to effectuate the broad purpose of the Act to dismantle election devices which discriminate against minority voting strength. The requirement of proving a discriminatory intent as mandated by Mobile v. Bolden, 100 S. Ct. 1490(1980) would categorically prevent successful challenges to these discriminatory election devices.[11] As noted in previous testimony, there will simply be no smoking gun. Lodge v. Buxton, 639 F.2d 1358, 1663 n.8 (5th Cir. 1980). For these reasons a return to the discriminatory effects standards of pre-Mobile cases is necessary. This section of the written testimony will address the concerns raised by the Chairman in his opening remarks.

Contrary to the assertions made by the Chairman, the proposed amendment to Section 2 will not assure the incorporation of a

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11. The plurality consisting of Justice Stewart, Chief Justice Burger, Justice Rehnquist, and Justice Powell would require a discriminatory intent to succeed in a Fourteenth and Fifteenth Amendments challenge. Justice Stevens would focus on the objective effects of a political decision rather than the subjective motivation of the decision maker. However, Justice Stevens' objective effects test present such high evidentiary burdens, that the test can almost be equated with an intent requirement. Justice Stevens' test incorporates an inquiry to determine whether the election structure is unsupported by any neutral justification. Thus, discriminatory intent does play a role in Justice Stevens' analysis. Justice Blackman's concurring opinion merely assumes for purposes of this case that a discriminatory intent is required. Justice White would also require a discriminatory intent. Only Justices Marshall and Brennan explicitly reject a discriminatory intent requirement in establishing a Fourteenth and Fifteenth Amendment violation.

racial quota. The amendment specifically states: "The fact that members of a minority group have not been elected in numbers equal the the group's proportion of the population shall not, in and of itself, constitute a violation of this section." Moreover the House Committee report also states that the amendment does not require proportional representation at the remedy phase of a redistricting lawsuit. House Report at 30. The absence of minorities on an elected board in proportion to their representation in the population is merely a starting point for determining whether a statutory violation exists. Such a factor is no different from the use of racial impact in the constitutional analysis required under Village of Arlington Heights v. Metropolitan Housing Authority, 97 S. Ct. 555 (1977).

According to Arlington Heights, racially discriminatory impact or the absence of racially proportional representation alone will not be sufficient to establish a discriminatory intent under the Fourteenth Amendment. 97 S. Ct. at 563. Discriminatory impact, however, is relevant. As noted by the Court, in some instances, ". . .a clear pattern, unexplainable on grounds other than race, emerges from the effect of the State action even when the governing legislation appears neutral on its face." 97 S. Ct. at 564, citing Yick Wo v. Hopkins, 6 S. Ct. 1004 (1886). Similarly in the statutory framework, the absence of racially proportional representation is merely a starting point to assist the decisionmaker in ascertaining the presence of a discriminatory effect. Thus there is no radical departure from existing constitutional standards.

The proposed amendment to Section 2 will not guarantee elective posts for minorities. As noted in the House Committee Report, this amendment relies upon the evidentiary standards of White v. Regester, 93 S. Ct. 2332 (1973). The only modification incorporated in the proposed amendment to Section 2 is the abandonment of the requirement of demonstrating non-responsiveness by elected officials in order to establish a violation of Section 2. House Report at p. 30.

None of the litigation undertaken under White ever adopted proportional racial representation as a requirement for remedying a

constitutionally defective election structure. On the contrary, there is ample authority prior to Mobile rejecting such a standard. See Marshall v. Edwards, 582 F.2d 927, 936 n. 11 (5th Cir. 1978), cert. denied sub nom, East Carroll Parish Jury v. Marshall, 99 S. Ct. 2820 (1978) (As a goal "[p]roportional racial representation, though attractive, is an abuse of the district court's equitable discretion."); U.S. v. Bd. of Supervisors of Forrest County, 571 F.2d 951, 955 (5th Cir. 1978). Consequently a return to the evidentiary standards of White and its progeny will not mandate a remedy which is designed to guarantee the election of minorities.

A review of voting rights decisions prior to Mobile will reveal that the Courts focused on the impact of a given electoral scheme on minority voting strength, not on the electability of minority candidates. For example in Kirksey v. Bd. of Supervisors of Hind County, 554 F.2d 139, 152 (5th Circ. 1977) (en banc), cert. den. 434 U.S. 877, the Court held that a plan adopted by a Court should not divide a cohesive minority voting area in a community where racially polarized voting exists. In Marshall, supra, 582 F.2d at 938, n. 11, the Court noted that overconcentration of minorities is disfavored because ". . .it. . . reduces the influence of the group in the remainder of the. . .[district]." The proposed admendment to Section 2 would merely follow this precedent with respect to emphasizing the impact of a given electoral scheme on minority voting strength rather than focusing on the electability of a given minority candidate. The fear that a results test in Section 2 will "mandate" racial quotas is not supported by precedent in the law and only serves to distort the issue and deflect attention away from the voting problems Section 2 was enacted to address.

In his statement, Senator Hatch characterized evidentiary test of Mobile as not requiring a "smoking gun" or a confession of discrimination. According to the Chairman, both direct and indirect evidence can be utilized to establish a discriminatory intent. The Chairman's characterization ignores the difficulties of trying to establish a discriminatory motive. Circumstantial evidence is often the only relevant evidence available to ascertain a discriminatory intent. To establish a discriminatory intent from circumstantial

evidence requires adherence to the traditional tort standard. This standard establishes an inference of intent by examining the natural and foreseeable consequences of adopting a given election structure. Yet the Court in Mobile rejected the exlusive use of the tort standard by citing to Personnel Administrator of Mass v. Feeney, 99 S. Ct. 2282 (1979):

> " 'Discriminatory purpose'...implies more than intent as volition or intent as awareness of consequences. ...It implies that the decision-maker...selected or reaffirmed a particular course of action at least, in part 'because of,' not merely 'in spite of,' its adverse affects upon an indentifiable group." 100 S. Ct. at 1502. n.17.

To establish that a decision to enact or maintain a given electoral structure was reached because of its adverse effects upon an identifiable group would require a "smoking gun." It is not sufficient under Mobile merely to demonstrate that a given decision was taken in spite of its adverse effects upon minority voting strength. Given this evidentiary restriction, establishing a discriminatory intent on the basis of indirect or circumstantial evidence would be virtually impossible.

Additional support for characterizing the Mobile decision as requiring a "smoking gun" is found in Justice Stevens concurring opinion:

> "Today, the plurality rejects the Zimmer analysis, holding that the primary, if not the sole focus of the inquiry must be on the intent of the political body responsible for making the districting decision. While I agree that the Zimmer analysis should be rejected, I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers." 100 S.Ct. at 1512.

Thus Justice Stevens agreed that the plurality opinion placed too much emphasis on subjective intent.

This same understanding of Mobile is reflected in the dissenting views of Congressman M. Caldwell Butler in the House Committee Report:

> "The Supreme Court's decision in Mobile v. Bolden (1980) raised the issue of what is the appropriate standard by which to judge discrimination in voting rights litigation: the showing of purposeful intent or the showing of imbalanced or discriminatory effects. The intent test defined by the Court is a stringent standard which requires that a 'smoking gun' must be shown to successfully prove voting discrimination." House Report at 70.

Clearly these observations by Justice Stevens and Congressman Butler, as well as the rejection of the tort foreseeability standard, support the proposition that Mobile requires a high evidentiary

standard of subjective intent. Thus the availability of indirect or circumstantial evidence to prove a discriminatory intent is inconsequential since the legal standard for measuring the materiality of this evidence was rejected by the Court in Mobile.

An additional concern raised by the Chairman involves the effect of the proposed amendment to Section 2 on the substantive scope of the Fifteenth and Fourteenth Amendments. The amendment to Section 2 will not redefine the rights available under the Fourteenth and Fifteenth Amendments. As noted in the Committee Report, "Pursuant to its authority to enforce the Fourteenth and Fifteenth Amendments Congress has the power to enact legislation which goes beyond the specific prohibitions of the Fourteenth and Fifteenth Amendments themselves so long as the legislation is appropriate to fulfill the purposesof those constitutional provisions." Committee Report at 31. Thus Section 2 can prescribe an effects test even though the Fourteenth and Fifteenth Amendment protections may only reach purposeful discrimination. Section 2 will not rewrite these Amendments. On the contrary, Section 2 will supplement the protections afforded by the Fourteenth and Fifteenth Amendments.

MALDEF supports the bail-out provisions contained in S. 1992. The proposed bail-out standards permit those covered jurisdictions to bail-out if they have complied with the Section 5 preclearance provisions and have eliminated voting procedures and methods of election which dilute equal access as well as having engaged in constructive efforts to provide an expanded opportunity for the eligible voter population to participate in the electoral process. The bail-out provision offers an incentive for a covered jurisdiction to improve minority voting opportunities and protect minority voting rights.

Similarly the ten year extension of the bilingual election provisions serves to provide Hispanics with physical access to the electoral process. A bilingual election process will not serve to create a Quebec in the Southwest. Rather these provisions will politically integrate the Hispanic community.[12]

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12. The bail-out and the bilingual election provisions have already been extensively discussed in the testimony of Vilma S. Martinez.

CONCLUSION

In view of the extensive documentation prsented before the House hearings and the hearings before this Subcommittee, there is a well documented need to continue the federal role on protecting the voting rights of minorities. For these reasons, MALDEF urges the Subcommittee and the full Senate to support S. 1992.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 3, 1982

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This is responsive to the telephonic request of Mr. Steve Markman of your staff inviting me to respond to allegations made by Joaquin Avila, Associate Counsel of MALDEF that I have refused to meet with that organization to discuss pending submissions under Section 5 of the Voting Rights Act. According to press accounts, Mr. Avila testified, generally, that the Administration "is insensitive to Hispanics" and, specifically, that I had declined to meet with him last week to discuss a pending decision. In my opinion he is wrong on both counts.

The Civil Rights Division reviews about 6,000 changes under Section 5 of the Voting Rights Act annually. Because of the 1980 Census, the past few months have brought the largest volume of redistrictings ever processed in the Division. Although our resources are literally stretched to the breaking point I believe the procedures which have been developed over the last several years, and which I have not changed at all, assure that this important responsibility is carried out fairly and with full opportunity for the views of all affected citizens and organizations to receive consideration. Interested groups such as MALDEF receive a weekly notice of every submission and frequently forward written and oral comments to the officials conducting our reviews. Upon request staff members routinely meet with such groups to discuss their concerns. Mr. Avila himself is a regular participant at such meetings. The analysis done by our Voting Section invariably includes a summary of such views, and in making my decision, I carefully review the analysis.

On occasion when my review indicates it would be helpful, I schedule meetings with one or more interested parties. Obviously, given the volume of submissions and my other responsibilities, it is impossible for me to meet with every organizational representative that wishes to make a special case. Instead, I have continued a system that guarantees a full opportunity to comment.

For example, in the last week, the very period in which Mr. Avila apparently felt slighted, I reviewed and entered objections to the legislative redistricting in the Texas House and Senate and the Congressional redistricting in that state. In each instance comments provided by MALDEF were among the considerations that led to the objection. Indeed, of all the organizations participating in our Section 5 review program, MALDEF is by far the most active. Mr. Avila and his associates are in regular, virtually daily contact with us.

Under these circumstances, if the press accounts are accurate, I am astonished that Mr. Avila would advise the Judiciary Committee that we have been unresponsive to his group's interests based on my unavoidable inability to meet with him on a particular pending matter.

With regard to the general charge that this Administration is insensitive to Hispanics, much of the foregoing discussion is also relevant and instructive. We carefully review each submitted voting change to determine if it has a proscribed discriminatory purpose or effect -- applying the legal standards enunciated by the courts regardless of the nature of the minority group involved. As for our general interest in MALDEF's views, in point of fact I have met with representatives of MALDEF on two separate occasions during our consideration of possible extension of the Voting Rights Act.

In view of Mr. Avila's concerns and because he represents a major civil rights organization, I will attempt to schedule a meeting with him at a mutually agreeable time. On that occasion I will outline the above principles and reassure him of our continuing interest in his organization's views.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Senator HATCH. Our next witness will be Mr. Steve Suitts, the executive director of the Southern Regional Council.

Mr. Suitts, we are happy to have you here, and we will look forward to taking your testimony at this time.

STATEMENT OF STEVE SUITTS, EXECUTIVE DIRECTOR, SOUTHERN REGIONAL COUNCIL

Mr. SUITTS. Thank you, Mr. Chairman and the subcommittee.

I want to submit my written statement for the record and will briefly review it.

Senator HATCH. We appreciate that, and your statement will be made a part of the record at the conclusion of your oral presentation.

Mr. SUITTS. Thank you, sir.

My name is Steve Suitts, and I am the executive director of the Southern Regional Council, the South's oldest biracial organization.

For more than 38 years, the council has worked toward equal opportunity for all people of the region, and one of our paramount concerns has been the right to vote. Since the 1940's, the council has gathered a great deal of research relating to voter participation and voter registration rates and has recorded incidents of violations of the law in this field. I want to share some of our observations and findings today.

I think it is remarkable, Mr. Chairman, that the South has lived with the Voting Rights Act for more than a decade and a half and it has, in fact, set in motion our region toward a more democratic government, free of racial discrimination in voting. While this progress has been bottomed on all elements of the act, it has depended largely on the administrative mechanics of section 5 and upon private litigation on section 2. These two provisions have accounted for most of the sustained gains that have been made in assuring equal suffrage for black southerners.

Without a U.S. Attorney General and a Justice Department that will enforce section 5 with vigor and without an exacting measurable standard of proof for section 2, we have perhaps the capacity of the law merely to state a principle, leaving only the sham of reality.

It would be, however, a mistaken notion to believe the vast improvements hve been made for black citizens in the right to vote throughout the South. Although registration data is only now being compiled because of the lateness of the census data from 1980, it is worth noting that barely half of the elibible population who are black in Georgia is registered to vote today, while more than two-thirds of all eligible whites are registered.

The racial disparity in registration rates is exceeded in 60 percent of the Georgia counties, and the largest gaps continue to be concentrated among those counties with substantial black populations. Sixteen years ago, the difference between the registration rates of black and white Georgians was 23.6 percent; today that rate remains at 15.2 percent difference.

While this act has been called the most effective piece of civil rights legislation, section 5, which is at its heart, is not self-executing. In fact, our research shows that the enforcement of section 5

has been at times haphazard and certainly not uniform, and that this condition has more often been to the disadvantage of the affected black citizens than to the disavantage of local governments.

Perhaps the most grievous, consistent and widespread failure of the Justice Department has been its inability to assure that every electoral change by local and State jurisdictions is in fact submitted for review. The council's research has found more than 750 State enactments in six Southern States affecting voting have been passed by State legislatures since 1965 which have not been submitted for review under section 5.

The unsubmitted enactments affect a wide variety of practices, and they affect procedures in nearly 200 countires, and they affect procedures in nearly 200 counties among the six Southern States and probably include as many as 100 State enactments applying to all counties of each applicable State

These findings probably indicate only part of the problem of noncompliance. In most Southern States, governmental structures and voting procedures are shaped both by official actions of local government and State government.

While the council's review of State acts examined only the level of compliance at the State level, we have been able to undertake at this time a limited review of some changes affecting county governments in North Carolina. In this research we found that, throughout the State, 150 State laws affecting voting which still have not been submitted for review by the Justice Department have been passed by the State legislature. A total of 17 changes were identified relating to county government in North Carolina in three areas: form of government, number of members, and the terms of office.

Now, among that limited number, we found that only two had been submitted to the Justice Department, and those two were enactments by the State legislature. The other 15 had not been submitted. All of the 12 changes which were incorporated by local governments had not been submitted. In other words, no electoral change identified in this limited study which was made by a local government in North Carolina has been submitted to the Justice Department for review.

I think the evidence of this admittedly limited research, which will continue in the future, suggests the failure of local governments to submit changes in the practices and procedures relating to voting may be as widespread, if not more so, than the patterns of noncompliance of State governments in the South.

On balance, it is clear that the Justice Department has failed to inspire or require strict compliance with the key provision of the Voting Rights Act.

Without vigorous enforcement of the administrative procedures, section 5 is not an effective part of the act. However, section 5 does have an exacting, measurable standard of proof. Section 2 of the act, however, presently under Supreme Court interpretation, has an intent standard, and we urge that that intent standard be amended, as the House bill does, so that Federal courts may be able to judge electoral changes which were enacted before 1965 in the South by a standard which can be measured and which is more exact.

While this change will alter the holding of the Supreme Court case's interpretation of the statute, the *Mobile* case generally is not the standard by which we believe Federal judges in the Deep South have, in the past, applied the law.

While we believe that the House bill presents some important provisions, we also suggest that this subcommittee consider other changes that would strengthen the act by assuring that key provisions of the act are enforced to the letter of the law and by bringing a greater sense of evenhandedness in the application of the law. I will submit, from our president, a more detailed listing of these proposed changes, but I want to make two for the record.

First, there is a need for civil penalties for local and State governments that fail to comply with the act. The council's research illustrates a pattern of repeated failures to submit voting changes in the Southern States. In North Carolina recently the State submitted a 1968 constitutional amendment, 13 years late, and only after litigants in private litigation asked the court to require that it be submitted. This requirement provided that the North Carolina Legislature had to draw State house and Senate district lines along county lines. It was held to dilute black citizens' right to vote in November 1981 for the U.S. Attorney General. In other words, for more then 13 years, because this enactment had not been submitted, we have seen the practice of an unlawful voting scheme in that State.

Civil penalties could be a useful deterrent in assuring that the law is complied with, and we believe that there is evidence to suggest that that kind of penalty is necessary in order to discourage serious damaging violations which will occur.

We are also asking that there be placed in the law a need for more evenhandedness. Under existing law, public jurisdictions have a right to seek judicial review of an objection under section 5. An affected black citizen who may be damaged by the failure of the Justice Department to object does not have that right.

We believe this is particularly important because the failure of the Justice Department to object can be viewed as merely a technical, clerical, or administrative error. In the case of Sumter County, Ala., recently, there is a dispute over whether the Justice Department in fact had objected within the required 60 days.

Now, apparently, the reason the Justice Department did not object, if it did not, within 60 days was simply a clerical error. The letter that should have been sent did not get sent. Is it a fair process that we have underway to permit that kind of mistake to be the final matter of judicial review for an affected black citizen who may be damaged by the change in the law in rural Alabama? We believe it is not.

Mr. Chairman, an effective Voting Rights Act with vigorous enforcement is the clearest, most realistic promise to black southerners that we will continue to have progress in and not the abridging of the right to vote.

Seventeen years ago, you and your colleagues in the Senate placed into law the mechanics by which to do this. You now have an opportunity to give strength to that act. I hope it is an opportunity, and I think black and white citizens in the South hope that it

is an opportunity, that you will not relinquish until the Voting Rights Act helps put into the roots of the South the right to vote.

Senator HATCH. Thank you so much, Mr. Suitts.

You complain about several enactments passed by the North Carolina Legislature which were not submitted under section 5. Is there any decision of the Supreme Court which holds that the legislature of a State which is only partially covered must submit its enactments to the Justice Department?

Mr. SUITTS. I do not know that there is a case precisely on that point, although I do not know that there has been any serious argument that that is not a requirement. It is pretty obvious that all those items which we identified do affect the 40 counties. There is a holding in the Federal court in North Carolina that a statewide law which affects one of the 40 counties must be submitted.

Senator HATCH. What is the difference between the effects test in section 5 and the proposed results test in section 2 of the present law, and why is there different language?

Mr. SUITTS. I think the results test is less strenuous than the effects test in section 5. The council regrets that the House felt it necessary to place the results test under section 2 and avoided the effects test.

I would suggest to you, Senator, that the results test, as has been said, follows the force of *White* v. *Regester*. I think the effects test is a bit more stringent.

Senator HATCH. Well, in your opinion, what, specifically, is the results test in section 2 of the House bill and, frankly, what does it mean?

Mr. SUITTS. I think it does mean that where a voting practice has a result of discriminating against minorities in the South, that result is unlawful.

Now, I think that that will be shown by a series of factors shown in the *White* case, and I think that it is an interpretable standard. I think it is a measurable standard. I simply do not think it is as strong as the effects standard.

Senator HATCH. This still leaves us with my original question unanswered. What is the standard? Can any among you people who so adamantly support the standard, define it?

Let me elaborate. Every time I try to determine what the specific standard is which will be used to identify discrimination under the "results" test, I get the response that the court has to consider the "totality of the circumstances" or that it has to "weigh all the factors." I think that is nice, but I think it is also irrelevant.

I am heartened by the fact that the court must consider all of the evidence. This is, of course, no less true under the intent test. What I would like to know, however, is how the court evaluates this evidence. In other words, what is the judicial standard? What is the judicial inquiry under the intent test? As I view it, the court must evaluate all of the evidence before it can make a determination of whether or not the circumstances raise an inference of intent.

So what is the comparable question under the results test? My personal belief is that is is invariably a question of the existence of proportional represenatation, and I think there is a wide body of authority who would agree with that. Indeed, I do not even see the

purpose of a court considering the totality of the circumstances under the results test, because it would not know what to do with all these bits of evidence with no real standard to define effect. In fact, the court would need to look at virtually nothing more than the lack of proportional representation and one other scintilla of evidence, as it was so aptly put last week.

In my opinion, this is the key. I do not want to know what evidence would be permissible. That is not what my question is. I want to know how that evidence is to be evaluated. What does the evidence have to suggest in order to demonstrate a violation. The totality of the evidence is going to be utlized to establish the intent test.

What, really, does the results test mean? I have not gotten a very definitive answer to that question from anybody, I hear all these comments by my colleagues and by those who testify that it is such a very simple standard, yet none seems able to define just what the standard is. What it sounds to me like is that if the result "looks like" discrimination, then it must be. As you and I both know, appearances are an insufficient ground on which to base a finding of discrimination. As a matter of fact, appearance are probably not indicative of discrimination in most cases. In other words, it appears to be obvious that this standard is just a very simplistic method for trying to get around the necessity of proving your case with reasonable, credible evidence.

I guess the question is, what is the purpose, not the scope, of the evidence?

Mr. SUITTS. It is to prove that the results of a practice or procedure are racially discriminatory and does not require a determination, as an intent standard would, as to whether it was in fact the primary, consistent motive that that be the result.

Senator HATCH. Under your definition, then, even if there was no intent nor any shred of evidence that there was an intent to discriminate, a whole community or political subdivision could be branded as a discriminatory political community, subdivision, or division.

Mr. SUITTS. I think, Senator, that if you and I were to go down to the "black belt" of Georgia, I think we could agree on what results——

Senator HATCH. I think we could, and I think, in each and every case, we could agree that there is an inference of intent in those cases. I do not think it is a monumentally difficult job to prove intent. I have done it in almost every case I have had to try as an attorney and I have tried a considerable number of cases.

In every criminal case, I had to prove intent beyond a reasonable double. In a number of the civil cases, I had to prove intent by a preponderance of the evidence. In very few cases did I have a confession so that I could directly show intent. I had to create the influence through circumstantial evidence or otherwise, in order to go to the jury.

What it comes down to is, what question does the Court ask itself? Tell me. You say this is such a wonderful thing and it is going to make civil rights law more just and it is going to solve all our problems. Rather, I see amended section 2 leading to the cre-

ation of the racism and the segregation that everybody in the civil rights community strives to eliminate.

But what question does the Court ask itself when employing the effects test or to determine the effects of a situation? Is the standard simply based on a belief that if a situation looks like discrimination it must be discrimination? Is that it?

Senator KENNEDY. Could I ask, Is the Chairman's time up? Are we operating on a 10-minute rule?

Senator HATCH. Let's see. We did not hit the light.

Senator KENNEDY. The light was on. I am just trying to, since I was interrupted in my questioning, I just want to find out what the rules are.

Senator HATCH. Well, why don't you answer that question. Mr. Suitts. I do not think I have gone 10 minutes, but answer that.

Senator KENNEDY. Could I ask just for the clarification so we know, in the course of these hearings, what rules we are going to proceed on?

Senator HATCH. We will proceed on the 10-minute rule.

Answer that question, and then we will turn to Senator Kennedy and give him 10 minutes.

Mr. SUITTS. I think a judge would be bound, under a results test, to look at whether or not the scheme of circumstances created by the jurisdiction creates a discriminatory scheme.

Senator HATCH. You are giving me the evidence again. You are not giving me a standard with which to evaluate the available evidence.

Mr. SUITTS. If the law said that at-large procedures were unlawful, and I do not think the law should say that, but if it did, then I think we could talk about what it is that is an intent standard and what it is that is a results standard.

What you have to do, because this law does not specifically identify a practice, a specific conduct which is unlawful, as would be my taking a gun out at this moment and aiming it at the colleague to your right—there what my intent was would be very important. What we are talking about here is whether or not there is going to be a finding of a violation of law and whether the results of that effect, whether the results of those practices are going to establish that there was a violation, or whether or not you also have to prove both that the results were discriminatory and that, also, there was an intent to make sure that had a disciminatory result.

Senator HATCH. Well, we will go to Senator Kennedy, but I just ask again, what are "disciminatory results." We need a standard in order to make that determination. That is why the Supreme Court has said it, I presume, in *Mobile*.

Mr. SUITTS. All I can say, Senator, is that the language of Utah west of the Mississippi is different from the language of Eutaw, Ala., east of the Mississippi. We are not communicating.

Senator HATCH. I agree. I certainly agree with that, and I will tell you one thing: You certainly have not given me one shred of evidence of the existence of a standard that would exemplify or justify the results test. We have a standard with the intent test, however, a standard which has been used in courts of law for centuries.

Mr. SUITTS. Well, I regret that I am not cogent enough in this.

Senator HATCH. Senator Kennedy?

Senator KENNEDY. What is the time now, just so we know?

Senator HATCH. You have 10 minutes. As soon as the light goes on, you will have 10 minutes.

Senator KENNEDY. Well, let me ask the staff how much time the chairman had.

Senator HATCH. Might I remind you Senator Kennedy, that you are not even a member of the subcommittee. We are showing you a great deal of deference and courtesy, which I would always extend, by providing you with the opportunity to sit on this committee for these hearings.

Senator KENNEDY. I just wanted to find out. Either I am going to be able to inquire, ask questions, and we are going to have procedures that we are going to follow, and they are going to be respected by the Chair and the other members of the committee, or we are not.

Senator HATCH. We have been trying to do that. When the green light goes on, you have 10 minutes; when the yellow light goes on, you have 1 minute; and when the red one goes on, I want you to stop.

Senator KENNEDY. And my question of the staff is how much time did the Chair have. I think I am entitled to that amount of time.

Senator HATCH. The Chair rules it had 10 minutes. Now, go ahead.

Senator KENNEDY. Well, I am asking the staff. Can I ask the staff?

Senator HATCH. No; if you were a member of the subcommittee, maybe you could. Go ahead and take your 10 minutes or I will move to Senator East. In fact, I will give you more than 10 minutes, Senator Kennedy.

Senator KENNEDY. All I want to do is just be treated as any other member.

Senator HATCH. You are being treated as any other member.

Senator KENNEDY. I have been a member of this committee for 20 years. I have seen the members of this committee who have agreed with my position and have differed with my position treated fairly and equitably, and either there are going to be rules which we are going to follow or there are not, and if there are not going to be, then I am glad to bring that up to the full committee——

Senator HATCH. That will be fine with me.

Senator KENNEDY [continuing]. And have the standards established on it. But I am not going to have one rule set for one member of the committee and another rule set for other members of the committee. That is not the way this committee has operated over the 20 years, and if that is going to be the desire by the majority on that, then I think we are going to find out about it.

Senator HATCH. Well, I believe I did take about 10 minutes. Let me clarify the rules. Apparently, a mistake was made. I do not handle these lights. I estimate that I took about 10 minutes. If I took a little bit more, then I apologize for that, but what we have tried to do is stay within the 10 minutes. I am trying to get today's hearing concluded in a reasonable amount of time.

I might mention, the Senator is not even a member of the subcommittee, yet the chairman has ruled that you can participate

fully in these committee hearings. If your 10-minute time limit expires, I will be happy to move to Senator East and then come back to you as I did before, so you can have extra time. We are always going to show that kind of courtesy to you, but I do not think we need to go through a lengthy discourse over any and every procedural problem which may occur. I apologize for the fact that the light was not on, but I do not think I took much more than 10 minutes.

Senator EAST. I would like, since the issue has been raised, to defend publicly the chairman of this subcommittee, who has very graciously invited all members of the Judiciary Committee to be here and to participate.

I would like to remind our distinguished colleague from Massachusetts that, last Thursday, his staff member was allowed to ask questions extensively——

Senator HATCH. We showed deference there.

Senator EAST [continuing]. To a staff member, in other words, playing Senator for some length of time, which no one objected to, and I think that is fine. But if the implication is that Senator Hatch has not given an open, fair, equitable, balanced hand in these hearings, I must, as a guest here, because I, too, am not a member, strenuously object to that, because I think he has done to the contrary, and he has indicated that if, per chance, there is a slip between the cup and the lip, he is willing to go back and correct it. So I commend him. I think he has been very generous and openminded.

Senator KENNEDY. Just for the basis of the record, the chairman's staff member inquired and asked questions, which I welcomed last week.

Senator HATCH. We did ask one question.

Senator KENNEDY. And when the Senator was not here, I made a request to the committee that my staff be able to do so, and that was granted at that time.

Senator EAST. That is right.

Senator KENNEDY. So that was not any unusual procedure.

Senator HATCH. Well, Senator, I do not think anybody is complaining about that.

Could we go to questioning——

Senator KENNEDY. Sure, we can, but——

Senator HATCH. And let's quit worrying so much about procedure and worry a little bit more about the testimony being given. It is the most important consideration to be addressed.

Senator EAST. That is right.

Senator HATCH. If I made a mistake and went a minute over, which I do not think that I did, I apologize. We are going to show deference to Senator Kennedy, even though he is not a member of this committee. I think we have done it from the beginning of this subcommittee, and we are going to do it whether anybody likes if or not. I think I have always done that as a committee chairman, both on the Labor Committee and here.

Senator, to make any inconvenience caused by any procedural difficulties up to you, we will give you 11 minutes right now. How is that?

Senator KENNEDY. I am not asking for any gratuitous action by the chairman.

Senator HATCH. I am merely asking for some reciprocal courtesy; please go ahead, Senator.

Senator KENNEDY. I just happen to be a member of the Judiciary Committee, and I am entitled to rights, and I intend to see those rights complied with——

Senator HATCH. Let's give you 12 minutes, Senator.

Senator KENNEDY [continuing]. Whether it is chairman's desire or not. We are Members of the United States Senate, and I am not going to be pandered to.

Senator HATCH. Well, then, take 13 minutes, Senator. That will be fine with me. In fact, take all the time you want.

Senator KENNEDY. See how well we get along on this? [Laughter.]

Senator HATCH. Actually, we really do. [Laughter.]

Senator KENNEDY. Is that green light still rolling?

Senator HATCH. Put the green light back on.

Mr. SUITTS. For a while I thought this was the Alabama legislature. [Laughter.]

Senator HATCH. We are not that good.

Senator KENNEDY. Those who think that the bailout requirement we are adding to the law in this bill should be a lot looser argue that we are trying to punish jurisdictions for their past sins. What is the perspective of the Southern Regional Council, based on your extensive research about the present threat to the voting rights in many areas, if the protections of section 5 are removed?

Mr. SUITTS. Senator, I think the consequences of removing section 5 would be to halt what has begun since its original passage, and it would, I think, create not only problems with representation for black citizens, but also it would begin to dilute their votes and dilute the notion of democracy in our region.

I have no doubt that there would occur both changes specifically calculated to dilute black voting strength and the rights of black citizens to vote, and a callousness about whether those rights should occur.

I think we have seen in Alabama recently, as this law was pending for renewal and will expire by August 6 if not renewed, some unprecedented efforts to try to require all citizens to reregister under the most restrictive circumstances. I think that is an illustration of local legislation that we would begin to see more often, and we would begin to see often. The basic indicators of the right to vote, voter registration, and other indicators. would begin to show that democracy had been lost in the South. And I do not exaggerate in that forecast.

Senator KENNEDY. Do you think that the provisions in the bill are too stringent or that it is an impossible bailout? If so, what are your reasons?

Mr. SUITTS. Senator, the council is not particularly taken, as we say down South, with this particular bailout, not because it is too stringent but because we fear it is too loose.

Senator KENNEDY. Why do you think it is too loose?

Mr. SUITTS. Well, there has been mention by other witnesses that the affirmative requirements for bailout do provide an incentive but that they are subject to interpretation.

The history of the enforcement of section 5 shows, I think without question, that if there is to be interpretation, it will not be the local governments who suffer from that interpretation of those provisions by the Justice Department or others; it will be the affected black citizens.

Second, we are not particularly taken with the notion that particular counties can bail out, even though the States cannot. We see that that particular provision will allow a shell game to go on. State governments have a lot to do with the particular conditions of local government, and we could find situations where the State legislatures would begin to take actions which the counties could have taken, but they can be permitted not to take those assuming that their local legislators will take the actions in their stead.

We do not want to encourage that kind of duplicity, which is exactly what the Voting Rights Act, in its original form in 1965, put a halt to. So, if anything, we think that this is the bottom line.

Senator KENNEDY. We are referring now to the bailout provisions in the Mathias-Kennedy motions. Is it reasonable, in those bailout provisions, to require that places trying to bail out show some constructive efforts to open up the political process fully to minorities such as reasonably accessible registrations and efforts to stop intimidation?

Mr. SUITTS. I think those are, in general, reasonable, good incentives. I fear, Senator, that while we are willing to live with them, my fear is that that standard is not tough enough, that it will be subject to interpretation which makes those meaningless. We are willing to live with that if we must, but we would prefer a tougher bailout. But if this is one that the House has passed and that the Senate will adopt, we think it is the minimum.

Senator KENNEDY. There have been suggestions questioning the fairness and reasonableness to require that all of the counties of the State be eligible to bail out before the State may bail out. We have been told that this was unfair to state legislators. What is your reaction?

Mr. SUITTS. I think the fact is that the States do have responsibilities for local governments. As a matter of fact, States participate in every session, through their legislatures, in shaping local policies, in overturning decisions of local governments. That responsibility cannot be shirked and should not be shirked, and this subcommittee should not give an incentive to see that that happens.

States are responsible for local governments. They create them; they alter them. This act should recognize that basic fact.

Senator KENNEDY. I want to thank you for your presentation and responses to the questions.

Senator HATCH. Senator East?

Senator EAST. Thank you, Mr. Chairman.

Mr. SUITTS, I appreciate your coming this morning and helping us on this critically important subject.

I think Senator Hatch has very ably put his finger on the thing that is most difficult for him and, I must say, for me. I am speaking for myself here now; he speaks too ably for himself for me to be an interloper. But this whole question of the effects test, the criteria, they just are not there.

I would submit that is really where we are. There really are not any other standards. You know, in the *City of Rome* case, there you had the effects test ensconced, and a third of the population was black. No one was contending discrimination, but they were simply contending that, in the at-large elections, blacks had not been elected; hence, ipso facto discrimination—in other words, proportional representation—compelled them to go to a district system.

As this law then has evolved, and you are an advocate on that side of it, and I think this is where your testimony has been very valuable, as I would see it, let us focus on this question as to whether there really are any hard-and-fast criteria. I submit there are not.

As consequence, it leads me to this next point I would like to make to you. You mentioned North Carolina, which obviously I must rise to comment upon, being a Senator from North Carolina, a junior Senator. First of all, North Carolina does have, and has historically had, I think, as progressive a record as any Southern State on this matter. I remember, not long ago, our Governor was up here, and Senator Kennedy and I on the Labor Committee and Governor Hunt were sharing some comments, and he congratulated the Governor on the great record of North Carolina.

But in North Carolina, you see, today, we cannot even hold elections for the House of Representatives and the State legislature. Why? Well, we feel we have been blindsided—mugged, really, in a way—by this very vague effects test. I mean, an innocuous thing is done, and then, all of a sudden, someone turns it around and says, "well, by some strange rationale, it diluted some sort of voting strength, and the effect is racial discrimination."

We are hog-tied down there. We cannot even hold primaries for the House of Respresentative races right now. The whole thing started when Durham County, where Duke Universtiy is located, was put in the Second District, and the Justice Department ruled, based upon the effects test, that it had not been shown that the reason for the change in the county was not to involve racial discrimination. This was a very perverse way of stating the proposition, putting it in the negative of an effects test.

You mentioned our constitutional provision about not splitting counties. Now, the purpose of that was to maintain the political integrity of counties, which seemed to be wholly independent of the question of race. Then someone spun out this theory that, well, you ought to split counties, and if you don't, then there is the potential there that you might discriminate on a racial basis.

My point is, and Senator Hatch is making it, all of this puts the State of North Carolina, or any other covered State, or partially covered—40 out of our 100 counties—under standards that are nonexistent. You are simply at the mercy of the elite bureaucracy here. Again, it has nothing to do with the 15th amendment. No one is contesting, really seriously, as I understand it—I have not seen it in any of the comment in North Carolina or here—that there is a problem of, in this case, black minority members of our State, registering and voting.

The 15th amendment is accorded with, and rightly so, and we are happy to participate in that. But again, we are into effects; we

are into proportional representation, apparently; we are into again, the *Rome* case.

Not just because I represent an affected area but because these new changes would undoubutely extend this nationwide, I do not see how one can take this effects test, in view of, as I noted earlier, my understanding of the 15th amendment and what Congress must have intended in the 1965 Voting Rights Act, to ensconce the effects test in the law of Congress.

As Senator Hatch has indicated, as a practical matter, that is going to give us poportional representation, and as I indicated with the earlier witness and as Senator Hatch has suggested, too, I think it is going to fragment, going to create antagonism in American polities, again the district system, away from at-large, guaranteeing results, I presume with black as well as white, as I was noting with the earlier witness.

In order to bring a sense of some degree of coherence and integrity into the law, there has got to be a degree of objectivity and criteria to it. Otherwise, we are simply at the mercy of whatever intution the Justsice Department might have on Monday morning and Thurday morning.

To people schooled in the law and in Anglo-American law, that is troublesome. That is not law. That is just vague wishes. I think we will do a disservice to the cause of civil rights and voting in this country if we cannot put on our thinking caps and come up with some objective criteria by which we evaluate misconduct as regards the 15th amendment, like we do with every other kind of misconduct, tort or criminal. Standards? I do not see them.

Again, could you give us something we might at least begin with, something other than merely saying, well, there is not proportional representation; ipso facto, there must be discrimination; ipso facto there must be a 15th amendment problem.

Mr. SUITTS. Senator, I have some distant relatives in North Carolina, and I think highly of those folks and that State, but I think the cases in North Carolina under section 5 pertaining to the congressional and legislative districts are not unrepresentative of precisely what is at work here under thats particular element of the statute.

There was an argument, as I understand it by the State top reserve county lines, but in this recent congressional plan, at least one district did cross county lines, did split up counties. The fact is that with the shift of population in North Carolina since the 1880's drawing at-large systems, especially in metropolitan areas and in the seacoast area, did not prevent someone from going to the ballot box, but because of the practices of bloc voting in many of those communities, it did bar black citizens to be able to have that vote counted, just as if it were tantamount to someone saying, Yes, you may mark that ballot, but no, I will not put it in the ballot box.

I think that is a part of the vote. I think that was intended by framers of the 15th amendment. Senator, if there is a problem in defining what are standards, by any definition in this act, it is my view that, on the evidence that we get, the people who suffer are not the local governments in the contest of one side against another. That discretion has more often, if not prevailingly been used to deny relief to affected black citizens.

That is my view of where discretion is and any standards are going to require some interpretation that we have. It cannot work mechanically, nor should.

I think, Senator, that we are not encouraging future racial strife by this bill. I think what we are doing is looking for a democratic society in which all citizens feel that they have some empowered right to go to the ballot box and to cast a vote that is going to mean something to them. I think that is not going to mean that we are going to have more racial polarization; I think it will mean we have less.

In the city in which I now reside, Atlanta Ga., we now have two single-member districts which are more than 70-percent black who elect whites to represent them. They do so with a substantial majority of the registered voters who are black.

I think what we are trying to do is make sure to hold faith with all citizens that have the right to go to the ballot box and to have that vote counted. Once that is secured, once we have done that, once we have accomplished that, I think that we are going to have an equal opportunity, and I think we are going to begin to see that racial barriers, racial distinctions, will break down. That is my vision of what is going to happen.

Senator EAST. But the difference I have with you—I do not quarrel with your saying that it is within the letter and the spirit of the 15th amendment, the right to register to vote and have that vote cast and to have it counted. I would agree with you on that. But you are going further than that now with your effects test, not only to have it counted but to get this result, and therein lies the problem.

You are talking about not only registering to vote and having it counted but you are also saying, "And by the way, if we do not get this result, we small keep changing and manipulating and reorganizing and redoing until we get it if it means abolishing at-large elections and going to districts or whatever," and that is the nub of the problem.

That is where I draw the line, because I do not think it is consistant with the 15th amendment; I do not think it is consistent with sound democratic political theory of the right of individual to register, vote, and have it counted. To go beyond that into the effects test as ipso facto evidence of racial discrimination with no other criteria except some vague longing that justice, as I subjectively define it down in here intuitively, would have produced this result, I cannot agree.

I just do not think that satisfies people who are thinking in the usual norms of the rule of law. We need clearly defined, articulated, specific criteria so that we can act in knowledge upon what the law requires—it goes back to Aristotle's rule of law. No wonder North Carolina is in a total state of turmoil down there. Nobody has the slightest idea that the law is except for the latest reading from some fellows in the Justice Department, bless their hearts, who are probably trying to do their best, but how do they know? It depends on what they had for breakfast, it almost seems sometimes. One does not know, and, doggone it, the rule of law ought not to be killed, I do not care how honorable the intentions.

I think that is what Senator Hatch is insisting upon. That is what I am insisting upon, at least. Again, he is too articulate and eloquent; I do not have to speak for him. But we want specifics and concretes, and if those are there and they are satisfying and can be put in some sort of reasonable form, then we make progress. But right now all we have are vague yearnings for something called justice which is never clear because no one has any defined idea of what it is.

I think the framers of the 15th amendment would say, Gentleman, you have to think a little more clearly than that, and you have to articulate a bit more than that, within the great spirit of Anglo-American law and the legal tradition, it seems to me.

Mr. Chairman, I have run out of my time.

Senator HATCH. Thank you, Senator East.

Let me just ask one other question. Mr. Suitts, you indicated in your statement to Senator East, that the votes of some citizens in North Carolina were not counted, as I recall. I am not misstating that, am I?

Mr. SUITTS. No, sir, I do not believe you are misstating it.

Senator HATCH. What do you mean by that? Does the voting registrar count only those ballots put in the ballot box by whites? Maybe I could ask this: Are you aware of any instances in the areas that you have worked where individual citizens have been denied an oppportunity to register or to cast their vote in North Carolina? Isn't that what the act is aimed at eliminating?

Mr. SUITTS. Do you want to put a time limit on that? Within the last year?

Senator HATCH. I do not particularly care what time frame we assess, let's say the period of time since 1975.

Mr. SUITTS. I do not know that there has been a judicial determination, but there have been some allegations that there have been incidences in some counties. We have had no authority of govenment, authority vested in law, to determine yet those who are at fault.

Senator HATCH. Well, have you brought suits on behalf of those individuals effected where such instances have been evinced?

Mr. SUITTS. There have been complaints to the Department of Justice, I think.

Senator HATCH. I see.

Mr. SUITTS. And there have been contested elections about whether absentee votes should be counted or had been counted, those sorts of disputes.

Senator HATCH. But could you give us specific examples? You say there have been complaints made to the Department of Justice. Do you actually know of any specifically in North Carolina or, for that matter, anywhere else? I am concerned about this prospect.

Mr. SUITTS. I shall be glad to go to our files and pull that out?

Senator HATCH. You will provide that to the committee, then?

Mr. SUITTS. I will provide that to this subcommittee.

Senator HATCH. All right. I think that would be fair.

Thank you, Mr. Suitts. We appreciate your being here.

Mr. SUITTS. Thank you.

Senator HATCH. I might clarify that when I said that my purpose in trying to move this along was to get these hearings over with,

that I did not mean to imply that we would get all of our hearings over with today. I simply want to proceed expeditiously with these hearings and I want to get these matters taken care of. I want, however, to have all witnesses have the opportunity of testifying and answering questions. In fact, I have been quite pleased with all witnesses on both sides of these various issues. I think they have been highly informed, articulate, and decent witnesses, and I certainly commend you for coming.

Mr. SUITTS. Thank you, sir.

Senator EAST. I would like to thank Mr. Suitts for coming, also, and for your very valuable testimony. Thank you.

Mr. SUITTS. Thank you.

Mr. Chairman, I would have thought that with your graciousness you have certainly got some southern family somewhere. [Laughter.]

Senator HATCH. That is very nice of you to say. I would be indeed honored if that were true. I am not sure that it is, however.

[The prepared statement of Steve Suitts follows:]

PREPARED STATEMENT OF STEVE SUITTS

Mister Chairman:

My name is Steve Suitts and I am the executive director of the Southern Regional Council, the oldest biracial organization of the South. I am pleased to accept the invitation of this Subcommittee to speak about the pending issues surrounding the renewal of the Voting Rights Act.

For most of its 38 years, the Council has considered the right to vote a paramount concern and has carried out research and technical assistance to identify the barriers and problems of equal suffrage and to enforce the provisions of established law guaranteeing voting rights. Since the 1940's the Council has gathered and interpreted data relating to voter registration and participation and has recorded incidents of violations of the right of black citizens to vote and to have their vote counted. Today the Council continues its research and work in these areas, and I want to share with you some of our findings, observations, and conclusions that address the issues before you.

While an obvious fact, it is remarkable that Southerners have now lived for more than a decade and a half with the Voting Rights Act. It has not made the region a "conquered province," as even one of the most dedicated jurists once suggested in hyperbole, and instead has set the South in motion towards a more democratic government, free of racially discriminatory practices. While bottomed on all protections in the Act, this progress has depended heavily upon the administrative mechanisms of Section 5 and private litigation under Section 2 of the Act. These two provisions have accounted for most of the sustained gains that have been made in assuring that equal suffrage for black Southerners is not obstructed by subtle or indirect means. They depend upon the vigor, good faith, and resources of the Justice Department to enforce the law and upon the legal standards of proof by which barriers are challenged in the courts.

Without a United States Attorney General and a Justice Department that will enforce Section 5 scrupulously and vigorously and without an exacting, measurable standard of proof for private litigants in voting cases, the law's capacity to restore and preserve democracy in the South can be reduced to little more than a statement of principle with only the sham of reality.

It would be a mistaken notion to believe that even traditional indicators of voting problems show vast improvements. Although data for all Southern states are not available at the moment, a recent analysis of the registration rates in Georgia tell us that by the most basic indicator of barriers to voter participation substantial differences persist in the full access to the ballot for blacks and whites. Barely half of the eligible black population in Georgia is registered to vote today, although more than two-thirds of all eligible whites are registered.

The racial disparity in registration rates is greater in 60 percent of Georgia's counties than in the state as a whole, and the largest gaps are concentrated among those counties with substantial black populations. Sixteen years ago the difference between the registration rates of black and white Georgians was 23.6 percentage points. Today the black rate remains 15.2 percentage below the white rate.

While the Voting Rights Act itself has been called the most effective civil rights legislation in this country, the enforcement of Section 5 is not self-executing and has been difficult and sometimes haphazardous. Perhaps the most consistent, grievous, and widespread failure on the part of the Justice Department has been its inability to assure that every electoral change by local and state jurisdictions is submitted for review. The Council's research indicates that since 1965 in six Southern states as many as 750 state enactments affecting voting have been passed by state legislatures and have not been submitted for review under Section 5.[1]

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1 These states are: Alabama, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina. The Council's research was carried out by reviewing all state enactments and identifying those which affect voting. Those enactments were checked against the listing of submissions provided by the Department of Justice. The Council is preparing a special report on its research and will file the report with this subcommittee at a later time.

These laws apparently affect a wide variety of practices, including changes in the forms of government, new terms of office, annexations, relocation of polling places, and changes in the methods of election. The unsubmitted enactments affect voting procedures in nearly 200 different counties among the six states and probably include as many as 100 enactments that apply to all counties in each of the applicable states.

These findings indicate only part of the problem of non-compliance. In most Southern states governmental structures and voting procedures are shaped both by official actions of local governments and by state acts. In Alabama, for example, the state legislature has exclusive power to decide the form of local governments and the terms and conditions of government service, although as a practice the legislative delegation from the local jurisdiction has the opportunity to decide for itself the fate of local legislation. In many Alabama cities and counties, however, the local government can move the polling place or change some voting policies or procedures. At the same time, the state legislature can pass laws changing these decisions of local governments at any time.

While the Council's review of state acts examined only one level of compliance with the Voting Rights Act in states which share responsibility at the state and local level for legislating local electoral changes,[2] it has undertaken a review of a few kinds of changes affecting county governments in North Carolina. The data suggest that there are widespread problems with non-compliance at the local level.

The Council's research in North Carolina shows that more than a hundred and fifty state laws affecting voting in one or all of the forty counties covered under the Act were passed from 1965 to 1979 and never submitted for review by the Justice Department. During the same period, a total of 17 changes were made by local county governments covered under the Act in the methods of election, the numbers of members on the governing boards, or the terms of office of those members. Only 5 of those 17 changes were

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2 To my knowledge there has been no systematic examination of local changes that affect voting in the South.

made by the state legislature in North Carolina. The remaining 12 were apparently made with authority granted by the legislature to the local governing boards.

Among these 17 changes affecting the county governing boards, it appears that only 2 were submitted to the U.S. Justice Department for review under Section 5. Both of those submissions were state enactments -- not changes by local governments. Of the remaining 15 changes which have not been submitted, three are state enactments and 12 are changes made by local governments. Hence, no electoral change identified in the Council's study and made by a local government in North Carolina has been submitted to the Justice Department for review.[3]

The evidence of this limited research suggests that the failure of local governments to submit changes in practices and policies that it adopts on the local level affecting voting may be as prevalent, if not more widespread, than the pattern of non-compliance of state governments in the South. On balance, it is clear that the Justice Department has failed to inspire and require strict compliance with the key provision of the Voting Rights Act. Today across the South there are scores of practices and policies affecting voting that have been implemented for months and years and which have never been subjected to the scrutiny of Section 5 as required by law.

While vigorous enforcement of the administrative procedures hasn't been accomplished yet, Section 5 does require an exacting, measurable standard of proof for submitting authorities to meet. This requirement that jurisdictions meet the test of proving the absence of "intent" or "effects" of racial discrimination should be continued. In Section 2 of the Act, the "intent" standard should not be required to prove the presence of racial discrimination

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3 This analysis of electoral changes involved identifying voting changes that had been passed by the state legislature and checking those changes with reports provided by the North Carolina Institute of Government about changes affecting the methods of election, the numbers of members, and the terms of offices of county governments. Those findings were then compared with the list of changes submitted to the U.S. Justice Department. A report on voting in North Carolina is being prepared by the Council and will be submitted for the record to this subcommittee at a later time.

in voting. The federal courts must be able to judge electoral changes which were enacted before 1965 in the South by a measurable exacting standard.

The bill passed by the U.S. House of Representatives establishes a "results" standard for litigation under Section 2. The adoption of this standard would not require a showing of "intent" and would restore an effective tool by which to reach racially discriminatory electoral changes that are now outside the limits of Section 5. While this change will alter the holding of the Supreme Court in the Mobile case,[4] it is generally a standard by which federal judges in the Deep South have in the past applied the law.

For instance, Judge John Minor Wisdom of the federal Fifth Circuit Court of Appeals wrote in a concurring opinion in Nevett v. Sides in 1978 that "intent is not required to make out a case under . . . Section 1973" (Section 2 of the Voting Rights Act). Referring to the views of the Fifth Circuit, Wisdom wrote that an earlier "en banc decision of the Court was based on the conclusion that effect alone was sufficient to prove a violation of these statutes."[5]

This assessment of the status of the law before Mobile was echoed by Fifth Circuit Judge Goldberg when after Mobile in March of 1981 he concurred in Jones v. City of Lubbock. Writing that the case must be remanded for reconsideration by the lower court in light of the Mobile opinion he said:

> Since the Supreme Court has completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens, we must remand this case to the district court to reexamine the evidence,

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4 Mobile v. Bolden, 100 Supreme Court 14 (1980).

5 Nevett v. Sides, 571 F. 2d 209 at 237-238 (1978).

> and its findings, in whatever light is radiated by Bolden. In addition, due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations.[6]

While the change now placed in the House Bill is important to restoring vigorous enforcement of voting rights in the South, the subcommittee also should consider other changes which would strengthen the Act by assuring that its present, key provisions are enforced to the letter of the law and by bringing a greater sense of evenhandedness in the application of the law.

While the president of the Southern Regional Council, Alabama State Representative Antonio Harrison, will write in more detail to the Subcommittee at a later time about all our suggestions for improving the effectiveness of the Act, I want to suggest two areas: 1) the need for civil penalties for local and state governments that fail to comply with the Act and 2) the need to permit affected citizens the same right of judicial review as is available to covered jurisdictions which disagree with a ruling of the Justice Department under Section 5.

Although criminal penalties are available for violations of the Act, Congress has not provided for civil penalties. To my knowledge the criminal penalties have never been leveled against any local or state official. Yet, the Council's research illustrates a pattern of repeated failures to submit voting changes in Southern states. In North Carolina recently the state submitted a 1968 constitutional amendment -- thirteen years late and only after litigants went to court to require submission. Since its adoption the provision has required the North Carolina legislature to draw state house and senate district lines without

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6 Jones v. City of Lubbock, 640 F. 2d 777 (1981).

dividing counties. The requirement, which was held to dilute black citizens' right to vote in November, 1981, by the U.S. Attorney General, had sustained an unlawful voting scheme for more than a decade.

Civil penalties could be a useful deterrent against the widespread failure to submit voting changes at a time when there are no disincentives in the law to discourage serious and damaging violations which have occurred and continue to occur. Presently, a covered jurisdiction may, and a substantial number have, disregarded a key provision of the Voting Rights Act with impunity.

Under existing law covered jurisdictions have a right to seek judicial review of an objection to a voting change by the Department of Justice; however, affected citizens have no such option when the decision of Justice is not to object.

The need for evenhandedness in the process is a matter of simple fairness. The failure of Justice to object can be due to merely a technical, clerical, or administrative error. For example, Justice may not object because it loses a letter or fails to send a letter within sixty days. Delays in the mail or computer errors are also problems that can and have caused Justice not to object within the time permitted by law.

Currently there is a dispute in Sumter County, Alabama, over the question of whether Justice objected within 60 days to a state bill requiring this majority black county to purge all voters and re-register. On the merits Justice has objected although the local jurisdiction is contending that the objection arrived too late. Apparently the letter of objection had been misplaced for a few days within the Justice Department.

Regardless of the outcome of this factual question in Justice's timely response in this particular case, is it a fair process to permit clerical error to deny deserved relief to local black citizens without a right of review by the courts? It is a right in the administrative process that local jurisdictions now have. So should injured black citizens.

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An effective Voting Rights Act with vigorous enforcement remains the clearest, most realistic promise to black citizens in the South that they will have an unabridged right to vote and to have that vote counted. Seventeen years ago, the United States Senate placed into law the mechanics by which the South could begin to realize that democratic promise. You now have an opportunity to give life to an effective Act and thereby continue that promise. It is an opportunity which both black and white Southerners hope you will not relinquish until democratic principles take root in the life of the South.

February 1, 1982

Senator HATCH. Our final witness today will be Mr. David Walbert, who is former professor of law at Emory University and currently a practicing attorney in Atlanta, Ga.

Professor, we are happy to have you with us, and we will look forward to your testimony at this time.

STATEMENT OF DAVID WALBERT, ESQ., FORMER LAW PROFESSOR, EMORY UNIVERSITY

Mr. WALBERT. Thank you, Mr. Chairman and Senator East.

As you stated, I am formerly an assistant professor of law at Emory University, where I primarily taught constitutional law, election law, and civil litigation, and I have, in private practice, handled a good number of voting rights cases throughout Georgia and, in one instance, in Alabama over the past 6, 7, 8 years.

I am here primarily to testify about the intent question of section 2, and I would like to say at the outset that I am firmly opposed to requiring intent in litigation under section 2, and I support the House bill that was passed because it is directed to a results type of standard.

By way of background, I would also like to point out that as I read the law, the requirement of purpose and intent traditionally has had no place in the law. If we go back to the Supreme Court's decision in *Fletcher* v. *Peck* back in 1790, they were very explicit in saying, "we do not look to the motives of the legislature when we determine the constitutionality of a piece of legislation."

Again, as a number of witnesses have said, *White* v. *Regester* quite obviously never looked at the intent of the legislature in the adoption of the reapportionment schemes there. There was not the slightest bit of evidence or any finding whatsoever on the intent of the legislature in the *White* case. That was in 1973 when the Supreme Court there affirmed the decisions of the trial court in invalidating at-large elections.

I think the *Mobile* decision is most disturbing because of what it does to section 2. In adding in a requirement that one must prove intent, they have largely vitiated section 2. We have set out in our brief in the *Lodge* case that is on appeal to the Supreme Court now our legal arguments on section 2, and I would just like to tender that to the committee to incorporate that in the record.

Senator HATCH. Without objection, that will be incorporated in the record.

Mr. WALBERT. I think my views on section 2 may be borne out by the experience I have had in litigating voting discrimination over the past 8 years. In about a dozen cases that I have handled in Georgia, it was not my experience that the courts found this some kind of tremendously difficult area to litigate in terms of finding justiciable standards.

Most assuredly, I never ran into a judge anywhere who suggested that proportional representation was required before the *Mobile* decision, nor did I ever run into any judge that ever would entertain for a moment the idea that merely proving that you had disproportionate representation in election of blacks was sufficient to prevail. Had I ever suggested that, and I never did in any case, I am sure I would have gotten short shrift by the Court.

So I do not think you realistically have any kind of a problem in adopting the legislation that has been passed. It really is specifically intended only to reenact the *White* v. *Regester* standard. There is not any realistic way that that is going to be construed to require proportional representation. That was not the track record that was established over a number of years in these cases, and there is no reason whatsoever to expect that to occur in the future.

What did occur in those cases was really a very arduous task of proof to assess the local political process and see whether or not blacks—I have not been involved in any Hispanic litigation in Georgia—did have an opportunity to participate in the political process equally and whether or not blacks had an opportunity to elect legislators of their choice. Were they shut out of the political system? That is the kind of ultimate standard that the district courts in the fifth circuit were looking at in applying the *White* v. *Regester* standard. I did not find them having a great deal of trouble doing that.

I really have to take issue with some of the things that have been said about the role of intent in our legal system because it just is not true that intent is normally a requirement in the law. Senator Hatch, I am sure you recall from your litigation experiences, if we were talking about putting local elected officials in jail for discriminating with regard to the right to vote and in enacting discriminatory reapportionment systems, I would be the first one to testify that you should have specific intent. You should be able to prove that there was no other motivation but to discriminate before you could have a criminal conviction.

Senator HATCH. But here you are talking about calling whole communities racist or discriminatory. Where that occurs, it seems to me you have got to have somebody who at least acted with the intent to discriminate.

Mr. WALBERT. Well, that would just differ from every other aspect of law in this country because, in civil litigation, when you are talking about a tort case, if you are just talking about somebody driving down the road and hitting someone, you don't charge the jury that that individual has to be proved to have intended to cause the accident or to have intended to hit that person.

Senator HATCH. In some civil cases, you do; in some tort cases, perhaps not.

Mr. WALBERT. Well, if you are going for punitive damages, of course, you do. If you are going for the question of culpability, as in punitive damages or in criminal law, intent is normally required.

Senator HATCH. Well, of course, the law treats you differently, too, if intent is present.

Mr. WALBERT. I am sorry, Senator.

Senator HATCH. The law treats you differently if you intended to do something, rather than if you did not.

Mr. WALBERT. Sure, you get punitive damages.

Senator HATCH. That is right, but that is not all.

Mr. WALBERT. That is because the question of culpability is there, but when you are talking about normal injunctive remedies or regular civil remedies, intent is a minor, if ever occurring, factor. It is only when you get into culpability questions and punishment questions——

Senator HATCH. Not necessarily. If I am driving down the road and I have a heart attack resulting in my being involved in an accident; I still may be involved in a lawsuit, despite the fact that I never intended or did anything that was negligent.

Mr. WALBERT. But I do not think the Court is going to be focusing on whether you intended to hit the person in terms of the civil case. It only would be the criminal case that they are going to look at whether or not you intended to hit the individual.

I think it is interesting, too, because we are not really even talking about intent in some ways here, as we would normally understand it, for criminal litigation.

Senator HATCH. Of course, we are not talking about intent from a criminal litigation standpoint.

Mr. WALBERT. No, but that is what troubles me particularly, because the plurality opinion in *Mobile* went much further than the criminal standard.

Senator HATCH. I do not agree. What brings you to that conclusion?

Mr. WALBERT. Well, in this sense. If you sit down and you hear the judge charge the jury in a criminal case on specific intent, foreseeability is invariable a proper basis for the jury to infer criminal intent. The jury is always charged, as we have heard hundreds of times, that you are allowed to assess all of the circumstances; you do not need specific or direct evidence of intent; look at all the circumstances, and you are able to infer intent from the foreseeable consequences of the defendant's actions which he is presumed to have intended.

Senator HATCH. Well, I do not concede that, and frankly, that is only one factor.

Mr. WALBERT. Well, now, here is the problem with that. That is sufficient, as the Supreme Court has said, in criminal cases, and yet that is not enough for the plurality opinion in *Mobile*. So we have not only not a regular civil standard in these kinds of cases; we do not even have our criminal standard of intent; we have got something that is absolutely unique in American law now, that forseeability is not——

Senator HATCH. Again, I do not agree with you. You know, criminal intent says that you have to have the requisite state of mind to commit the offense.

Mr. WALBERT. You can prove it with foreseeable circumstances.

Senator HATCH. That is not necessarily true.

Mr. WALBERT. Take *United States* v. *United States Gypsum.* It is a very good case analogy in this area, an antitrust case. This is actually very much on point in this situation, because there they are comparing civil litigation and civil remedies under Sherman I and under the Clayton Act, and they say intent is absolutely irrelevant in your civil cases under the antitrust laws, which *United States* v. *Gypsum* says, and then they start talking about, well, what will be the standard of criminal intent, though.

Senator HATCH. In *Sandstrom* v. *Montana,* the Supreme Court decision made it very clear that you have got to have and prove criminal intent.

Mr. WALBERT. In a criminal case.

Senator HATCH. That is right.

Mr. WALBERT. Well, in a criminal case, yes. I am saying, though, in a civil case, typically, historically, as in the *United States* v. *Gypsum,* you do not need to show intent to prevail, say, in the antitrust area.

Senator HATCH. Yes, but professor, the *Montana* case does not mean that you need to show foreseeable circumstances.

Mr. WALBERT. You do not need to, you are saying.

Senator HATCH. That is right.

Mr. WALBERT. So it is even more lax. That would even be more lax than the *Mobile* rule or even the normal intent thing. I think you are right because you have got your general—you are absolutely right, sir.

Senator HATCH. Well, in other words, foreseeable circumstances will not suffice. You need to show actual intent under the ruling in the *Montana* case and under Supreme Court law.

Mr. WALBERT. Actual intent? I am not sure what you mean. What did you mean by actual intent?

Senator HATCH. It does not mean foreseeable circumstances, I will tell you that. That, standing alone, does not necessarily constitute intent.

Mr. WALBERT. That would not be allowable. Well, the Supreme Court, I think, endorsed that in *Gypsum.* I do not know about the *Sandstrom* v. *Montana* case.

If you look at all the different areas of litigation, you are going to find a tremendous preponderance in all the civil cases where intent really is not the controlling factor. Punitive damages I would concede immediately because you are talking about punishment, culpability, and it is important there.

Really, I have a very hard time understanding why intent should be relevant in this whole area. We are not dealing with a private citizen, whether to put a private citizen in jail or whether to assess damages.

Senator HATCH. Or with the whole community?

Mr. WALBERT. We are talking about whether or not the whole community and the Government will be allowed to use the law, which is what we are talking about, or a reapportionment scheme, that does discriminate, and that is the basic proposition. Can they use a law that allows white people to have a tremendous predominance over the political process? I do not see, really, how we can

say that can be justified, in my own mind, period, and why we have to add any additional requirement to show intent. I have a very difficult time understanding why that would be required, why the mere proof of discrimination, in and of its own right, would not be sufficient.

I do not see, historically, in our law, where we have ever had any kind of a notion that the Government is allowed, authorized, and legally able to discriminate. It just does not exist. It is a lot different even than we talked about when you had the open housing matter here a couple of years ago and you really had kind of the exact same debate.

Senator HATCH. Pretty much the same.

Mr. WALBERT. I think there is a real difference, though. I mean, there you were talking about the Federal Government legislating and regulating the activities of private individuals, less and less Federal control, and so on. We do not have that situation right here. The Government is already acting. The local and State governments have already put into place some kind of legal mechanism to control the elections, so we are not talking about the Government versus the individual. We are talking about a government system of elections that is already in place by the Government.

I think, in this case, there is even less reason for the Federal Government to be concerned about having the power of Federal rule here. I mean, the Government has already acted in setting up the legislation, and to add an additional intent requirement here I think is much more inappropriate than it would be in the title VII employment area or in the open housing area.

I think, too, that we talk abut the unpredictability of what would occur if you did not have an intent requirement, and I think that the results that I would foresee if you do require intent would really be a good deal more bizarre and sort of absurd than anything imaginable, really.

You could have adjacent counties, it seems to me, that had identical facts, a political process that was identical, where black people had the same degree of oppression and elimination from the political process in two adjacent countries; then you have some people run for office who say openly, I am going to keep the at-large election system here specifically in order to keep black people out of office, and then you could bring your case and you could win.

In the next county over, they run on some different platform where people are not so open about their motivations, even though the facts and the operation of the system are identical, and you would lose.

You talk about predictability and consequences and just sort of a good legal system that Senator East talks about: We want predictability in the legal system; we want sense in it; it must make sense. Well, it is not going to make much sense if two counties adjacent to each other can have completely different results because you have an avowed open group of racists perpetuating the law in one county, and in the next county you have a more sophisticated group who are not open about their motivations. That really does not make any sense.

I think, also, frankly, and it is interesting because the appellants in the *Lodge* v. *Buxton* case make quite a point of this—they say

that it is unseemly to be investigating the motives of the legislatures. Frankly, I think that is true. It would be like having somebody attack the law of this body, of the U.S. Congress, as being unconstitutional because it was racist in its motive, putting you gentlemen on the witness stand, peering into your motivations. That is not right. It is unseemly.

Senator HATCH. I think it would be appropriate if that exists.

Mr. WALBERT. Well, I think the law should be tested by a different standard. I agree with the appellants on that one position in the *Lodge* case. That is unseemly. The courts should not be interfering in the legislative process in that way. They should not be looking into the minds of Senator East and Senator Hatch and Senator Kennedy in terms of why you passed this particular legislation. That is inappropriate.

I see that my time has expired, and I want to thank you.

Senator HATCH. We will put your full statement in the record.

I do not think you have to read the minds of legislators, however. There are a lot of factors to which you would look to determine whether the legislature has acted to the purposeful detriment of any racial group or groups.

The Supreme Court noted in the *Arlington Heights* case, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." Of course, it goes on to mention specific considerations such as historical background of the action, the sequence of events leading up to the decision, the existence of departures from normal procedures, legislative history, the impact of the decision upon minority groups, et cetera.

I do not believe legislators should be immune from standards of proof in these cases, but I have also appreciated your testimony expressing your point of view.

Let me ask you this. You have said that all 14th and 15th amendment cases prior to the adoption of the Voting Rights Act in 1965 applied an effects test for discrimination. Can you name one single case——

Mr. WALBERT. *Baker* v. *Carr.*

Senator HATCH [continuing]. Before 1965, where a challenged practice struck down by the Supreme Court was not racially discriminatory on its face?

Mr. WALBERT. *Baker* v. *Carr,* obviously. It was totally a fair reapportionment scheme when it was adopted in 1901.

Senator HATCH. But *Baker* v. *Carr* had nothing to do with racial discrimination.

Mr. WALBERT. Do you remember how that was justified, Senator?

Senator HATCH. Well, keep in mind, I am asking you about anything that was not racially discriminatory on its face before 1965, any single case.

Mr. WALBERT. I do not think, in *Colgrove,* they were looking at all at the question of discrimination. I think Frankfurter's dissent, as I recall in *Colgrove,* made that quite clear. I would not suggest to the Senator that this case, other than *White* v. *Regester,* which is absolutely explicit in 1973, was not——

Senator HATCH. *Colgrove* was the predecessor of *Baker?*

Mr. WALBERT. *Colgrove* was the pre-*Baker* case on the same type of issue.

Senator HATCH. No, but my recollection is that that was not racial discrimination.

Mr. WALBERT. Well, let me state it this way.

Senator HATCH. It did not involve an issue of racial discrimination, either, did it? There is a great deal of difference between equal protection analysis focusing upon individuals, as in *Baker*, and equal protection analysis focusing upon racial groups, as proposed here.

Mr. WALBERT. You are certainly right that these cases did not even come up until, say—I guess *Whitcomb* was the first one, which is post-1965, so certainly you are right that there were none before 1965.

Senator HATCH. Let me ask you this. With regard to the significance of *White* v. *Regester*, did the per curiam district court opinion in this case, or Justice White's opinion for the Supreme Court, mention the 15th amendment?

Mr. WALBERT. Did it, you say?

Senator HATCH. Yes, did they ever mention the 15th amendment?

Mr. WALBERT. It is a strange omission, isn't it? I find that peculiar, myself. I assume you do, too. I mean, it seems like it should be a 15th amendment case if that deals with racial discrimination in voting.

Senator HATCH. Well, not according to the Court. It did not even mention it.

Let me ask you this. Did the per curiam opinion for this case, or Justice White's opinion, mention the Voting Rights Act?

Mr. WALBERT. It was not raised by the parties, so I think it would be inappropriate for them to raise it.

Senator HATCH. It really was not. It was not even part of the case.

Mr. WALBERT. Senator, may I respond to that just briefly?

Senator HATCH. Sure.

Mr. WALBERT. I am sure you are well steeped in the legislative history of the 1965 act, and it was quite clear that most people—certainly, if you go back and read the legal professional journals at that time and if you look at the congressional debates—the namesake of this building, when he was talking about the 1965 Voting Rights Act, thought that the 15th amendment reached things that were purpose or effect in their nature. That is quite clear from the legislative record at that time, so I do not think there would have been much of a dispute back then of what section 2 and——

Senator HATCH. I do not think that is true. We both have got to read that case again, but I do not think that is in there.

Mr. WALBERT. It is not codified in law. I am not talking about the case; I am saying the legislative record, the legislative history.

Senator HATCH. Oh; I do not think that that is true about the legislative history, either. What is your basis for saying that?

Mr. WALBERT. Congress never passed any law and said there are resolutions that say we believe it means effect, but that is how I read it.

Senator HATCH. Are you aware that the district court opinion in *White* v. *Regester* states, at page 735, that effect alone is not sufficient to invalidate a districting scheme under the 14th amendment?

Mr. WALBERT. As I recall, though, Senator, they are talking there about effect in the specific sense of dispproportionate election, and I agree with them completely in that regard.

Senator HATCH. Are you aware that the Supreme Court opinion does not comment on the district court's determination that effect alone is not sufficient to invalidate a districting scheme under the 14th amendment?

Mr. WALBERT. Sorry, Senator, I did not hear your question.

Senator HATCH. Are you aware that the Supreme Court opinion in that case does not comment on the district court's determination that effect alone is not sufficient to invalidate a districting scheme under the 14th amendment?

Mr. WALBERT. I would think that when they say that the mere focusing in on the disproportionate election of blacks versus whites is not enough to prevail, that is adopting and affirming that statement by the district court. That is what the district court meant when it said that, as I read it. That is in that context.

Senator HATCH. But you are aware that, in the *White* case, the Court in fact identified the existence of invidious discrimination or purposeful discrimination. What is "invidious" discrimination?

Mr. WALBERT. Absolutely not, in connection with the maintenance of the electoral system, however. They identified historical discrimination much as in *Bolden,* the *Mobile* case, against blacks in schools and in voting, and so on, but absolutely no evidence whatsoever aimed at this question or any finding whatsoever on the question of invidious discrimination in the maintenance or adoption of the multimember districts.

Senator HATCH. Well, of course, in the *Mobile* case, the Court reiterated the fact that *White* involved such invidious or purposeful discrimination or, in fact, an intent to discriminate.

Mr. WALBERT. What is your question, sir?

Senator HATCH. That is what *Mobile* said. *White* actually involved invidious, purposeful discrimination.

Mr. WALBERT. Well, we would have to look at *White.* I think four people in the plurality in *Mobile,* tried to read *White* that way. If you can show me the language of *White* that would support that, I would certainly see your point.

Senator HATCH. Well, the thing that bothers me is that proponents of the bill are coming in and claiming *White* is the basis of their support, but *White* was not a 15th amendment case, nor was it a voting rights case, and in *White* the justices agreed that there was invidious discrimination. So what is its value to us in this particular issue?

Mr. WALBERT. Let's use Senator East's analysis here and let's say that we want the Constitution to make sense. Quite clearly, if *White* v. *Regester* prevailed on the 14th amendment, a stronger standard should prevail on the 15th amendment, because that specifically deals with voting. The 15th amendment, if it means anything, must mean something more than the 14th amendment or it was nugatory and a worthless thing when they adopted it. Now, it

has to mean something, and it says "deny or abridge," not just "deny," "deny or abridge the right to vote." If the 15th amendment means anything, it must be at least as powerful a mechanism as the 14th amendment in a dilution case, at least as powerful if not a stronger test, if we follow the *White* reasoning and what the Senator is asking. It could not be weaker, certainly. It deals specifically and exclusively with voting, and we would expect a stronger impact, a stronger rule from the 15th amendment for that reason.

Senator HATCH. When you appeared before the House committee, your fellow panelist, James Blacksher, bemoaned the, "absence of a clear, judicially management definition of dilution." Do you agree that the courts have failed to develop such a definition?

Mr. WALBERT. I had never read his testimony, Senator.

Senator HATCH. I see.

Mr. WALBERT. But my recollection is that he was talking about this responsiveness problem. I would agree with him that if a court focuses in on the question of responsiveness, you are into a political thicket; you are into something that should not be focused on, and I would agree with the Senator in that regard.

Senator HATCH. Do you believe that the House bill gives us a definition of dilution in this case?

Mr. WALBERT. As I recall, the House report quite explicitly says that responsiveness should not be focused on. With that deletion, I have no problems with the House bill.

Senator HATCH. Now, you told the House committee, "The ultimate test in *White* v. *Regester* is, does the minority group have equal opportunity to elect the legislators of their choice."

Mr. WALBERT. To participate in the political process, I think.

Senator HATCH. Right, leaving aside the fact that the Constitution protects persons, not groups, how can a minority's chance to win elections ever be equal to that of the majority? Isn't the word you really want "proportional"?

Mr. WALBERT. No; the word I want is "some shot," some chance, not no chance like it is today.

Senator HATCH. You are saying there is no chance?

Mr. WALBERT. No chance in the situations where these cases have prevailed. Again, if you take the assumption that the courts have adopted a proportional representation rule, and no decision you could ever cite would support that, then I think you would have the situation the Senator is suggesting.

But if you look at the cases that have prevailed, blacks had no chance. That is how the courts dealt with it before *Bolden,* and I think they did quite a good job.

Senator HATCH. You claim that in *Washington* v. *Davis,* the Supreme Court held for the first time that intent to discriminate is necessary for 14th amendment equal-protection challenge. Of course, we all know that section 2 of the Voting Rights Act represents the 15th amendment.

Be that as it may, did the Supreme Court ever hold that intent was not necessary under the 14th amendment equal protection challenge, either before or after *Washington* v. *Davis?*

Mr. WALBERT. Wasn't it *Adkins* v. *Georgia,* if my recollection is correct, where they explicitly said that purpose and intent is not

required in that jury case? I am not sure it was *Adkins*, but I believe it was.

Senator HATCH. Senator East?

Senator EAST. Thank you, Mr. Chairman.

Mr. Walbert, again I welcome you and thank you for coming and helping us this morning.

First, what do you think of the *City of Rome?*

Mr. WALBERT. I like it. [Laughter.]

Senator EAST. You like it, you say.

Mr. WALBERT. Which one do you mean, now? [Laughter.]

Senator EAST. Well, do you like the holding in the *City of Rome* case?

Mr. WALBERT. Oh, the case. [Laughter.] I really did not prepare on the section 5 question, Senator. I did teach this. I should have some recollection.

Senator EAST. It was in the *City of Rome* v. *Georgia* case where there was not any question that individuals could register and vote. The point was that a third of the population of the city of Rome was black. They had at-large elections and no black had been elected to the city council.

There the Court held that that, ipso facto, in and of itself, was evidence of the violation of the applicable law, the 1965 Voting Rights Act. In effect, I am suggesting that gives you proportional representation because it meant they had to abandon the at-large system and had to go to the district system.

Mr. WALBERT. Was that a section 5 case, Senator?

Senator EAST. Pardon?

Mr. WALBERT. That was a section 5 case, then, wasn't it?

Senator EAST. Yes.

Mr. WALBERT. They were applying the straight regression standard which I think is different, as I understand it, than what the House advocates in section 2, though. It is a little different than what I am speaking of.

Senator EAST. All right. Well, let me shift ground here a bit on a good point you are raising, and I think this would be better to focus on, since this is what you feel is critical in terms of your testimony.

Senator HATCH. Senator East, could I interrupt you for a second?

Senator EAST. Yes; you may.

Senator HATCH. I thought I was correct in my assessment of the *Adkins* case. In the *Washington* v. *Davis* case, it does cite this as the proposition from the *Adkins* case. It says, "A purpose to discriminate"—in fact, this is a quote right out of *Adkins*—"must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race whereby unequal application of the law to such extent is to show intentional discrimination."

Mr. WALBERT. Sir, I will get the case where I know there is a decision. I thought it was *Adkins* and I am wrong. *Palmer* v. *Thompson* certainly held it, and there they proved intent. In *Palmer* v. *Thompson,* they said, I am sorry, you can't use intent to prove a 14th amendment violation, the 5–4 majority said, and the dissent said you could. *Palmer* would do it.

Senator HATCH. Perhaps that is what you are thinking about.

Mr. WALBERT. No, there is a jury case. I thought it was *Adkins,* but it obviously was not if that is a quote from *Adkins,* but I will get it for you, Senator, if you would like.

Senator HATCH. Let's both look it up and see what it is.

Excuse me, Senator East. I apologize.

Senator EAST. Let me pursue this tack on this matter of intent. Now, you suggest that our perhaps traditional conventional notions of intent in criminal law and elsewhere really are not applicable here, obviously opting out for the idea that an effects test is what we should be utilizing.

Let me pursue this line of reasoning in test of that theory, though. Back to the fundamental first principle here of the Constitution—namely, the 15th amendment—which is where all this begins. Now, as I say, the right of citizens of the United States to vote, which I again would assume means the right to register, to vote, and to have it counted——

Senator HATCH. Senator East, can I interrupt you again?

Senator EAST. Yes.

Senator HATCH. I have to leave.

Senator EAST. All right.

Senator HATCH. Would you close out the hearing. I apologize to you, but I have already gotten to the questions I wanted to ask you, Mr. Walbert, and we appreciate the effort you have taken to be here. Could you close out the hearing, Senator?

Senator EAST. You are leaving me here to run this whole thing on my own?

Senator HATCH. I would like you to do it.

Senator EAST. It is a reckless act. [Laughter.]

Senator HATCH. Without objection, I ask unanimous consent that you continue the hearing and close it out. I am sorry I cannot stay for the end.

Could I just make one other point? I think—and this is not necessarily meant to pick on you—these hearings are extremely important. I don't care which side you are on either side of these issues. But we have not been receiving these statements far enough in advance, and I think that they are important enough that all witnesses, pro or con on this issue, should have their statements in. We are supposed to have them 3 days in advance, but even if we could have them by 5 o'clock the evening before, I would feel good about it.

I am going to look with a jaundiced eye upon not having these statements on time in the future because it is hard for us to prepare and ask the most intelligent questions possible to really thoroughly exhaust this area. So from this time forward, I hope that all witnesses will get their statements in 3 days in advance and no later than 5 o'clock on the day preceding the subcommittee hearing. If we can do that, I think it would help everybody. It helps Senator Kennedy and Senator Mathias; it certainly helps me and all of the other members of this subcommittee, and it helps the other members of the full Judiciary Committee who may want to participate in these hearings.

With that, I am going to have to excuse myself. Senator, I appreciate your taking care of closing out this hearing.

Mr. WALBERT. Senator, I did not "intend" to have my statement in late.

Senator HATCH. We understand.

Mr. WALBERT. But it did have that "effect."

Senator HATCH. That is why I hesitated. I was going to wait until you sat down because I did not want to look like I was picking on you. This has been kind of the rule rather than——

Mr. WALBERT. I had good intentions.

Senator HATCH. I am sure everybody has good intentions, but these are important hearings, and everybody admits that they are important. I think they are important enough for people to have their statements in here so that we can properly prepare. We would appreciate it.

Thanks, Senator.

Senator EAST. Thank you, Mr. Chairman.

So this is how you eventually get power around here. It is a battlefield commission. You simply endure long enough and you finally end up getting to chair things. So all of a sudden I am chairman of a committee of which I am not a member. [Laughter.]

I look upon this newfound power with mixed emotions here.

Mr. WALBERT. How about the 10-minute rule? [Laughter.]

Senator EAST. I am in charge now. [Laughter.]

And there will be no further testimony. I will bar the doors. No more interlopers here.

On this question of intent and effects, they are interrelated, but let me focus on this question of intent a bit. You again suggested you did not think our traditional, conventional understanding of intention was applicable to this situation, that it was not, again, a traditional, conventional, criminal law kind of situation.

I appreciate what you are saying and your line of reasoning there, but let me approach it this way. I would just appreciate getting your reaction to my thinking on it. Again, the 15th amendment is predicated upon the idea that the individual shall have the right to register to vote, to have it counted, and that cannot be denied on the basis of race, color, or previous condition of servitude.

Now, to me, the language there is fairly clear, as language goes in constitutional law. As I noted earlier, in the 15th amendment and the debate over it, the idea of the right to hold office was rejected. All right, so that is the right, the right of the individual to register, to vote, to have his vote counted without regard to race, color, or previous condition of servitude. It says nothing now about the right to hold office. It certainly says nothing about the right for certain groups to have their proportional representation.

I think it is a simple, elementary, fundamental concept of democratic political theory ensconced rather specifically in the 15th amendment that each and every one of us has the right to register, to vote, and to have it counted.

Now, let me just finish my line of reasoning here. If I am correct on that, and that is my first premise, as a corollary to it, if someone intends to deny me as an individual the right to vote because of any of those things, race, color, previous condition of servitude, they have violated my right. In other words, in order for me to lose

the right, someone has to intend and in fact discriminate against me based upon those reasons.

You get into this whole question of a change in a district line, perhaps brought in to broaden the tax base, or perhaps this community wants to be brought into the community to get certain government services, and in return the city likes it because it means a better tax base. Yet it would have the effect—not the intent now—of altering ever so slightly the racial balance or whatever in that community. That violates the 1965 Voting Rights Act as you would currently support it.

Mr. WALBERT. I do not think that is what I am saying. You are saying that, I think.

Senator EAST. Well, I would submit, if intent is no longer what you are looking at——

Mr. WALBERT. I do not think that is correct.

Senator EAST. If intent is no longer what you are looking at, if what you are looking at is the effect, if the effect is to dilute or alter in any substantive way minority voting strength—mind you, not even majority, and I would submit majority is covered by this because each individual is graranteed this. You certainly cannot have it both ways now. You cannot have this thing simply work to the advantage of those minorities as defined by the Department of Justice, whoever is drafting this law.

The problem is, in the hypothetical I gave, that would very likely be considered a violation, because the effect is to dilute minority voting strength and hence a violation of the 1965 Voting Rights Act.

But to me, the idea of the intent to discriminate based upon race, color, or previous condition of servitude inheres in the 15th Amendment. In order to prove intent, I agree, you could look at a whole range of things, external as well as internal, but as it stands now, we are not offered by the witnesses any criteria of that kind. We are simple told, look at the effect, look at the effect, look at the effect. But if you look at the effect, basically, the effects test is a proportional representation test.

If any change is made that alters, creates any imbalance as regards what the designated minority now obtains, any alteration of that that diminishes it, dilutes it, ipso facto, you have a violation. I submit, as a practical matter in the real world of law and application, there are no criteria. There are no criteria except how does it strike you as the head of the Civil Rights Division in the Justice Department, and it goes back to my earlier point about rules of law and the responsibility of the legislative branch to set forth specific criteria whereby the Justice Department can guide its conduct and State and local government can act in response to that in some sort of ordered, rational way.

To me, it is a very fundamental premise of the rule of law that we are up against here, and simply vague yearnings about desired results are not the rule of law; that is benevolent authoritarianism. The standards are vague, undefined, not clear, just large grants of power given over, and I do not think it is good law.

Frankly, as regards the November elections of 1980, not that that has to be the sole determining criteria, but I think it did indicate that there was some desire in this country among the American

people that perhaps, as regards bureaucratic elitism and judicial elitism having usurped the legislative process, it was about time that the Congress tried to reclaim its fundamental policymaking role in the American system.

I would submit, as one lowly freshman Senator if what we want is proportional representation, then we ought to amend the Constitution and say so, that racial minorities will be guaranteed *x* percentage, and I presume it will mean racial majorities will be guaranteed *x* percentage.

But let us not, because it just is not there, try to strain it out of the 15th amendment. The 15th amendment, in my judgment, on any reasonable, rational reading, will not yield up the premise that racial minorities are guaranteed effects or proportional representation.

It seems to me that however honorable the intentions of those who speak otherwise, as a matter of good constitutional law, let's look at that proposition and see if that is what we want. Is that good, sound, democratic political theory? If so, let's amend the Constitution and put it in. Perhaps it would foster racial harmony in this country. If so, I give it a plus and I would support it.

My own estimate is, and again, I have made the point several times in here, that I think it would violate the fundamental premise of democratic political theory, the Madisonian idea of trying to build consensus out of coalitions of groups.

I am going to give you a chance to respond here in a moment, but why confine this to racial groups? Why not do it with sexes? Why not do it on religious groupings? For example, you could show that in a given Catholic area, no Protestant had ever been elected; ipso facto evidence, Catholics bigoted against Protestants, or vice versa, or people of the Jewish faith versus people of the Christian faith. I mean, the thing has endless ramifications.

What it brings you back to, in every case, is this ideal of proportional representation—religious, ethnic, racial, sex, ad infinitum. And to me, it has nothing to do with that fundamental tenet of democratic political theory, Madison's idea that in the great melting pot, the challenge will be to build consensus, to pull it together, and no one can be guaranteed that their religion or their race or their sex or their political party or whatever it might be will be guaranteed their proportion of the State legislature or the U.S. Congress. Why hold the line at race?

In North Carolina, for example, we have a three-to-one Democrat-over-Republican registration. That is not reflected in the State legislature. Are people of North Carolina prejudiced against Republicans? We do not know. Some of them are able to cross the line from time to time.

But that would be an effects test, wouldn't it? Is it right to discriminate against a person because of party affiliation? I do not think it is a frivolous question because you open up this Pandora's box. You say that race ought to be privileged. I say religion, then, maybe; sex, maybe; political party, maybe; physically handicapped, maybe. I do not know.

But at some point, I think, in democratic political theory, you have to say. We just can't do that, ladies and gentlemen. We cannot guarantee the right to hold office. We cannot guarantee

quotas and proportions. But what we can guarantee you this: the unfettered right to participate in the political process, to express your views unintimidated, to register and to vote and to have it counted.

I think if you put that propostion to the American people, they would buy it. But if you got into this whole question of proportional representation, as those of you who are up here talking about what I think in effect is proportional representation, I think they would vote it down overwhelmingly, if they understood it. I do not think the House of Representatives would have sent over that bill, as Henry Hyde indicated the other day, if they had understood it.

I do feel, in the Senate, if we can get our 100 brethren to focus on this thing long enough and get them to understand the nationwide implications of it, they will turn it down or they will ask for major changes in it: intent as opposed to effects, reasonable bailouts, and so on and so forth. That is what we are fighting over.

I respect your point of view, and you say it well, and obviously you are an incredibly literate and articulate person on this matter.

I have packed a lot in here, but let me ask you. where do you think is the fundamental error in my analysis here, beginning with the 15th amendment? Do I misread the 15th amendment? Do I misread what you are trying to do?

Mr. WALBERT. Yes, Senator, you do misconstrue the 15th amendment and what I am representing.

First of all, when the constitutional convention, rather than the Congress, voted down that proposal on the 15th amendment about holding office, they did that because they considered it too narrow, not too broad. Therefore, what was embodied in that particular proposal for the 15th amendment was considered to be embodied in the ultimate 15th amendment that was adopted.

When they talked about the right to hold office, they meant that something more than just the right to walk into the ballot box and cast your ballot was included in the 15th amendment.

Senator EAST. What evidence do you have that, under the 15th amendment, they did mean or could have meant more than that, or we could reasonably expect to guarantee it as a practical matter in American politics?

Mr. WALBERT. Senator, your predecessor——

Senator EAST. You are saying it means more than that. What does it mean? What does it guarantee beyond the right to freely participate and to register and to vote and to have it counted? What do you think it means beyond that? What could it practically mean that you would embrace? Results, effects, proportional representation? I mean, I am curious.

Mr. WALBERT. I think that it does. As the Senator says, the right to freely and equally participate is certainly embodied in it, and that is part of what we are talking about today.

Senator EAST. Yes, but again, that does not guarantee results now.

Mr. WALBERT. No, it does not. Most assuredly, I would not suggest that we are talking about guaranteeing results. I would agree with you there, and I do not think we are talking about proportional representation, and I would disavow any relationship with proportional representationalists. I do not support that.

Senator EAST. But that is the problem that Senator Hatch and the others and I are having, that in effect that is what we are going to have, proportional representation. We are going to have the *Rome* case, and we are getting it in North Carolina. They have got us in such a convoluted state down there in terms of our electoral process, and fundamentally what they are saying is there has to be proportional representation.

Mr. WALBERT. You need a good election lawyer down there, Senator East.

Senator EAST. Well, what we need is a good law that makes it clear to the Justice Department what they can and cannot do, because right now we are at the mercy of faceless bureaucrats in the Justice Department, bless their hearts, doing their best, but they have no standards, no criteria; it is just, "Hey guys, how does it strike you this morning?" It is sort of vague humanitarian yearnings that have become the standard for the rule of law. However honorable those intentions, and that is always the tact of the benevolent dictator, I want some standards, I want some criteria, and that is what we are not getting.

Mr. WALBERT. All right.

Senator EAST. We are just getting vague yearnings for something here of this ideal system of voting justice, which I submit is proportional representation. That is the path you are leading us down.

Mr. WALBERT. I think, Senator, you put your finger on a point very well when you keep talking about not wanting to disrupt the harmony, racial harmony, of North Carolina or somewhere by having district elections. I think harmony is an interesting point here, because if you go into a commmunity, and let's say you find that the political process is completely segregated like it might have been in 1960—let's say that there is no interaction among blacks and whites. Let's say that you have a situation where black people in a North Carolina town have no access to the political process in terms of the decisionmakers, in terms of who is running for office, and in terms of support groups, and so on. Then you do not have equal access to the political process as *White* v. *Regester* meant it.

In those towns in North Carolina where you no longer have the vestiages of segregation, where you have the harmony that the Senator is speaking of, you cannot prevail in one of these cases. If you have this harmonious, integrated relationship, you would have no problems, and the fact that blacks may not have been elected is completely irrelevant.

Senator EAST. Who would make that determination? You are saying the standard could be harmonious racial relationships as defined by whom? Well, I presume the gentleman in charge of the Civil Rights Division of the Justice Department.

Mr. WALBERT. They have no authority over section 2 whatsoever in the Justice Department. What we are talking about today, I thought, was section 2. The Justice Department has no role in it, has no interpretive power. They certainly never file lawsuits under it, although I suppose they should.

Senator EAST. Well, as regards their preclearance requirements, that is exactly what they are doing in North Carolina, are they not?

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Mr. WALBERT. Section 2 has no preclearance requirements.

Senator EAST. They are telling us that we cannot have this particular approach in this particular legislative district because it is diluting potentially, they say, black voting strength. It is the results test, I think these things are interrelated.

Mr. WALBERT. Well, section 2, of course, does not have any of those problems, thank goodness, because there is no preclearance, there is no role for the Justice Department, and the Supreme Court will ultimately determine what the standards are, and the Justice Department, I think, is 0 for 12 before the Supreme Court, so you do not need to worry about them.

Senator EAST. But on the preclearance of determining whether a given voting change is of discriminatory character, that is what they are doing, are they not?

Mr. WALBERT. Not under section 2 because there is no such thing as preclearance under section 2. It does not exist.

Senator EAST. Well, the whole concept in terms of preclearance, which is where the issue arises extensively, is that you go to the Justice Department to get the affected jurisdiction cleared that this change in the election law process is not discriminatory in character. Is that correct?

Mr. WALBERT. I do not know.

Senator EAST. Well, you do.

Mr. WALBERT. Section 2 is what I know, the constitutional litigation.

Senator EAST. Well, all right. We are back to your specialty now, so we will go ahead with that. But I am submitting that under preclearance the issue arises, too, because you are trying to determine whether that particular change in the State election law, as we were noting earlier in Mr. Suitts' testimony—they tell us in North Carolina that our change in the Constitution forbids you, in redistricting, to split counties, that the effect is to dilute minority voting strength. There was never the understanding or the correlation; simply a marginal corollary point spun out of it.

The idea was, to protest the integrity of counties, you put them in various districts. Trying not to split counties as the basic unit of State government seemed to make sense. It had nothing to do with racial discrimination.

The Justice Department said, Hey, the effect is, as we see it, possibly to cause dilution of minority voting strength, and it is an effects test under preclearance.

Mr. WALBERT. Were they right?

Senator EAST. Well, do you know what our choices are?

Mr. WALBERT. What?

Senator EAST. To fight it in the courts or to call the legislature back into special session. It is a nonchoice. We are trying to get on with the election process, so the legislature is back in special session, trying to unscramble this thing, keeping their fingers crossed that the young lawyers in the Civil Rights Division of the Justice Department will find it OK. So our people are coming up, cup in hand, to see if these young gents think it is fine. We in the Congress have not given them any guidance.

Mr. WALBERT. I am not one to endorse the Justice Department's behavior under section 5. You will not find me doing that, Senator.

Senator EAST. All right, but these things are interrelated because preclearance, then, in this case, depends on what is the intent of the legislature of North Carolina? They concluded it must have been to discriminate. In other words, they put it in a fascinating way. They said, "We see no evidence that it was not done for purposes of discrimination." That really puts you in a bind. How do you prove that crazy negative?

And so, as a practical matter, what you have to do is what our legislature is doing. You go back into special session, you come up to the Justice Department, and you say, "Gentlemen, what would satisfy you?," and they say, "Well, let's see. Ah, we like this and this and this, or whatever." And so you go back and you try to draw it to conform to their way.

Not surprisingly, this is not very popular in North Carolina. I think the problem is not because anyone wants to discriminate on the basis of race, because people understand that it does not have anything to do with discrimination based upon race.

Mr. WALBERT. It is strange, though, Senator, that among black people in North Carolina, it is very popular.

Senator EAST. Well, it could be.

Mr. WALBERT. There seems to be a different perception there.

Senator EAST. What evidence do you have that that is so? I would submit that in North Carolina, unless there are certain black political figures who want guaranteed results, and perhaps there are—we have got Republicans in our State. You know, often some of these things work against us in the State legislature, which is Democratically dominated, and often we could possibly go in and prove that this was done for the purpose of possibly altering the chance of Republican victory. I mean, there is no end to this.

Again, you could get into sex, you could get into religion. You open up Pandora's box here. It is not strictly a racial problem.

Mr. WALBERT. Aren't we safe, though, Senator, because the Civil War was fought solely over the race issue, and the 13th, 14th, and 15th amendments deal with race, not Republicans, not Democrats, not sex, nothin else but race.

Senator EAST. But they all come out of the same period. Often the discrimination based upon party in the South goes back to the same period, the hostility to the Republican party. And the whole question of discrimination against women based upon sex, is this not a part of it, too?

Mr. WALBERT. But as the Senator points out, we must stick with a principled interpretation of the Constitution, and where only race and color are mentioned in the 15th amendment, you are getting on pretty thin grounds to say that you could pass——

Senator EAST. That is right. That is why I say I think what they are talking about is to make sure that the right to register and to vote and to have it counted based upon race, color, or previous condition of servitude will not be denied. I think we ought to look at that in that spirit.

Mr. WALBERT. Senator, you notice the word "intent" is not in the 15th amendment.

Senator EAST. Well, I think it is clear, as I was noting, that the right to vote, to register, to vote, and to have it counted, that the intent is required that when of a State legislature or any subdivi-

sion thereof makes a change in the election laws, in order to show that it violated the spirit and the letter of the 15th amendment, you would have to show some degree of intent to discriminate based upon those grounds. But you do not. You are just saying effects.

Actually, the effect could be brought about not by the intent to discriminate but simply because, for example, you brought in a subdivision to increase the tax base and to expand the opportunity for city services. That is not uncommon. It had nothing to do with race, but yet the conclusion is the change was made for purposes of discriminating based upon race.

I think you need some criteria for saying, the reason the city council did that, or the State legislature did that, is palpably, clearly, the motivation is what?; it is racial. That is the letter and the spirit and the meaning of the 15th amendment.

I think you are making a jump here that the Constitution cannot bear, that the 15th amendment does not yield up. You are going to effects, which is going to mean proportional representation.

Mr. WALBERT. I just did not want to engraft intent into the 15th amendment when I do not read it there.

Senator EAST. Pardon?

Mr. WALBERT. I do not want to see intent engrafted into the 15th amendment when I do not read it there. When I read the amendment, I do not see the word there.

Senator EAST. Well, I think that by "intent" I mean some demonstrated evidence, some specific criteria, that the purpose of doing what was done was to discriminate based upon race, color, or previous condition of servitude, and it affected directly the right to vote, to register, to vote, to have it counted, and to participate in the political process, but again, not effects, not results; above all, not proportional representation.

Well, we have probably exhausted that one. I appreciate your coming, and I shall cease and desist. If there are no further proceedings, and I gather there are none, we shall stand adjourned.

Mr. WALBERT. Thank you, Senator.

Senator EAST. Thank you.

[The prepared statement of David F. Walbert follows:]

PREPARED STATEMENT OF DAVID F. WALBERT

Good morning, Mr. Chairman and members of the Subcommittee. I am David Walbert from Atlanta, Georgia. I am formerly an assistant professor of law at Emory University where I primarily taught constitutional and election law. I have resided and practiced law in Georgia for most of the past eight years and have specialized over the years in voting rights and election litigation.

I would like to thank the Subcommittee for inviting me to testify before you, and I hope I can offer some useful comments on the " purpose or intent " issue that has cropped up in the constitutional and election litigation in the past few years. At the outset let me say that I am firmly opposed to the newly created intent requirement that has been injected into the law for the first time in our Nation's history. I am opposed to this development not only because it contradicts our historical legal traditions but also because of the practical consequences of the new doctrine.

By way of background, I should first point out that the requirement of purpose and intent traditionally has had no place whatsoever in our legal system. Since 1790, the Supreme Court has repeatedly refused to consider the intent and motive that lay behind the adoption or retention of a particular or legislative scheme. The constitutionality of official action has always hinged on the impact, not its motivating purposes. That was the rule set down in the landmark opinion of Chief Justice Marshall in the 1810 decision, Fletcher v. Peck, 6 Cranch 87, 130 (1810). That position was reiterated by our Supreme Court on many occasions in the nearly two centuries that followed, and was most recently restated in Palmer v. Thompson, 403 U.S. 217 (1971).

In the voting area in particular, there had never been any dispute that the discriminatory effect was enough in its own right to raise a constitutional question. Justice Black stated what he felt was a self-evident constitutional rule in his opinion in the 1946 decision in Colgrove v. Green, 328 U.S.

549, 572 (1946). In Justice Black's words, the Supreme Court has a "duty to invalidate [a] state law" where discrimination results from either "negligence or a willful effort to deprive some citizens of an effective vote." Even the most conservative wing of the Supreme Court that dissented in the historic Baker v. Carr, 369 U.S. 186 (1962) reapportionment case agreed that the constitutionality of a statute was tested by its consequences, not by the intent that may have motived the adoption of the statute. Justice Frankfurter stated that it "is settled that whatever [constitutional] consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the State's fundamental law." Id. at 325-26. Thus, where a statute "works" some form of discrimination--i.e., where it had the effect of discriminating in actual implementation--its constitutionality was tested by these consequences, and not by some underlying motivations that may have been expressed on the face of the statute or otherwise. A "purpose or effect" type of standard was reiterated subsequently by the Supreme Court and lower federal courts, and by the Supreme Court at least as recently as 1973 in the case of White v. Regester, 412 U.S. 755 (1973). In that case, the Supreme Court unanimously struck down certain countywide elections that had the effect of discriminating against blacks and Hispanics in the State of Texas. The district court and the Supreme Court found those elections to be unconstitutional, notwithstanding the complete absence of any evidence whatsoever of an intent to discriminate in either the adoption or maintenance of the countywide election scheme.

The historic American principle that the Constitution of the United States was concerned with effects and consequences, and not motivations, first began to change in 1976 with the Supreme Court's decision in Washington v. Davis, 426 U.S. 229 (1976), an employment discrimination case involving Washington, D.C. For the first time, the Supreme Court held that intent to discriminate was necessary in maintaining a Fourteenth Amendment

equal protection challenge. Then in the 1980 decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), a number of the Justices of the United States Supreme Court imposed the newly created intent standard in the area of election litigation.

Concerning today's problem, the most disturbing aspect of the Mobile decision in the plurality's construction of §2 of the Voting Rights Act. The plurality concluded that §2 of the Act reached only a narrow class of cases, and that a plaintiff could not ever prevail unless he or she proved that the discriminatory practice was actually motivated, in its adoption or retention, by an invidious racist intent to discriminate. This interpretation of §2 was without any support in history or logic.

I believe that interpretation of section 2 was erroneous. I have recently filed a brief in the Supreme Court in the case of Rogers v. Lodge, in which I have set forth the arguments on this point. I believe you have also been presented with an amicus brief in that case as well as the amicus brief filed by the United States of America when the case was pending in the fifth circuit. Both these amicus briefs make the same argument, so, with the Subcommittee's permission I would like to make my brief a part of the record of this hearing. Although I do not propose to describe the reasons for my view in detail in this statement, I would be happy to answer any questions the Subcommittee members may have about the arguments.

I should say that my views on what had to be proved before Mobile are borne out, to my way of thinking, by my actual experiences in litigating voting discrimination cases over the past eight years. By my count, I filed approximately ten cases in Georgia during this eriod, as well as one case in Alabama, not counting four cases in which I was co-counsel with others. I would like to share my experiences in those cases with the Subcommittee, because I believe that experience is directly relevant in assessing the proposed amendment to section 2.

Overall, I would like to make several principal points, and I will try to illustrate them with specific discussions of some of the cases. First, there was never any notion, either one expressed by any court or by any of the defendants' counsel, that we had to prove discriminatory intent. Second, these were all arduous cases because

notwithstanding the absence of any requirement of intent, what we did have to prove was not easy. We were required to prove essentially that the electoral system in the particular county or city, teken in the totality of circumstances, shut minority voters out of a fair opportunity to participate--that is important, there was never any aspect to our claims of any guarantee of a particular result (much less a result of proportional representation); it was opportunity. And if any of the Subcommittee members would actually go and look at some of these places, they would see that it is really pretty irrelevant to talk about claims of proportional representation; just as it is also pretty irrelevant to talk about any realistic opportunity within the existing electoral system because black voters had always been shut out, pure and simple. Even though the proof was arduous, it was at least possible in those places that really fit that description; in contrast, the intent test of Mobile is not only well-nigh impossible unless there are very fortuitous circumstances, but it also goes after a fact that I think has very little relevance in considering whether a particular system is discriminating today.

A third factor is that it was clear the standard would not be met in very many places, so the fears I have heard expressed about an all-out assault on election systems everywhere do not seem to have any foundation in fact or experience.

In contrast, I have learned some lessons since Mobile too. One lesson I have learned is not to file a dilution suit without smoking gun evidence, and in fact I have not filed a dilution case since Mobile. Lodge v. Buxton does not weaken that severe lesson, and I will be happy to discuss with the Subcommittee my reasons for thinking so.

The starting point for the position I take is that the most fundamental right we have is the right to vote. It holds our entire system of government together, and maybe more importantly, it provides the very legitimacy upon which the government is founded. Where the election mechanisms themselves are fundamentally unfair and operate to discriminate on the basis of race, the government does not have the legitimate claim to govern under our democratic principles. Whether these discriminatory

practices have been adopted or retained with the specific intent to discriminate, or whether they are the results of negligence, political self-protection, ignorance, or whatever other reason there might be, is simply irrelevant.

The very basis of the United States, and our sole claim to historical significance, is the promise that our government will affirmatively seek to maintain a true democracy on behalf of all citizens. We live on the promise that we will make our government open to all people, and not that we will allow the callous exclusion of people who may be powerless to come in because the electoral system operates to keep them out.

[Whereupon, at 12:41 p.m. the subcommittee recessed, to reconvene at the call of the Chair.]

VOTING RIGHTS ACT

TUESDAY, FEBRUARY 2, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY
Washington, D.C.

The subcommittee met, pursuant to recess, at 1:40 p.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Metzenbaum, and East.

Staff present: Stephen Markman, chief counsel; William Lucius, counsel; Dennis Shedd, counsel; Claire Greif, clerk; and Prof. Laurens Walker.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the 4th day of hearings by the Subcommittee on the Constitution on the Voting Rights Act. The subject of today's hearings will be section 2 of the Voting Rights Act, although it is fair to say that this has also been the focus of discussion of the first 3 days of hearings as well. I am confident that we will be exploring the proposed "bailout" provisions of the House legislation as well as other provisions of existing law in substantially greater detail during future hearing days.

There has been a great deal of discussion during the first 3 days of hearings about what the Supreme Court and other Federal courts have had to say about the intent/effect issue in the past. We have debated *White* v. *Regester*, *Arlington Heights*, *Washington* v. *Davis*, *Feeney* v. *Massachusetts*, *Mobile* v. *Bolden*, and other cases. Far more than most hearings, even Judiciary Committee hearings, we have devoted time to trying to understand and distinguish these cases.

We have explored these decisions primarily as I see it in order to determine the extent to which the *Mobile* decision reflected a departure in the existing law. In my view and in the view of a number of our witnesses, including the Attorney General of the United States, the *Mobile* decision restated previous law. This was the view, of course, of the Supreme Court as well and that is a pretty good authority. According to this view, intent or purpose has always been an indispensable element of 15th amendment discrimination just as it has always been an indispensable element of 14th amendment equal protection violations.

Other witnesses and some of my colleagues on this committee see *Mobile* as a reversal of existing law. By this view, courts prior to *Mobile* identified constitutional civil rights violations on the basis of some effects or results test.

What most witnesses do seem to agree upon is that the *Mobile* decision is the present law. Whether or not to overturn this law as well as whether or not such a constitutional ruling can be overturned by a simple statute are the basic issues involved in the Voting Rights Act debate.

While I believe that these hearings thus far have proven extremely informative and that they insure the development of a thoroughgoing record on section 2, I would hope that today's and Thursday's hearings would begin to focus more upon the substantive merit or lack of merit of the proposed results test.

As far as the state of the law prior to *Mobile*, I believe that most members of this committee are familiar with the arguments that have been suggested during these hearings. I would hope that my colleagues as well as interested members of the public and the media might make some effort to disclose the major court decisions that have been discussed here in order to make up their own minds.

I believe, however, that we do a disservice to this debate, whatever one's perspective on the issues, if we lose sight of the forest for the trees. From my own perspective I would oppose the results test and I would oppose overturning the *Mobile* decision, whatever the state of the law 5, 10, or 50 years ago. I would guess that proponents of the results test would feel similarly.

Several of the issues or questions that I would hope to explore in some detail over the next 2 days of hearings are: What precisely is the results test? How does it differ from the effects test in section 5 of the Voting Rights Act? How does a court identify violations of the results test? How does a community know when it is in violation of this so-called results test? What is the impact of the so-called objective factors of discrimination discussed in the House report?

With respect to the overriding issue here, the issue of proportional representation by race, I would hope that we could explore both problems of definition and of substance. How is it that there can be such a fundamental difference on the issue of proportional representation? To restate the issue, does the results test inevitably move us in the direction of reevaluating election laws and procedures on the basis of whether or not such laws and procedures move us in the direction of proportional representation?

The issue is not whether or not pure proportional representation will be achieved overnight. It is whether or not future courts and future Justice Departments will look into the proportional representation as the standard against which all electoral and voting practices are assessed. If such a practice does not at least move a jurisdiction in the direction of proportional representation, I believe that it will be constitutionally and legally suspect.

During the debate on this subject, I hope that we would all bear in mind that the burden of proof is upon those who propose to change the current law. The burden is upon such individuals to

demonstrate that their proposed alterations in the law would represent improvements in the law.

Ladies and gentlemen, I do look forward to each of our witnesses today and I would anticipate that each of them would assist the committee in trying to understand more thoroughly the impact of the proposed new section 2 standard.

I might mention that I personally am a strong supporter of civil rights and I believe that we should do everything in our power to see that the civil rights laws are enforced in this country because there is no reason for anybody's civil rights to be violated, and certainly there is no reason for any violation of constitutional civil rights. However, this issue on section 2, as well as some other issues in this matter, is one of the most important constitutional issues of our time. Unfortunately, I don't think it is being explained except in this committee, and I encourage those who are interested and those who have the obligation to explain it to explain both sides of this issue and not just one side.

I notice that Senator Metzenbaum is here and we will turn to Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman. I would like to commend you for moving the hearings forward. I know that you have been very diligent in giving those who wish to be heard an opportunity to be heard, and for that I certainly have nothing but great words of praise.

Senator HATCH. Thank you, Senator.

Senator METZENBAUM. I also recognize that well-intentioned people can come to a different conclusion with respect to the issue of intent or the results test, and I am also aware of the fact that nobody as such is against civil rights. It is a question of what the bottom line is and how you come out.

I believe, Mr. Chairman, that the overriding concern that many of us have, at least this Senator has, is that this very, very important issue although fully heard, fully discussed before the hearings—fair hearings and plenty of them—may take us down a road to the point where we have to legislate under the pressure of a time limitation.

As I have mentioned to you personally before, so this is not a new question, does the chairman have any idea as to when the subcommittee might be acting on this particular matter so that it could be before the full committee for an adequate period of time, to provide the entire committee an opportunity to act on it and so it will have adequate time on the floor of the Senate? As you well know, around here time flies very rapidly.

Senator HATCH. The last day of hearings will be on the 25th of this month so I am hopeful that shortly before or shortly after the end of this month we will hold a subcommittee markup on this bill. I presume that it would take us a little more time after that and then it would come to the full Judiciary Committee. I am hopeful that before the end of March this matter will be marked up in both this committee and the full committee.

Senator METZENBAUM. I thank the Chair.

Senator HATCH. I can't guarantee that, I am just saying that is my goal.

Senator METZENBAUM. Well, as I said to you, I think reasonable people can come to different conclusions on this subject. I think all of us agree that we ought to move it forward as soon as possible, and I think the administration feels the same way. I know we on the minority side are prepared to work with you to expedite the process.

Senator HATCH. Well, I think we are trying to do that. We will need some time to prepare the committee report on this matter. It is not simple, as you so well have articulated, but I intend to accomplish it as expeditiously as we can without failing to do the thorough job that needs to be done.

Senator METZENBAUM. Might I suggest to the Chair that the staff might start to think about and start work on the preparation of the report because I don't think there are going to be any shocking developments between now and the time that we actually vote on it. I would urge that the staff be so instructed, including the minority staff, because I don't know what the votes will be in the subcommittee. I haven't counted them, but I have my own opinion.

Senator HATCH. Yes. One of the problems that we are faced with in preparing a report, and one of the problems we are trying to face here in this subcommittee in these 9 days of hearings, is that they hardly looked at section 2 in the House, yet almost everybody here has admitted that section 2 is the most important issue to be considered. I find it somewhat astonishing that since everyone here admits that section 2 is the real issue and that it is a very real important constitutional issue, that they spent little, if any, time on that particular issue in the House. For that reason we will have to listen to the rest of these witnesses. I suspect by the 25th we will have concluded our last hearing; at least I hope so.

We do have some complications there. As you know, if the Williams matter comes up on the 23d as is anticipated, they have asked that we hold no hearings during that period of time. If that happens, we may have to postpone the last hearing until after the Williams matter is disposed of. I still think we may have time in the morning to hold the hearing on the 25th or those hearings that would conflict with the Williams schedule. We will see what we can do to keep this series of hearings on a nice steady course. I am determined to do that.

I believe in an extension of this bill. The question is, as we have been debating here, in what form should that extension take place? If I had my way, it would be a simple extension of the present law, which everybody until 2 or 3 months ago indicated was a perfectly fine law, one that worked well, and probably was and is the most important Civil Rights Act ever enacted.

Be that as it may, we have had a legitimate and productive public debate on this issue. I think that is what is taking place here, and I think it is good for everybody concerned.

Senator METZENBAUM. If we find that the Williams debate is going to interfere, I would respectfully suggest to the Chair that we meet early in the morning. I would say to the Chair that, if he so

decides, I would pledge to him that I would make every possible effort to be here at whatever time he schedules the hearings.

Senator HATCH. Well, we certainly appreciate our distinguished Senator from Ohio's position on that. I am grateful to you for bringing these matters up. We will certainly continue to try to push this along. We realize there is a time constraint and I personally don't want to approach that time constraint. It may take longer than March because of reports and conflicts, but I think that we will have this done expeditiously.

Are there any other Senators here?

[No response.]

Senator HATCH. Our first witness then will be Dr. John Bunzel, a senior fellow at the Hoover Institution at Stanford University in California. Dr. Bunzel is the former dean of San Jose State University in California and has written extensively on civil rights, including the Voting Rights Act. I might add that he has written extensively on what he calls the egalitarian revolution.

Dr. Bunzel has been an active Democrat most of his life, I understand, and in spite of that, Dr. Bunzel, I as a Republican, welcome you to this committee. We are very happy to have you here. You have been an eloquent witness on matters in the past. We will very strongly look forward to your testimony here today.

STATEMENT OF PROF. JOHN BUNZEL, THE HOOVER INSTITUTION, STANFORD UNIVERSITY

Mr. BUNZEL. I thank the Chairman very much. I would only make two corrections to his generous comments. I was not the dean at San Jose State. Some wished I had been. I was the president.

Senator HATCH. That is what I thought. My staff wrote down "dean" but, as I recall from a prior session, you were the president.

Mr. BUNZEL. Some feel that the jobs are really interchangeable.

Senator HATCH. I am just very happy that San Jose State is still active and strong.

Mr. BUNZEL. Yes. We have had a very good football season. Thank you very much, Senator. [Laughter.]

The other point I would like to make is that while I have participated as an administrator and as one who has sought to reflect on my experiences, and have also written somewhat on matters of equality, I have only recently become interested and begun to write on the Voting Rights Act.

I should point out to both you and Senator Metzenbaum and others that I am not a lawyer so I am going to be looking at forests rather than trees.

Senator HATCH. Right. We appreciate that.

Mr. BUNZEL. I deal with lawyers. I have dealt with them for a long time but I know you have also had people here who know the intricacies of the law and you will have other witnesses.

You mentioned the fact that——

Senator HATCH. Dr. Bunzel, what we are going to do here is have what is called a 10-minute rule. We would like all witnesses to summarize their testimony. Your full written testimony will be placed in the record at the conclusion of your oral remarks.

Again, I am encouraging witnesses to get their statements in by 5 the night before. That is cutting 2 days off the committee requirement. However, in the future, just so everybody understands, I don't know if we are going to allow a witness to testify who doesn't get his statement in by at least by 5 the evening before because we just can't make it otherwise. If this issue is this important, we want the statements in so the full committee can analyze them. This applies to all witnesses.

When Ms. Greif presses this button, the green light comes on. You have 10 minutes. When the yellow light comes on, you have 1 minute. The red light means you should stop and let us ask you some questions.

Senator METZENBAUM. If you are 1 minute over the place explodes. [Laughter.]

Senator HATCH. Well, Senator Metzenbaum explodes. That is the problem. [Laughter.]

Or should I say Senator Kennedy does, after yesterday.

Mr. BUNZEL. Well, I will look for the fireworks. I am looking forward to it.

You mentioned the fact, Mr. Chairman, that I was a Democrat and have been most of my adult life. I must say that one of the reasons that I have come before this committee is that a number of my colleagues and friends in the Democratic Party and in the civil rights movement, with which I was most active before I became a university administrator and had to become neutral on these matters, have taken what I have considered to be a very unfortunate position with regard to my coming here or some of the things that I hope to say.

Senator HATCH. What do you mean by that?

Mr. BUNZEL. Well, I mean that it has been suggested to me that this particular bill, the Voting Rights Act as it has come out of the House—and now I am quoting a friend of mine—"is our turf and that you really should be with us on this and stop throwing up dust in terms of other kinds of considerations."

"Did you know," I was told, "this bill passed through the House overwhelmingly?" And I said, "Yes, I did."

Senator HATCH. The House does a lot of that, you know. They throw insufficiently researched bills over here and expect us to do the cleanup.

Mr. BUNZEL. Well, I have since discovered that there really hasn't been a serious page of discussion and analysis of section 2, for example.

Senator HATCH. That's right.

Mr. BUNZEL. That disturbs me because one of the propositions which I hold dear—and it is a point which Senator Metzenbaum made for many of us who belong to his party—is that one can have many differences of opinion about matters having to do, say, in this case with the Voting Rights Act and have some concerns about language that has been added and in no sense diminish one's commitment to civil rights.

Senator HATCH. That is right.

Mr. BUNZEL. When I was an administrator I found myself, for example, very supportive of affirmative action in terms of its original goals and its purposes, but as it developed I became very discour-

aged by the notion that we were moving, without any legislative intent, support, or language in the Civil Rights Act, to a proposition that was transforming equality of opportunity into something that became equality of results.

I also discovered firsthand experiences which led me to believe that people now, having defined discrimination by some numbers standard, were saying in effect what we need to do now when we are looking, say, for faculty is not to find the best qualified person but to give preferential treatment on the basis of race or sex and that we should, in fact, as many members on the departments on the faculty believe, set aside certain positions for those based in terms of one group or another.

I find that whole argument repugnant. It goes back to my earliest days when my values of civil rights were honed by members of the Democratic Party and others—I think of Hubert Humphrey among a long line of people.

I take very seriously the general ethic that individuals should be treated as individuals irrespective of their origins, sex, and background. I find very difficult, therefore, part of what I see now as a trend in the Voting Rights Act which would tend to raise questions about whether or not we are moving more in the direction of making race and politics so mixed that the results will become more important, particularly if this leads to block voting or if this leads to competition that is no longer to be open between white and black candidates. I find this very difficult, and I am sympathetic to the "intent-effects" distinction that has been drawn by the Supreme Court. Indeed, the *Bolden* case is one which I find of paramount importance, again in terms of my own values, and which I would hope this committee would be able to support and to defend.

I want to say, Mr. Chairman, that there are so many difficulties with respect to the bill that came out of the House that it seems perhaps useful to state some of those problems by asking the committee, perhaps for the umpteenth time, if it would address some of the questions which seem to me to be necessary to raise.

I would like to know, because I can't find it clearly stated, what the defining principle in the Voting Rights Act would be that would clearly establish when the opportunity of blacks and Hispanics to register and to vote has been reduced.

"Can the value of a person's vote be diluted without a standard of reference as to what a full vote should be worth?" I am quoting Justice Frankfurter in *Baker* v. *Carr*.

If the voting strength of black citizens is to be protected against dilution, will there be some specification in the act of what full strength means?

A different kind of question but very much related to this is, if blacks are mostly Democrats in, say, a predominantly Republican county, is their vote to be considered diluted when a black candidate loses, even when it is agreed by everyone that race had nothing to do with it?

Is it the intention of Congress that the Voting Rights Act should now carry the message that at-large voting deprives blacks or Hispanics of a voice in the electoral process?

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Under what conditions and for what kinds of reasons should district lines be drawn that will insure that black candidates will not face competition from white competitors?

If a city believes that it would benefit economically from expansion, and if it passes an annexation ordinance in which racial considerations played no part, does the fact that there was a proportionate drop in the black population provide prima facie evidence of discriminatory impact? Does even a small reduction justify the imposition of ward voting?

Is the original commitment of the Voting Rights Act to a nondiscriminatory electoral process now to be changed to a standard which implies a commitment to maximum legislative seats held by blacks?

There are many other kinds of questions. These to me are by no means definitive but they are suggestive. I find the debate over the Voting Rights Act frequently echoed by a familiar statement which Stokely Carmichael made in another context years ago, a rather facile distinction: If you are not actively with us, you are actively against us. I don't think that is satisfactory in this instance.

Those who have been long-time supporters of the Voting Rights Act, and I count myself in that large company, are not now, Mr. Chairman, in retreat because we are troubled by the efforts of some of the sponsors of a new extension to redefine in a major way the meaning and direction of "equal electoral opportunity" by creating an artificial mix of race and politics.

I don't think these people are friends who have suddenly become enemies merely because they contend that the other side has the burden of proving that the court's emphasis on racially discriminatory intent should be repudiated; or because they reject the notion that a person's voting behavior reflects a single dominating interest such as race or ethnicity; or that elected officials of one race cannot represent the interests of another; or because they wonder why 30 percent influence over three representatives who are white may not be worth more than 90 percent influence over one who is black.

The measure of their continuing commitment to the Voting Rights Act is that they would not want to see this goal transformed into a policy that, in the words of perhaps this country's most knowledgeable student of the Voting Rights Act, Abigail Thernstrom, has called a color-coordinated politics, the color of the candidate unfailingly matching the color of his constituency, which would make proportional racial and ethnic representation the true test of voting effectiveness and political equality.

These are men and women who do not wish, Mr. Chairman, to support those whose actions would increase the already pronounced trend to politicize and racialize more and more aspects of American life. They believe that the equal protection clause means, among other things, that white and black voters are equal when their opportunities to register and vote are equal.

They would not lend their weight to any cause that would foster race consciousness, that would perpetuate stereotypical thinking, or deepen the tensions, fragmentation, and outright resentment among racial groups, thus exacerbating the tendency to identify

and then to judge persons on the basis of the racial group to which they belong.

Some of us are old enough to remember when the great fight facing civil rights leaders and civil libertarians in this country was to remove, for example, any references to a person's religion, race, or color from admission forms to universities because anything to do with group origins, background, and national origin was offensive to those who were a part of the civil rights struggle. I find that those values today are equally important and just as compelling.

These are the values, I might add, that lead me to accept the principle that is embedded, I believe in both the Civil and Voting Rights Acts, namely, that in a democratic society an individual's worth has a much higher moral claim than his color, his sex, and his origin.

Thank you, Mr. Chairman.

Senator HATCH. Well, thank you, Professor. Is it your opinion that as the Voting Rights Act has evolved its goal in 1982 is different from its goal in 1965?

Mr. BUNZEL. Yes. I find myself troubled by the change in language that has been part of the House-passed bill. I have looked as hard as I can for some indication that when Congress passed the Voting Rights Act it had anything but an intent standard in mind. I believe that it is generally agreed that the purpose of the Voting Rights Act was to make certain that blacks, for example, who had been disenfranchised by white racist discrimination would no longer persist, and, indeed, that there would be movement toward an integrated political process.

Those of us who were actively in support of the act found this reflecting our own deepest commitments and concerns. Now I worry that the Voting Rights Act, as amended by the House, would change the standard from an intent or purposeful discriminatory standard to something that suggests a results test, and, even more disturbing to me, is a results test that would lead to more rather than less emphasis on proportional representation.

Those who wish to change, Mr. Chairman—and this is quite an irony—it seems to me that those who wish to change the language of section 2 deny that they intend to support the idea of proportionate representation, but the change they want has that effect or result.

I believe that while I am in no position to get inside their heads, and I am in no position whatsoever to point to a smoking gun, I think there are some indications nevertheless that proportional representation for minorities is a likely direction and outcome. After all, they are the ones who are proposing this new language and, at the very least, there is now confusion and ambiguity. This is clearly one of the reasons why this committee is holding these hearings.

If the intent standard is now to be considered insubstantial or insufficient, how are the results to be measured? One inference is the dilution of the potential numerical strength of a minority voting block.

I would find one clear way, Mr. Chairman, for this body, this committee, the Senate, and ultimately the Congress to clear the air on all of these questions—namely, in my own preference to leave

the language of section 2 as it is with the presumption of intention to discriminate intact and understood.

I think, furthermore, the Senate could remove the suspicions of moving to a right to proportional representation as a remedy by making some unambiguous declaration that the legislative purpose of the Voting Rights Act resolves to avoid proportional representation. This is what the Supreme Court has resolved in the *Bolden* case.

If the voting rights act, as extended, seeks to overrule *Bolden*, I think it will signal a different and rather mischievous message.

There are some points that I think need clarification, if I may be specific for a moment.

Senator HATCH. Go ahead.

Mr. BUNZEL. The Voting Rights Act originally enunciated the ethic of equal access to the ballot box; that is to say, a political process that was to be integrated. Now one wonders if the intent and the goal is a political process equally open to blacks and Hispanics that will produce proportionate results in some form of racial proportionality.

If this is not intended, why does the House-passed bill want to restore the pre-*Bolden* understanding of the proper legal standing which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it? The courts will then be able to infer, I am afraid, that proportionate representation based on race can be sanctioned. I would have very serious reservations about signaling a message of this kind either to the Department of Justice or to any of the courts.

What does "effect" as a standard mean or, indeed, what does effect as a standard imply? I think the Voting Rights Act should leave no doubt that equal access does not mean equal results. It was never intended to mean equal results. There is no such language in the Civil Rights Act that would suggest anything parallel to that. There is no such language in the Voting Rights Act itself.

I think the Senate, Mr. Chairman, should leave no doubt that the right to vote does not mean in some unspecified way the right to an effective vote, with the effectiveness of that vote measured in terms of a group's rather than an individual's vote.

Here, again, I would suggest a parallel with what has happened in the whole debate on affirmative action because I think what we have found here is a great reversal. I think we now find, not because the Civil Rights Act intended it so but because other agencies of the Government have now moved to a point where discrimination has been redefined—and discrimination used to mean "without regard to race, creed, or color"—it now has the connotation, and in many important respects the practice, of suggesting that if there aren't sufficient numbers, then the burden shifts to an employer or to a university to prove they have not been discriminating.

Originally, Mr. Chairman, the Voting Rights Act was clear that it was directed to remedying disfranchisement. Now there is considerable talk of dilution. Again, this parallels the language of the new equality in affirmative action, where proportionate results have become the test of discrimination.

I don't think that this committee or the Senate or the Voting Rights Act itself can address these questions and resolve them unless it talks specifically to what it believes minorities are entitled to. It should not leave this to the Department of Justice or the courts to decide. I believe it must also come to some understanding as to what it means by equal electoral opportunity.

The "effects" standard, I am afraid, leaves the inference that the individual principle of one-person-one-vote can be transformed into a group principle, and not all groups but racial group claims. That gives me considerable pause.

I think that the Voting Rights Act would clear the air by stating, as Edward Elder observed here, that dilution measured in terms of racial proportionality is not the constitutional equivalent of disfranchisement.

If there is no proof of discriminatory intent, proportionality, I am afraid, will become further embedded in our political and electoral language, with equal access less controlling than equal outcomes, and those outcomes to be based on race.

I say again, Mr. Chairman, that I think that the Voting Rights Act—since there is this confusion and since there are now questions dangling out there like participles—it should leave no doubt that it does not subscribe to the notion that every political group, or at least every such group that is in the minority, has a Federal constitutional right to elect candidates in proportion to its number.

Senator HATCH. Professor Bunzel, the House report on H.R. 3112 states on page 30,

> It would be illegal for an at-large election scheme for a particular State or local body to permit a block voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interest of a racial or language minority.

How would we be able to determine whether a candidate was "identified with the interests of a racial or language minority"?

Mr. BUNZEL. Well, that is one of the real problems. I think that it would be very difficult to try to establish this. I think, if one did try, one would run into some very serious problems that go to fundamental premises.

One of the difficulties with the whole notion of looking for an "effects" or a "disparate impact" test is that the result tends to make us work our way back to the primacy of race as the criterion by which we determine whether or not there has been equal opportunity or equal treatment. Many of us feel very strongly that there is no real reason to assume—and I would give you as the most clear example one from the State from which I come, California—to believe that the voters of that State are motivated exclusively by race or color in what is now the 80-percent endorsement of the people for Mayor Bradley of Los Angeles as a Democratic candidate for Governor.

I think, were he to appear before this committee, he would be the first to tell you that he does not come before this committee or before the people of California as a black candidate. Of course, he is black and everyone knows this, and one is not proposing for one moment that this is not an important point in our history, but he has been able to build his success—and this is not simply a local story—based on the notion of coalition politics.

If we begin to isolate districts, if we begin to move to the notion that certain districts are based squarely on a number in proportion to their own color, then I think we are moving further toward a polarization. I believe that that is neither healthy for what we want in this country nor in keeping with the Voting Rights Act's original purpose.

Senator HATCH. What is the defining principle for discrimination under the Voting Rights Act?

Mr. BUNZEL. I think it was very clear. It was to remove all obstacles to voting and registration that were based on race; it was to make certain that every individual had an equal right to vote and to register; that race and all of the obstacles which the white racist structure in the South had been practicing for years was no longer to obtain; and, furthermore, that these particular concerns were very much in keeping with the implicit and explicitly stated notion that the consequence of this would be not a fragmentation but a political process that would be both more equal in terms of participation but also moving us toward an integrated society.

Senator HATCH. Can you elaborate on your statements with respect to "color coordinated politics"?

Mr. BUNZEL. What I am beginning to see, and what I am worried about, is the kind of view that suggests that only blacks can represent blacks, only whites can represent whites, and only Hispanics can represent Hispanics. While there may be some exceptions to this, the argument goes on: We need to bring about an equality of representation based on color and that what is really important for so many people, the argument goes on, is to understand that there are certain kinds of interests that only those of a certain color or background can represent fully. I don't know what "fully" means and, further, I don't believe in the proposition that only those of a certain background, group, or color can represent that particular group or color.

Senator HATCH. Thank you, Doctor. Can you wait? I have to vote so we will have a short recess until we return. If Senator Thurmond returns, I will instruct the staff to ask him to start the questioning, or if Senator Metzenbaum returns first he may start it, whichever the case may be. Please wait for us. We will recess for about 10 minutes. Thank you.

[Recess taken.]

Senator HATCH. We will call the subcommittee to order again.

Dr. Bunzel, it looks as though neither Senator Thurmond nor Senator Metzenbaum is here. If they come, I will call you back. Therefore, please wait just a little while longer.

Mr. BUNZEL. I will be here for another half hour or so, Mr. Chairman. I have another commitment.

Senator HATCH. If you have to leave, we will understand. They understand, too.

Mr. BUNZEL. Thank you.

Senator HATCH. Let me ask you one more question, though, in the interest perhaps of getting just a little more information from you.

As you know, the amended version of section 2 in S. 1992 contains a disclaimer provision with respect to proportional represen-

tation. In your opinion, what is the effect of this disclaimer language?

Mr. BUNZEL. I think that what is being disclaimed here is honest in its intent, at least I would make that presumption. But I also think that it is very likely something of a sleeper.

One of the difficulties here in the changing of the language from an abridgement of the right to vote to language that talks about the results and the effects is that it opens up the possibility for a variety of searches for all kinds of evidence that would show discrimination. I think, as I try to suggest elsewhere, that if one, for example, were to look at the fact that in a State such as New Jersey, let us say, if blacks register less in number than whites, this is the kind of thing that might open the door for the kind of conclusion that this is that scintilla of evidence that would suggest there is discrimination.

I am afraid that what the disclaimer suggests when it says "in and of itself," what it really opens the door to, is the possibility of being able to show that a variety of other factors can make it possible to make a violation stick. If you could show, for example, that there has been a history of low minority participation or if there has been a malproportion of financial services, or moneys to education, or whatever, then this would be interpreted to show that there has been discrimination.

The standard of discrimination becomes more elastic. As the standard becomes more elastic, then one moves much more quickly to a standard that suggests that there has been discrimination, and discrimination is no longer one of whether it is purposely intended. It simply suggests that there has been an impact on a particular group and that impact may have very little to do with race whatsoever.

Senator HATCH. One of the witnesses said that lack of proportional representation plus any additional scintilla of evidence amounts to a section 2 violation under the proposed legislation.

Mr. BUNZEL. Well, I am afraid that is rather simplistic. I am not as prepared to argue in these kinds of rather morally absolutist terms.

There are districts in the South. There are districts elsewhere around the country. We would find all kinds of lawsuits, I think, coming in all manner of form and shape in the States around the country if we moved to an effects test which was based on disparate results.

I find, for example, that if a particular city in the South, having no reason whatsoever based on race, wants to extend its population or to annex itself for financial purposes because it needs a larger tax base, these are legitimate reasons. They do not show intent to discriminate.

If the result is to reduce the voting population in that district of blacks from 52 percent to 46 percent, I am afraid that the "effects" test, and those who would want to push it—and a Justice Department that might be sympathetic—would be able to show that this again has something to do with race, and, therefore, the reason for annexation would be secondary to the concern of race.

Senator HATCH. When this professor said the lack of proportional representation plus a scintilla of evidence would equal a section 2

violation under the House bill, he defined "scintilla of evidence" as to include at-large voting, block voting, reregistration requirements, impediments to independent voting, economic disparities relating to registration process, limits on singleshot voting, majority vote requirement, registration disparities, et cetera, et cetera. In other words, what he meant was that if you can show that there is a lack of proportional representation plus any one of those additional institutional factors, then you have a section 2 violation. I happen to agree with that interpretation.

Mr. BUNZEL. I see. I misunderstood your question.

Senator HATCH. Yes. I thought maybe you had.

Mr. BUNZEL. Yes.

Senator HATCH. Would you agree with that as well——

Mr. BUNZEL. Yes.

Senator HATCH [continuing]. The way this present bill is written?

Mr. BUNZEL. I am afraid that is true.

Senator HATCH. Therefore, what the bill really comes down to is an effects test obviating the necessity of showing any kind of intent.

Mr. BUNZEL. I am afraid that one of the reasons that I find the statutory direction and the language in the Voting Rights Act very discouraging is that it is moving in an increasingly different direction from what is now the court test of the constitutional document.

I keep coming back to the proposition that in order for this committee and for the Voting Rights Act itself to clarify precisely in what direction it intends to move, it will have to determine—and I believe it is the responsibility of the Congress to determine—what kinds of entitlements minorities have politically.

What does it mean, for example, for the black population of a State such as Texas, in some counties in Texas, where blacks themselves have objected strongly to having an arrangement made where they will have a considerable percentage of the vote in one district rather than in three? They have, interestingly enough, wanted to have representation that would be competitive, controlling, and influential over whites in three or four districts rather than settling for one.

The Hispanics in southern California and throughout the State of California, and indeed in many other parts of the country, are also less interested because they are far more scattered. They are not as homogeneous. They would not be very receptive to the notion that we should polarize and draw district lines based on color.

Senator HATCH. Well, thank you, Dr. Bunzel. We appreciate your testimony and the effort you have made in coming here to testify before this committee.

Mr. BUNZEL. Thank you. It is nice to see you again.

Senator HATCH. Thank you so much. It is nice to see you.

Without objection, your entire statement will be inserted into the hearing record.

[The prepared statement of Mr. Bunzel follows:]

PREPARED STATEMENT OF JOHN H. BUNZEL*

A funny thing happened on the way to the hearing today. I was struck by a case of deja vu.

During the 1960s I was an early and vigorous supporter of the Civil Rights Act because it spoke eloquently to the proposition that discrimination against anyone must be eliminated and that employment opportunities were to be independent of race, color, religion, sex or national origin. In the 1970s, when I was in my former life as a university administrator, I supported the principle that all contractors with the government, including colleges and universities, should take affirmative action to eliminate employment discrimination against women and minorities. Executive Order 11246 also prohibited "discrimination-because of. . .", commanded equal treatment "without-regard-to. . .", and required positive measures to eliminate the one and accomplish the other. Soon, however, affirmative action was transformed into a policy that endorsed and encouraged racially preferential treatment and fostered a "numbers definition" of discrimination that redefined equality of opportunity not as "equal rights for all" but as some form of group proportional equality.

I was not alone in feeling caught in the winds of a great reversal. The long-standing principle of individual achievement had been subordinated to the new principle of (really an old and discredited principle) group identity. Yet I can remember when it was believed to be unjust to bar an individual from a university or a job because of the particular group to which he or she belonged - indeed, that was the meaning of discrimination. Furthermore, millions of Americans have long been dedicated to creating a society in which distinctions based on race will be eradicated.

Today we have reached a point where there is no clear agreement about what constitutes discrimination. We are repeatedly told that the prohibition against discrimination means that men and women should receive "equal treatment", but what kind of treatment is "equal" remains a matter of dispute. At one time discrimination turned on whether or not an employer took racial considerations into account in making employment decisions - "intentional discrimination on the basis of race." Now "discrimination" can take place even if the employer

*John H. Bunzel, former president of San Jose State University, is a senior research fellow at the Hoover Institution, Stanford University.

does not intend to discriminate in this way. The new test is whether an employer's hiring procedure (or a university's admissions policy) has an "adverse impact" on certain (but not all) minority groups. In other words, if the effect is disproportionately to disadvantage blacks as against whites, the burden to prove good behavior shifts to the employer (or the campus) to show that it is not guilty of discriminating on grounds of race, reversing the ordinary requirements of legal procedure. I should add that there is nothing in the record to show that Congress has set the direction or given its legislative approval for replacing the principle of equality of opportunity with the principle of equality of results. That was certainly never intended to be the consequence of the Civil Rights Act.

Now the Senate is considering an extension of the Voting Rights Act of 1965, which has already been extended and expanded in 1970 and 1975. But, once again, there are proposed changes in the air that are disturbing - disturbing, I want to emphasize, to many liberals, conservatives, Democrats, Republicans, the labels are unimportant, who were strong backers of the landmark law (and would like to see it extended) because its permanent accomplishment was that by eliminating discrimination, it provided blacks and other minorities equal access to the voting process by securing the ballot. They believe in the fundamental premise of the Voting Rights Act - that equal political opportunity for all requires that everyone be counted for one and no one for more than one. Its passage, in fact, was a political revolution.

One of the major changes is in the House-passed Voting Rights bill, which seeks to overturn the "intent-effects" distinction drawn by the U.S. Supreme Court. (I recently discussed this issue briefly in the Los Angeles Times (January 21, 1982) and am taking the liberty of re-stating some of those comments and concerns here.) Section 2 of the Act, which is applicable nationwide, is a statutory codification of the 15th Amendment that protects all citizens from having their right to vote denied or abridged on the basis of race or color. It has traditionally been understood to mean - and was reaffirmed by the Supreme Court in 1980 in City of Mobile v. Bolden - that a violation requires a demonstration of intention or a discriminatory purpose. The Court has also ruled that only if there is "purposeful discrimination" can there be a violation of the Equal Protection Clause of the 14th Amendment.

H.R. 3112 changes the standard of proof for Section 2 lawsuits by eliminating the requirement that an electoral jurisdiction has intentionally discriminated in voting laws. Instead, it need only act "in a manner that results in a denial or abridgment" of voting rights. The House proposes a standard for identifying discrimination that looks to the racial "effects" or "disparate impact" of some particular action on blacks or other minorities rather than on whether or not the action was undertaken for an illegal purpose. It would go beyond the standard of Section 5 that covers specified jurisdictions with histories of electoral discrmination (mostly in the South) and that bans all election practices - gerrymandering election districts, for example - which prevent minorities from enhancing their political power. H.R. 3112 would change the right of minorities to vote to an effective right to vote. In short, blacks and Hispanics should not only have the right to select black and Hispanic candidates - an unarguable right - but blacks should have the maximum political opportunity to be represented by blacks and Hispanics by Hispanics.

The presumption is that minorities will be able to increase their political strength and influence only if Congress changes Section 2 of the Voting Rights Act so that blacks and Hispanics have more than equal access to the ballot box. They must somehow be assured of equal electoral results. The center of concern would move from eliminating racially motivated discrimination in the voting process to endorsing a theory of group representation that would push our politics closer to institutionalizing a system of single-member districts and racial bloc voting. This, it is claimed, is the only way to make sure that the black or Hispanic vote is not diluted and that every ethnic group is "fully represented." What worries many observers is that it is only a short step to sanctioning the concept of proportional racial and ethnic representation.

Thus, as the American Jewish Congress' Nathan Z. Dershowitz and Marc D. Stern point out, a law designed to guarantee full minority participation in the democratic process can also undermine a major tenet of that process - majority rule. "What is worse, it does so by insisting that racial considerations be used to dictate election results."

It is in this light that one must weigh carefully the implications of new language in H.R. 3112, which states that the fact that members of a minority group have not been elected "in numbers equal to the group's proportion of the population" shall not constitute a violation of Section 2 "in and of

itself." That is the key phrase - and the "sleeper." It recalls to mind the difference between quotas and goals in affirmative action. Proportional representation may be wrong, but the "effects" test is said to be right and necessary in much the same way that engaging in racially preferential treatment is claimed to be the right remedy for past discrimination.

A more fundamental problem involves the kind of representation blacks and other minorities are entitled to. Consider a western state that has a 30% black population but only 15 black state senators out of 100. By itself, this "disproportionate representation" would not violate Section 2. But it can serve as a trigger mechanism. The Justice Department could look at the discrepancy in registration figures between blacks and whites, or the disparity in state funds between black and white educational facilities, or the maldistribution of public services, and claim that any one of these additional factors constitutes that scintilla of evidence to make a violation stick. Furthermore, the "effects" test would permit this kind of evidence in order to "prove" that Section 2 had been violated. By contrast, all of the factors and circumstances would have to be examined together, as a total package, to satisfy the standard of purposefully discriminatory intent.

It is unfortunate that this whole matter was not extensively debated in the House. As far as I can determine, there was not one page of discussion before H.R. 3112 was passed, which is one reason why these Senate hearings can serve a very useful purpose.

There are other related questions which an extension and revision of the Voting Rights Act raise and for which the answers are anything but quick and easy. As Abigail M. Thernstrom, perhaps the country's most knowledgeable student of the Act, has pointed out, 15 years of experience and litigation have not yet settled the basic issue of electoral equality and minority voting rights. "And as long as it remains unsettled," she says, "the basic goal of the Voting Rights Act will remain elusive."

Originally the goal was clear - to remove all obstacles intended to sustain white racist power by preventing blacks from registering and voting, and to work toward an "integrated political process." Now there is growing ambiguity and confusion, both about desired ends and the means by which to achieve them. There is also a big difference between what is meant by the right to vote as set forth in various opinions of the Supreme Court and as understood by the Voting Rights Act. The one (constitutional law) has declared that black and

white voters are equal when their opportunities to register and vote are equal; the other (statutory law) suggests that political equality might depend on some notion of the representational rights of groups. At the very least, in Justice Felix Frankfurter's terms, we are dealing with "a choice among competing theories of political philosophy."

I would hope that the Senate Judiciary Committee would give careful consideration to the following questions (intended to be suggestive rather than definitive) in an attempt to clarify the meaning of electoral discrimination:

- What is the defining principle in the Voting Rights Act that would clearly establish when the opportunity of blacks and Hispanics to register and vote has been reduced?

- Can the value of a person's vote be "diluted" without "a standard of reference as to what a vote should be worth"? (Justice Frankfurter in Baker v. Carr)

- If the voting strength of black citizens is to be protected against "dilution", will there be some specification in the Act of what "full" strength means?

- Is electoral discrimination against blacks and Hispanics to depend on a showing of "underrepresentation"?

- If blacks are mostly Democrats in a predominately Republican County, is their vote to be considered "diluted" when a black candidate loses even when it is agreed by everyone that race had nothing to do with it?

- Does the fact that there is a disproportionate number of blacks on the Boston City Council imply an "adverse effect" in the form of a "diluted" vote, thereby constituting evidence of electoral inequality even though the voting process was fully open to black participation?

- Is it the intention of Congress that the Voting Rights Act should now carry the message that at-large voting deprives blacks or Hispanics of a voice in the electoral process?

- Under what conditions and for what kinds of reasons should district lines be drawn that will ensure that black candidates will not face competition from white competitors?

- If a city believes that it would benefit economically from expansion and passes an annexation ordinance in which racial considerations played no part, does the fact that there was a proportionate drop in the black population provide prima facie evidence of discriminatory impact? Does even a small reduction justify the imposition of ward voting?

- Is the original commitment of the Voting Rights Act to a nondiscriminatory electoral process now to be changed to a standard which implies a commitment to maximum legislative seats held by blacks - in a word, black power?

I regret that the debate over the Voting Rights Act has frequently echoed Stokeley Carmichael's familiar and facile distinction: if you are not actively with us, you are actively against us. When applied to policy-making decisions facing the Congress, this simplistic moral absolute denies legitimacy to complicated and inevitably vexing questions. Those who have been long-time supporters of the Act - and I count myself in that large company - are not now in retreat because they are troubled by efforts of some of the sponsors of a new extension to redefine in a major way the meaning and direction of equal electoral opportunity by creating an artificial mix of race and politics. They are not friends who have suddenly become enemies simply because they contend that the other side has the burden of proving that the Court's emphasis on racially discriminatory "intent" should be repudiated - or because they reject the notion that a person's voting behavior reflects a single, dominating "interest" such as race or ethnicity (or that elected officials of one race cannot represent the interests of another), or because they wonder why 30% influence over three representatives who are white may not be worth more than 90% influence over one who is black. The measure of their continuing commitment to the Voting Rights Act is that they would not want to see this goal transformed into a policy that, in Thernstrom's words, would promote "color-coordinated politics - the color of the candidate unfailingly matching the color of his constituency" - and would make proportional racial and ethnic representation the true test of voting effectiveness and political equality.

These are men and women who do not wish to support those whose actions would increase the already pronounced trend to politicize and racialize more and more aspects of American life. They believe that the equal protection clause means (among other things) that black and white voters are equal when their opportunities to register and vote are equal. They would not lend their weight to any cause that would foster race consciousness, perpetuate stereotypical thinking, or deepen the tensions, fragmentation and outright resentment among racial groups, thus exacerbating the tendency to identify and then to judge persons on the basis of the racial group to which they belong. Their values lead them to accept the principle embedded in both the Civil and Voting Rights Acts - that in a democratic society an individual's worth has a higher moral claim than his color, his sex, or his origins.

[From the Los Angeles Times, Jan. 21, 1982]

VOTING RIGHTS AND BLOC POWER—PROPOSED BILL CHIPS AWAY AT THE NOTION OF MAJORITY RULE

(By John H. Bunzel) [1]

The U.S. Senate is about to begin hearings on extending the Voting Rights Act of 1965. President Reagan and most members of Congress agree that the landmark law, which was extended and expanded in 1970 and 1975, should be extended for 10 more years. But a real fight is shaping up over how to go about it.

One of the major issues involves the "intent-effects" distinction drawn by the U.S. Supreme Court that the House-passed voting-rights measure is seeking to overturn. Section 2 of the act, which is applicable nationwide, protects all citizens from having their right to vote denied or abridged on the basis of race or color. It has traditionally been understood to mean, and was reaffirmed by the Supreme Court in 1980, that a violation of that law requires a demonstration of intention or a discriminatory purpose. The court has also ruled that only if there is "purposeful discrimination" can there be a violation of the equal-protection clause of the 14th Amendment.

The House-passed measure would change the standard of proof for Section 2 lawsuits by eliminating the requirement that an electoral jurisdiction has intentionally discriminated in voting laws. Instead, it need only act "in a manner that results in a denial or abridgment" of voting rights. The House proposes a standard for indentifying discrimination that looks to the racial "effects" or "disparate impact" of some particular action on blacks or other minorities rather than on whether or not the action was undertaken for an illegal purpose.

It would go beyond the existing standard that covers specified jurisdictions with histories of electoral discrimination (mostly in the South) and bans all election practices—gerrymandering election districts, for example—that prevent minorities from enhancing their political power. The proposed legislation would change the right of minorities to vote to an effective right to vote. In short, not only should blacks and Latinos have the right to select black and Latino candidates—an unarguable right—but also blacks should have the maximum political opportunity to be represented by blacks and Latinos by Latinos.

The presumption is that minorities will be able to increase their political strength and influence only if Congress changes Section 2 of the Voting Rights Act so that blacks and Latinos have more than equal access to the ballot box. They must somehow be assured of equal electoral results. The center of concern would move from eliminating racially motivated discrimination in the voting process to endorsing a theory of group representation that would push our politics closer to institutionalizing a system of single-member districts and racial-bloc voting.

This, it is claimed, is the only way to make sure that the black or Latino vote is not diluted, and that every ethnic group is "fully represented." What worries many observers is that it is only a short step to sanctioning the concept of proportional racial and ethnic representation.

Thus, as Nathan Z. Dershowitz and Marc D. Stern of the American Jewish Congress point out, a law designed to guarantee full minority participation in the democratic process can also undermine a major tenet of that process—majority rule. "What is worse, it does so by insisting that racial considerations be used to dictate election results.

It is in this light that one must weigh carefully the implications of new language in the House-passed measure, which says that the fact that members of a minority group have not been elected "in numbers equal to the group's proportion of the population" shall not constitute a violation of Section 2 "in and of itself." That is the key phrase—and the sleeper. It calls to mind the difference between quotas and goals in affirmative action. Proportional representations may be wrong, but the "effects" test is said to be right and necessary in much the same way that engaging in racially preferential treatment is claimed to be the right remedy for past discrimination.

A more fundamental problem involves the kind of representation to which blacks and other minorities are entitled. Consider a Western state that has a 30 percent black population but only 15 black state senators out of 100. By itself, this "disproportionate representation" would not violate Section 2. But it could serve as a trigger mechanism. The Justice Department could take a look at the discrepancy in reg-

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[1] John H. Bunzel, former president of San Jose State University, is a senior research fellow with the Hoover Institution at Stanford University.

istration figures between blacks and white educational facilities, or the maldistribution of public services, and claim that any one of these additional factors constitutes that scintilla of evidence to make a violation stick.

Furthermore, the "effects" test would permit this kind of evidence in order to "prove" that Section 2 had been violated. By contrast, all factors and circumstances would have to be examined together, as a total package, to satisfy the standard of purposefully discriminatory intent.

Those who have been long-time friends of civil rights are not suddenly enemies simply because they do not favor an electoral system that would shield a black candidate running for office from a white candidate, or because they do not believe that elected officials of one race cannot represent the interests of another. They continue to support the original aims of the Voting Rights Act because they remain committed to working toward an integrated political process rather than toward the goal of black or Latino power that, they feel strongly, is not the true test, of electoral equality.

Senator HATCH. Our second witness today will be Hon. Henry Kirksey who is a State senator from Mississippi. State Senator Kirksey has been a litigant in numerous Voting Rights Act cases.

We will look forward to taking your testimony at this time, Senator.

STATEMENT OF HON. HENRY J. KIRKSEY, STATE SENATOR, JACKSON, MISS., ACCOMPANIED BY BARBARA PHILLIPS

Mr. KIRKSEY. Thank you, Mr. Chairman. Let me introduce Ms. Barbara Phillips——

Senator HATCH. Ms. Phillips, we are happy to have you with us.

Mr. KIRKSEY [continuing]. Who will sit with me.

Mr. Chairman, first of all, let me express my appreciation for this opportunity to come before this committee and to testify. I shall read for the committee a summary statement rather than the lengthy statement that I have prepared.

Senator HATCH. Well, we would appreciate that, and then we will put your full, lengthy statement into the record as though fully delivered immediately following your oral presentation.

Mr. KIRKSEY. Thank you. I am Henry J. Kirksey, a member of the Mississippi Senate. I was elected to the Mississippi Senate in 1979 because of the protections of the Voting Rights Act.

Although Mississippi is 35 percent black, the Mississippi Legislature through racial gerrymandering of legislative districts succeeded in excluding any black representation in the Mississippi Senate from reconstruction through 1979.

I was born in Tupelo, Miss., in 1915, and I have been directly involved since 1965 in ligitation to protect the rights of black Mississippians fully to participate in the electoral process.

I was a plaintiff in the Mississippi State Legislative reapportionment case which went on for 14 years, including nine trips to the U.S. Supreme Court, until effective relief finally was obtained in 1979.

I have also successfully challenged racial gerrymandering in county supervisors' districts in Hinds County, Miss., and unsuccessfully challenged at-large elections in Jackson, Miss., also in Hinds County.

I would like to submit for the inclusion into the record of these hearings my written statement; a report entitled "Voting in Mississippi: a Right Still Denied," which describes continuing voting rights denials in Mississippi; another report, "Black Political Power

in Mississippi, a Report of the Mississippi NAACP Political Actions Committee," which shows continuing violations of the Voting Rights Act, and the broad base of support for a strengthened act. I also have one additional document here that I would like to submit. It is called Questions and Answers on the Section 2 Results Standards of Senate Bill 1992.

Senator HATCH. Without objection, those will be included in the record.

Mr. KIRKSEY. I am here to urge your support for Senate bill 1992 which extends and strengthens the protections of the Voting Rights Act.

One of the aspects of this problem that concerns me the most is the failure of the Justice Department under the Reagan administration to enforce the protections of the present act. One example of this in Mississippi is the Justice Department's decision in July 1981 to withdraw 4½ years after it was filed the Justice Department's objection to a racially discriminatory municipal annexation in Jackson, Miss., which clearly diluted black voting strength.

Jackson is governed by a three-member city council, all elected at large. Although blacks constitute 45 percent of the population, no black has been elected to the Jackson City Council since at-large voting was adopted in 1912.

Since 1960, the black percentage in Jackson's population has been steadily growing. The growth of the black population has been offset by a series of annexations of predominantly white areas to prevent blacks from becoming a majority in Jackson's population.

In 1976, the city annexed a 40-square-mile area which was 74 percent white and the Attorney General objected to this annexation for dilution of black voting strength. My own calculation indicates that, but for this annexation, Jackson would be majority black today.

In July of last year, after intervention by Senator Thad Cochran and Representative Trent Lott, this objection was withdrawn even though there was no change in the facts of the law applicable in this case. The withdrawal of this objection violated all of the procedures of the Justice Department and was clearly politically motivated. These are the kinds of things that we are faced with in Mississippi and show the need for strengthening section 2 of the Voting Rights Act to provide private plaintiffs an opportunity to file suit to correct these kinds of discriminations.

The Voting Rights Act is intended to eliminate discrimination which denies or bridges the voting rights of minorities because of their status as minorities. The amendment to section 2 is necessary to accomplish this goal.

To argue that discriminatory purpose must be proved is to condone the violation of the right to vote and to make illegal only a discriminatory purpose. How can anyone claim to support the right of minorities to vote and participate in the democratic process and yet oppose an amendment which makes illegal those laws and practices which result in a denial or abridgment of that right?

Our effort to end discriminatory at-large elections in the city of Jackson, Mississippi provides a clear example of how the *City of Mobile* decision changed the legal standard and why the amend-

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ment to section 2 is needed to maintain the standard which had been applied in the Fifth Circuit prior to *Mobile*.

Together with 16 other blacks, I filed an action in 1977 challenging the discriminatory at-large selection in Jackson, Mississippi. This case, *Kirksey* v. *City of Jackson*, is still pending. The case was tried in July 1977 in the District Court of the Southern District of Mississippi relying on the *Zimmer* v. *McKeithen* and *White* v. *Regester* factors. We lost in district court in 1978.

On appeal, the fifth circuit vacated and remanded for a supplemental hearing and reconsideration because *City of Mobile* had changed the law. The fifth circuit judge stated that the validity of the criteria developed in *Zimmer* is now very much in question in light of the recent Supreme Court decision in the *City of Mobile, Alabama* v. *Bolden*.

The Court then explained:

> We have many times held that factfindings that were made under the spell of legal principle which were either improper or since then declared to be improper really can't be credited one way or the other.

In *Jones* v. *City of Lubbock* the fifth circuit again remanded a voting rights case because the *City of Mobile* decision in the court's words "rejected the *Zimmer* test, simultaneously casting aside the 10 years of thought, experience, and struggle embodied within it."

Judge Goldberg in his concurring opinion leaves no doubt that judges know the *City of Mobile* opinion changed the rules. The Supreme Court has completely changed the mode of accessing the legality of electoral schemes alleged to discriminate against a class of citizens. When the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations.

Judge Goldberg went on to say that the courts no longer know how to proceed; therefore, although much was written by the Justices in *Bolden* little, save the rejections of *Zimmer* test, was actually decided therein.

It is a purely academic exercise to debate whether the *Mobile* opinion changed the law. Judges who interpret the law have addressed the issue. The proposed amendment to section 2 is needed to restore the 10 years of thought, experience, and struggle referred to by Judge Goldberg.

In October 1980, we retried *Kirksey* v. *City of Jackson* exclusively on the intent issue in light of the *Mobile* case. We offered both direct and extensive circumstantial evidence of the discriminatory purpose in adopting and maintaining at-large elections in Jackson, Miss., a city in which blacks are 45 percent of the population but in which blacks have never been elected to the city council since at-large elections were instituted in 1912.

We lost in the district court, which held that the motivation of the electorate is immune from judicial scrutiny. A panel of the fifth circuit court at appeal affirmed in Jackson, Miss., where at-large elections were first adopted by referendum in 1912 and were maintained by a referendum in 1977. The court held that even though *Mobile* requires us to prove discriminatory purpose, we are barred from using evidence of the motivation of the decisionmaker, the city voters.

The direct and circumstantial evidence of denial of access to the political process which meets the standards of *Zimmer* and *White* is not sufficient, neither is the *Mobile* decision, to prove a violation of the rights protected by section 2.

Senator HATCH. Mr. Kirksey, your narrative of the annexation case in Jackson I think may leave out one important fact. Isn't it true that the Carter administration permitted the 1977 election to proceed on the condition that a referendum be held to decide whether to change the city's form of government? Doesn't Mr. Turner's letter of February 17, 1981, reflect that fact?

Mr. KIRKSEY. I am sorry; I didn't get that latter part of your statement, sir.

Senator HATCH. Well, what I am saying is that the narrative that you have given on the annexation case leaves out the fact that Mr. Turner sent a letter dated February 17, 1981 indicating the election was supposed to proceed on the basis that a referendum be held to decide whether to change the city's form of government.

Mr. KIRKSEY. That is not basically the way I understand what occurred.

Because of the annexation's occurring close to the election, it was decided that the election would proceed. Those people in the annexation area would have to vote in separate boxes so that those votes would not count. We did not rule that they did not have the right to go out and vote but those boxes were held separate from the others.

Senator HATCH. You complain about the new congressional redistricting in Mississippi which clearly resembles the present apportionment. While you say that the existing plan is discriminatory, hasn't that existing plan been approved by the Justice Department?

Mr. KIRKSEY. For the first time, I think the Justice Department did not have that case before it after the redistricting in 1966, and that is very important because they did not have an opportunity to judge that case one way or the other when it occurred in 1966. In fact, it was into 1970 or 1972 before the Justice Department had an opportunity to look at the redistricting that occurred in 1966.

The fact of the matter is, sir, that over the years from 1882 Mississippi's congressional districts had followed regional district lines. Recently a former Congressman from Mississippi came to see me on the Senate floor to talk about that redistricting in 1966. I think that you should read an interview with former Congressman Smith, who was a Congressman of the delta district in which all of the counties in that district were black majority. You should read and see what he had to say about it. However, the Congressman who came to see me recently in the Senate said that it was very plain to him that race was the only reason for abandoning the congressional district.

The reason I am not using his name is very significant. He said to me, "I would prefer that you not use my name. I am telling you this. I don't want you to use it because of the condemnation that I will receive from my community should you use my name."

Now here is a man who has been retired from politics for years, but he was afraid of the consequence of having said that that was a

racially discriminatory redistricting of the congressional district in 1966.

Now the current redistricting plan is simply a shifting of a few counties in that plan in order to meet the one-person-one-vote standard.

Senator HATCH. We certainly appreciate your testimony.

Senator Metzenbaum?

Senator METZENBAUM. Senator Kirksey, I found your testimony interesting, but I want to be certain that I heard you correctly on one point.

As I understand it, under President Ford the Attorney General objected to the annexation in connection with the city of Jackson, Miss. Then, if I understand you correctly, Attorney General Smith and Assistant Attorney General Brad Reynolds went before the court, withdrew the objection, and, as I also understand you, there were no substantial changes in the facts which would warrant that total reversal of position. Now did I hear you correctly?

Mr. KIRKSEY. That is absolutely correct. The conditions remain exactly the same. Now it has been said to me that perhaps I should have filed a suit, but actually we were depending upon the Justice Department to hold its position in that case. That is why no additional suit was filed.

Senator METZENBAUM. What did Justice Department say to the blacks of Jackson, Miss., as to why it was withdrawing its objection?

Mr. KIRKSEY. It said nothing. In fact, in relaying to the black community what it was doing, in fact, what actually happened occurred without any consultation.

Senator METZENBAUM. They just went in?

Mr. KIRKSEY. They went ahead and did it.

Senator METZENBAUM. Have you or anybody from Jackson, Miss., attempted to meet with Attorney General Smith?

Mr. KIRKSEY. We have counsel who have tried to determine what actually occurred, and in fact have determined the extent to which there was political pressure exerted upon the Justice Department to make the changes that it did change.

Senator METZENBAUM. Well, Senator Kirksey, I have heard everybody say that they are for civil rights. I have heard everybody say that they are against discrimination. I have heard the Attorney General say that. Yet, it would seem to me that this kind of action is just totally outrageous and even more so for a lawyer who reversed the position of the Department without there being some additional evidence or some causal reason.

I am concerned that what you are saying is that the Department of Justice is being run on a political basis and also on a very discriminatory basis against minorities in this country. Now would you agree with that conclusion?

Mr. KIRKSEY. I agree wholeheartedly. That is my feeling and I have had that feeling for some time, sir.

Senator METZENBAUM. Let me ask you further, what was Mississippi's experience prior to the *Bolden* case with the courts applying a results standard? In other words, prior to the *Bolden* case, did the courts end up requiring proportional representation under that standard?

Mr. KIRKSEY. We used a large number of experts to document discrimination that was very clearly what occurred in Jackson, Miss. Those, I believe, were the same standards and the same documentations that were submitted in the *Bolden* case.

Now when the Supreme Court reversed the *Bolden* case and applied new standards, our case went to the fifth circuit. As a result of the Supreme Court's decision, the fifth circuit remanded the case back to the district court, saying that new standards were now in effect and that the standards by which the district court judged that case were no longer relevant.

Senator METZENBAUM. Senator Kirksey, how many members are there of the State senate in Mississippi?

Mr. KIRKSEY. Fifty-two.

Senator METZENBAUM. How many members are black?

Mr. KIRKSEY. Two.

Senator METZENBAUM. And that is in spite of the fact that up until the *Bolden* case the results interpretation was applicable in voting rights cases.

Mr. KIRKSEY. Yes.

Senator METZENBAUM. So that proportional representation was not obtained, and a claim to that effect is really somewhat of a figment of the imagination of those who opposed the results test; is it not?

Mr. KIRKSEY. May I just say something on that?

Senator METZENBAUM. Anything.

Mr. KIRKSEY. I came here yesterday, and this is the first time that I have heard any mention of proportional representation. Now that has never been our purpose. In fact, we have had the Voting Rights Act since 1965.

There is absolutely no indication that in the foreseeable future we will have proportional representation in Mississippi. There are many reasons for it, but the bottom line is that is not what we were seeking; that is not the case now; and it is not going to be the case.

Senator METZENBAUM. What percentage of the State's population is black?

Mr. KIRKSEY. Thirty-five percent.

Let me read, if I may, sir: Under the standards applied by the Federal courts prior to the *Mobile* decision, we have never proved our case simply by showing the lack of proportional representation, nor have we obtained proportional representation as a remedy. The cases clearly show that the proportional representation argument is not based on fact.

In Warren County, Miss., from 1970 to 1979, the all-white Warren County Board of Supervisors prevented the election of a black county official in this 41 percent black county by redistricting plans which fragmented the black population concentration in Vicksburg among several districts. In 1979, the Federal district court ordered into effect a plan which resulted in the election of one black county supervisor, one black justice of the peace, and two black constables—the first black elected officials in Warren County since reconstruction. Since there are five supervisors, justices of the peace, and constables from each district, we clearly did not obtain proportional representation.

Sentor METZENBAUM. Senator Kirksey.

Mr. KIRKSEY. Yes, sir.

Senator METZENBAUM. I prefer that the balance of your statement be included in the record because I don't want my time to run out.

If the Chair will permit, I would like to ask that the balance of the statement be included in the record.

Senator HATCH. Yes. That has been done.

Mr. KIRKSEY. Certainly.

Senator METZENBAUM. Let me ask you another question. You indicated that one of the State legislators had told you that in 1966 the redistricting was done on a racially discriminatory basis and then said to you, "But don't use my name."

Isn't that pretty much proof positive itself that the ability to prove intent is almost an impossible task since any white or anyone who is a party to the proceeding who would admit his involvement or her involvement would pretty much be ostracized in the Mississippi community?

Mr. KIRKSEY. Certainly, it is, sir. You said, "legislator." He is a former U.S. Congressman.

Senator METZENBAUM. I'm sorry.

Mr. KIRKSEY. Now let me give you another good example. Last year I ran for Congress in the Fourth Congressional District. Having been in the legislature for a couple of sessions, I came to know the legislators from that congressional district. One of the first things that I did was to call each of the legislators in that district, two of whom are black, and ask them if they would campaign for me in their respective districts.

I remember distinctly that the senior senator in the district I was unable to contact, but most of them I did contact. Almost to a man the answer was in this context: "I don't know too many black people in my district, but I do know a few ministers and a few teachers and I will talk to them."

My reply was to each one: "I didn't ask you to campaign for me in the black community. I have people out there campaigning for me. I want you to campaign among your own peers in the white community." The answer was precisely the same every time: "You are trying to make it impossible for me to get reelected."

Senator METZENBAUM. Senator Kirksey, I am glad you did get reelected. I gather you did get reelected?

Mr. KIRKSEY. No; I am on my first term.

Senator METZENBAUM. Oh, I see.

Mr. KIRKSEY. This is the third session of my first term.

Senator METZENBAUM. You refer in your testimony to a poll among white voters in Jackson, Miss. What exactly did the poll show in terms of racial motivation?

Mr. KIRKSEY. We were not able to present these claims in court. The claim was that it was not submitted in time and we were not able to submit it.

This was the result that you have just asked for: Different voters responded for two different racial reasons: (*a*) might cause racial tension, which was 33 percent of the respondents; (*b*) would encourage black participation in city government, which was 36 percent of the respondents; (*c*) might make it possible for blacks to serve as

city councilmen, which was 40 percent of the response; and (*d*) might result in my being represented by a person of another race, which was 33 percent of the respondents.

Senator METZENBAUM. What was that last one?

Mr. KIRKSEY. Might result in my being represented by a person of another race. Up at the top is the number of persons who gave statistics. Let me read from the statement which preceded the statistic which I just gave you.

Senator METZENBAUM. The lady with you may do it herself if you would like.

Mr. KIRKSEY. Yes. I will just start reading at the top of the paragraph.

We offered in evidence the result of a poll reporting the racial motivation of white votes in Jackson who in the 1977 citywide referendum rejected a change to single-member districts or wards. The referendum to change from the at-large system was defeated. Seventy-two percent—and this is the data that I want you to have—of the white voters voted to retain at-large elections and 97.9 percent of the black voters voted for the change. The poll among white voters showed that 61 percent of those who voted to retain at-large elections did so for one or more racial reasons, those reasons which I previously read to you.

Senator METZENBAUM. Mr. Chairman, my time has expired, but I would ask the unanimous consent that the entire poll be included in the record.

Senator HATCH. That will be fine. Without objection, that will be included.

Senator METZENBAUM. Will you make a copy available?

Mr. KIRKSEY. Yes.

Senator HATCH. I would simply comment in this way, Senator Kirksey: The fact that Mississippi doesn't have porportional representation is not very persuasive on this issue of section 2. It isn't very persuasive. Indeed, in my opinion, it isn't even particularly relevant for three simple reasons.

First, I strongly disagree that the results standard was the law under section 2 on the 15th amendment prior to the *Mobile* case. We have asked witness after witness to prove that it is, and none in my opinion has been able to do so.

Second, the notions of "dilution" and "effective votes" has developed only very recently, even in the context of section 5.

Finally, the results test in section 2 is a completely new test. I have been told by witness after witness that it is different than the effects test in section 5.

I am not here to defend or to castigate Mississippi. By the same token, let us not labor under the mistaken impression that your relating your Mississippi experience, under section 5, is particularly relevant to the section 2 debate. I just want to set the record straight with regard to that.

We are grateful to you for coming. We are grateful to have your statements put into the record at this point, and hopefully that will make a better record for us. Thank you so much.

Mr. KIRKSEY. May I say something?

Senator HATCH. Yes. Go ahead.

Mr. KIRKSEY. I would like this to be entered into the record. Of course, we are obviously in disagreement.

Senator HATCH. We are.

Mr. KIRKSEY. But let me say—and I think this is most important because it speaks to the heart of the problem in Mississippi as far as blacks are concerned—the district from which I was elected in 1979 has 15 precincts in it. As of the 1970 census, about seven of those precincts had white majority. Three of the precincts had a significantly larger population and voter registration than the other precincts in the district. The important thing, though, is that the district was drawn up basically to enhance the reelection of the incumbent and it was considered that no black would be able to defeat the incumbent.

It so happened in this case—and I don't to this day believe that I could have won that election except for the fact that the incumbent was in trouble with his constituents, about which the people in my community knew very little as to the circumstances, but the incumbent later was indicted and found guilty of whatever the problem was. The people in his community knew very well what he had done. They did not turn out in his support. Because they did not turn out—they certainly didn't vote for me—the black vote in the black majority precincts enabled me to get elected.

Now I brought that in because I wanted to make this important point. I have been senator from that district since 1979. I don't know and have been unable to make acquaintance on any kind of a cordial relationship with anyone in those white majority precincts.

It is a different world altogether, and that is the basic problem that we are faced with in Mississippi. There are two worlds. There is the black world and the white world. The whites are able to come in and always have been able to come into the black community. They are always able to find people in the black community who will represent them, who will campaign for them, but we cannot do the same thing in the white community.

There are no welcome signs out to blacks for campaigning in white communities. That is very important, in addition to the fact that there is a tremendous difference in the ability of blacks in campaigning to campaign in the same way.

As you know, today unless you can get on the television and radio and get in the newspapers, you simply are more or less ineffective. Well, unless we have that kind of money—and it is not available to us—in at-large elections we certainly are not equal participants.

Senator HATCH. Of course, Senator, I agree with you that is a deplorable situation where it exists, but that has little or no relevance to the Voting Rights Act itself. Be that as it may, we appreciate the testimony that you have brought to the committee today. Thank you for being with us.

Mr. KIRKSEY. Thank you, sir.

[The prepared statement of Mr. Kirksey and additional material follow:]

PREPARED STATEMENT OF HENRY J. KIRKSEY

I am Henry J. Kirksey, a member of the Mississippi Senate, elected in 1979 because of the protections of the Voting Rights Act. Prior to 1979, no blacks had been elected to the Mississippi Senate since Reconstruction.

I was born in Tupelo, Mississippi in 1915 and have been directly involved since 1965 in litigation to protect the right of black Mississippians to fully participate in the political process. In addition to voting rights cases in which I have prepared and analyzed redistricting plans, I have been a plaintiff in voting rights cases challenging the dilution of minority voting strength in Mississippi state legislative districts, Hinds County board of Supervisors districts, and the at-large election system in Jackson, Mississippi.

I would like to submit the following documents for inclusion in this hearing record along with my written statement:

--Voting in Mississippi: A Right Still Denied. This is a report on continued voting rights denials in Mississippi prepared by the Lawyers' Committee for Civil Rights Under Law, endorsed by former Attorney General Nicholas Katzenbach and six former Assistant Attorney Generals for the Civil Rights Division. The report describes in detail the efforts--many of them since 1975--to maintain political white supremacy. The report also discusses methods of election adopted prior to the Voting Rights Act which continue to exclude blacks from the political process.

--Black Political Power in Mississippi. This is a report of the NAACP Political Action Committee of which I am chairman. This report shows that black Mississippians are still denied equal access to the political process and shows the broad base of support for a strong Voting Rights Act.

I am here today to urge your support for S. 1992. My remarks will focus upon the need to amend Section 2 as proposed

in that bill in order to protect minority citizens from discriminatory laws and practices.

The only legitimate issue concerning the proposed amendment is whether laws and practices which discriminate against minorities should be illegal. Any statement that the proposed amendment requires proportional representation is wrong. In Mississippi we have experienced 17 years of the more stringent "effects" standard of Section 5 and we have not experienced a revolution of proportional representation. Blacks continue to be excluded from representation at every level of government in a state which is 35% black

--Of a total of 5,271 elective offices in Mississippi, only 7.34% are held by blacks.

--There are still no black elected officials in Mississippi's five-member Congressional delegation or in the statewide elected state offices.

--Of the 21 counties which are majority black in population eight still have no black representation on their county boards of supervisors, and black county supervisors make up a majority in only two counties.

--Of the 1,420 city council members, only 143 (10%) are black.

--From 1965 to 1979 black voters were denied all but token representation in the Mississippi Legislature by the discriminatory use of multi-member legislative districts with at-large voting in areas of black population concentrations. When the Legislature finally was forced to abandon at-large voting by a Section 5 objection and litigation challenging these multi-member districts, the number of blacks in the Legislature increased from 4 (1975) to 17 (1980). Blacks still comprise only 10 percent of the membership of the Mississippi Legislature.

The Voting Rights Act is intended to eliminate discriminatoin which denies or abridges the voting rights of minorities because of their status as minorities. The amendment to Section 2 is

necessary to accomplish that goal. To argue that discriminatory purpose must be proved is to condone the violation of the right to vote and to make illegal only a discriminatory purpose. How can anyone claim to support the right of minorities to vote and participate in the democratic process and yet oppose an amendment which makes illegal those laws and practices which result in a denial or abridgment of that right?

There are now 387 black elected officials in Mississippi compared to 29 in 1968. The Fifth Circuit Court of Appeals made a comment about Escambia County, Florida which is also appropriate for Mississippi:

> We hope eventually we will reach the point where local governing bodies will be elected on an at-large basis, and people will vote for candidates based on their individual merit and not on the color of their skin. Unfortunately, we have not yet reached that state. McMillan v. Escambia County, Fla., 638 F.2d 1239, 1248 n. 18 (5th Cir. 1981).

The progress we have made under the Voting Rights Act is not that whites now welcome black political participation. A comparison of election results from 1971 through 1980 shows no fundamental change in the attitudes and voting behavior of white Mississippians--described by Dr. James W. Loewen as a "furious determination" to deny blacks participation in the political system. 1/ Our progress has resulted from the protections of the Voting Rights Act which are slowly dismantling voting laws and practices which discriminate against black voters and unfairly advantage white voters.

1/ Lawyers' Committee for Civil Rights Under Law, Voting in Mississippi: A Right Still Denied, pp. 112-122.

We need the amendment to Section 2 so that the progress we made prior to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), will not be stopped. In the State of Mississippi, because of its history of discrimination, racial bloc voting, majority vote requirement, prohibition on single-shot voting, and discriminatory party politics, at-large elections remain a major method of discriminating against black citizens. Because of these factors, at-large elections in Mississipp are much more than an affirmative action program for whites--they are a major method of maintaining white supremacy.

Our efforts to end discriminatory at-large elections in the City of Jackson, Mississippi, provide a clear example of how the City of Mobile decision changed the legal standard and why the amendment to Section 2 is needed to maintain the standard which had been applied in the Fifth Circuit prior to Mobile.

Together with 16 other black voters, I filed an action in 1977 challenging the discriminatory at-large elections in Jackson, Mississippi. This case--Kirksey v. City of Jackson, is still pending. The case was tried in July 1977 in the District Court for the Southern District of Mississippi, relying upon the Zimmer v. McKeithen 2/ and White v. Regester 3/ factors. We lost in district court in 1978. 4/ On appeal, the Fifth Circuit vacated and remanded for a supplemental hearing and reconsideration because City of Mobile had changed the law. 5/

2/ 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom, East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

3/ 412 U.S. 755 (1973).

4/ Kirksey v. City of Jackson, 461 F.Supp. 1282 (S.D. Miss. 1978).

5/ 625 F.2d 21 (5th Cir. 1980).

The Fifth Circuit judges stated that the validity of the criteria developed in Zimmer "is now very much in question in light of the recent Supreme Court opinion in City of Mobile, Alabama v. Bolden." 625 F.2d at 21 (citation omitted). The Court then explained:

> We have many times held that fact findings that were made under the spell of legal principles, which were either improper or since then declared to be improper, really can't be credited one way or the other. 625 F.2d at 21-22.

In Jones v. City of Lubbock, 6/ the Fifth Circuit again remanded a voting rights case because the City of Mobile decision, in the Court's words:

> rejected the Zimmer test, simultaneously casting aside the ten-years of thought, experience and struggle embodied within it. 640 F.2d at 777.

Judge Goldberg, in his opinion of the Court, leaves no doubt that judges know the City of Mobile opinion changed the rules:

> [T]he Supreme Court has completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens . . . .
>
> [W]hen the rules of the game are changed the players must be afforded a full and fair opportunity to play by the new regulations. 640 F.2d at 777-78.

Judge Goldberg went on to say that the courts no longer know how to proceed:

> Therefore, although much was written by the justices in Bolden, little--save for the rejection of the Zimmer test, was actually decided therein. 640 F.2d at 778.

6/ 640 F.2d 777 (5th Cir. 1981).

It is a purely academic exercise to debate whether the Mobile opinions changed the law. The judges who interpret the law have addressed the issue. The proposed amendment to Section 2 is needed to restore the "ten years of thought, experience and struggle" referred to by Judge Goldberg.

In October, 1980, we retried Kirksey v. City of Jackson exclusively on the intent issue in light of the Mobile case. We offered both direct and extensive circumstantial evidence of the discriminatory purpose in adopting and maintaining at-large elections in Jackson, Mississippi, a city in which blacks are 45% of the population, but in which blacks have never been elected to the city council since at-large elections were instituted in 1912.

We offered in evidence the results of a poll reporting the racial motivation of white voters in Jackson who, in a 1977 citywide referendum, rejected a change to single-member districgs or wards. The referendum to change from the at-large system was defeated: 72.4% of the white voters voted to retain at-large elections, and 97.9% of the black voters voted for the change. The poll among white voters showed that 61% of those who voted to retain at-large elections did so for one or more racial reasons. 7/

Different voters responded to different racial reasons:

(a)	Might cause racial tension	33%
(b)	Would encourage black participation in city government	36%
(c)	Might make it possible for blacks to serve as City councilmen	40%
(d)	Might result in my being represented by a person of another race	33%

7/ Multi-Quest International, Inc., Attitudes of Jacksonians Toward the Form of City Government (1980).

A number of voters also offerred unsolicited racial comments, such as "I don't want a 'nigra' representing me" and "Blacks are human, but whites are more efficient."

We lost in the district court which held that the motivation of the electorate is immune from judicial scrutiny. 8/ A panel of the Fifth Circuit Court of Appeals affirmed. 9/ In Jackson, Mississippi, where at-large elections were first adopted by a referendum in 1912, and were maintained by a referendum in 1977, the Court held that even though Mobile requires us to prove discriminatory purpose we are barred from using evidence of the motivation of the decisionmakers--the city voters. The direct and circumstantial evidence of denial of access to the political process which meets the standards of Zimmer and White is not sufficient, after the Mobile decision, to prove a violation of the rights protected by Section 2.

9/ No. 81-4058 (5th Cir. Dec. 11, 1981).

8/ 506 F. Supp. 491 (S.D. Miss. 1981).

POLITICAL MEDDLING: THE WITHDRAWAL OF THE ATTORNEY GENERAL'S OBJECTION TO THE 1976 JACKSON ANNEXATION

In 1976, the Attorney General objected pursuant to Section 5 of the Voting Rights Act to annexation by the City of Jackson of a predominantly white area because the annexation diluted black voting strength in Jackson. The, in 1981--four and a half years later--after protests from Senator Thad Cochran (R-Miss.) and House Whip Trent Lott (R-Miss.), the objection was revoked and withdrawn, allowing the White voters in the annexed area legally to participate in Jackson elections.

On December 3, 1976, the Attorney General lodged a Section 5 objection for dilution of black voting strength to annexation of a 40-square-mile area containing 32,490 persons, 74 percent of whom were white. This was the third annexation of predominantly white areas by Jackson since 1960. Jackson is governed by a three-member city council, all elected at-large. The Justice Department determined that the 1976 annexation "continues a trend dating back at least to 1960 of the annexation of areas of primarily white population, which has the effect of counteracting the impact of an otherwise growing black percentage." The effect of these annexations was to "more than offset the growth of the black population," and without which "the black population in the City of Jackson would be approaching a majority."

This Section 5 objection was ignored by the City of Jackson, and--despite repeated request--the Justice Department refused to file any action to enforce it. Residents of the newly-annexed area were permitted to vote in the city elections of 1977 and 1981. In May, 1981, Rev. Jesse Jackson, Reps. John Conyers and Walter Fauntroy and several other black leaders formerly requested the Justice Department to file suit to enforce this objection, but no action was filed. One month prior to the June, 1981 general election, James P. Turner, Acting Assistant Attorney General, wrote counsel for the City of Jackson:

> It is our understanding that the City intends to hold its 1981 elections by including in the electorate the areas annexed in 1976. Because of the short time remaining before the elections and the disruptive nature of this last minute litigation, we will not seek to enjoin or delay the election process. However, if the 1981 elections are conducted in a manner violative of federal law, and if the objection is not resolved and remains outstanding, we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act. We should adivse you that the relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted.

On July 23, 1981--four and a half years after the objection was made--the objection was withdrawn. The letter withdrawing the objection contains evidence of several major irregularities:

(1) There is no evidence that Jackson officials ever specifically requested the Justice Department to reconsider its 1976 objection. A "transmittal" received on May 23, 1981 was merely interpreted by the Justice Department as a request for reconsideration, and then granted.

(2) The letter specifically notes that the Department's "thorough re-evaluation" included "consultation with the Deputy Attorney General." Justice Department regulations specifically delegate the Attorney General's Section 5 responsibilities to the Assistant Attorney General in charge of the Civil Rights Division. Consultation with the Deputy Attorney General, Edward C. Schmults, is outside the normal procedure followed in these cases.

(3) Justice Department regulations require that reconsideration of an objection can only be based on "a substantial

change in operative fact or relevant law." 28 CFR § 51-45. This objection was reconsidered and withdrawn even though there was no change in the facts or the law.

(4) The standards applied in withdrawing the objection directly contradict the standards applied and litigated by the Justice Department in City of Rome v. United States and affirmed by the Supreme Court in 1980.

The withdrawal of the objection was the direct result of political interference by Senator Thad Cochran (R-Miss.) and Rep. Trent Lott (R-Miss.) in the Justice Department's enforcement of the Voting Rights Act. In a Jackson Clarion-Ledger article published the day before the objection was withdrawn, both Cochran and Lott admitted intervening with Justice Department officials on the Jackson objection. Cochran admitted a telephone conversation, "I only asked the high echelon people to take a look at the Jackson problem," and Lott admitted a face-to-face meeting with Deputy Attorney General Schmults. Cochran is the brother of Jackson City Commissioner Nielson Cochran, a member of the three-member Jackson City Council.

Copies of the relevant correspondence are attached to my statement.

Mississippi Congressional Redistricting

In Mississippi, blacks are heavily concentrated in the Delta, a geographic and economic region in the northwest portion of the state. Fourteen of Mississippi's 21 majority black counties (1980 Census) are located in this region. Almost half of the state's 387 black elected officials are concentrated in the Delta.

The Mississippi legislature recently adopted a plan for Congressional districts termed the "Least Change" plan. The plan divides these fourteen majority black counties among three of the five oddly-shaped congressional districts, depriving blacks of a majority in any of the five districts. Mississippi

is 35 percent black in population. In enacting the "Least Change" plan, the legislature rejected two plans which would have provided majority black districts in the Delta. One plan, which I drafted, would have created a 65 percent black Delta district; another plan drafted by state Rep. Jim Simpson, a white legislator, would have created a 54 percent black Delta district.

During legislative deliberations, state Rep. Tommy Campbell, chairman of the Legislature's congressional redistricting committee, argued that adoption of one of the alternative plans would jeopardize the reelection changes of Mississippi's all-white congressional delegation:

> To trade these considerations for the symbolism of electing a black would throw away real political considerations. [A black majority district] was not in the best interest . . . of citizens of both races.

During legislative hearings on the plan, the "Least Change" plan was criticized by the Mississippi NAACP, the Mississippi AFL-CIO, the Mississippi ACLU, the Children's Defense Fund, the Mississippi League of Women Voters, a number of black community organizations, and members of Mississippi's Legislative Black Caucus, all of whom criticized the plan as a racial gerrymander and urged the adoption of a majority black congressional district.

Mississippi has not had a black congressional representative since 1882 when Rep. John Roy Lynch was seated after winning an election contest in the U.S. House of Representatives. For most of this century, Mississippi has had a Delta district stretching from Memphis to Vicksburg. In 1960, the district was 59 percent black in population. In 1966, a year after the Voting Rights Act was passed, the Mississippi Legislature sliced up the Delta district horizontally, and divided it among the

First, Second an Third Congressional Districts, thus depriving newly-enfranchised black voters in Mississippi of the opportunity to elect a member of Congress. The 1981 "Least Change" plan perpetuates this gerrymandering of the black population of the Delta.

Newspaper reports on the debates surrounding the 1966 congressional redistricting clearly show the racial motivation behind the adoption of the 1966 plan fragmenting the Delta district. The 1981 plan, nearly identical to the 1966 plan is, indeed, the "Least Change" from effective discrimination against black voters. The legislative debates of 1966 were reported as follows:

> Jackson Daily News, January 14, 1966
>
> "Did the Negro situation enter in this redistricting plan?" asked Rep. Odie Trenor . . . When he got no answer to his question, he said "we all know the Negro situation was the main factor."
>
> Rep. Thompson McLelland of Clay, said, "When this bill is attacked in the courts, they're going to look into what areas were moved, where they were moved and for what purposes they have been moved. They were moved so there shall not be a majority of certain groups in a district. The Courts will consider a similar case and they'll throw this out. We will have congressmen elected at-large or by districts fixed by the Supreme Court.
>
> This patently was drawn in a manner to devalue the vote of a certain group of people."
>
> Backers of the plan did not deny that the Delta area was split up to divide the heavy Negro vote.

Jackson Daily News, March 7, 1966:

> Rep. Clyde Burnes said that the House bill "had a little too much discrimination to be ignored (by the courts)."

Jackson Clarion-Ledger, April 1, 1966:

> A plan adopted by the Senate would have given second (District) a heavy Negro majority, but the House rejected this in favor of five districts with white majorities. Most senators agree that unless one heavily-Negro majority district is established, the government will knock the redistricting plan out through the federal courts.

Jackson Daily News, April 6, 1966:

> Rep. Thompson McClellan . . . argued . . . "Any bill that shows discrimination against a certain race they'll knock down. You are trying to take two white counties in northeast Mississippi out of the 2nd District and put a heavy Negro populated county in. They will say this bill is fraught with discrimination."

The year of the first Congressional redistricting to split the Delta -- 1966 -- saw a number of other actions by the same Mississippi legislature directed at diminishing black political participation. With black voter registration substantially rising as a result of the 1965 Voting Rights Act, the 1966 Mississippi legislature introduced at least 30 bills pertaining to elections or the political process, and no fewer than 12 bills or resolutions were passed which altered the state's election laws. United States Commission on Civil Rights, Political Participation, p. 22 (1968). Included among those measures which the legislature enacted into law:

--A statute repealing the previously mandatory single-member district elections for county boards of supervisors, and allowing each particular board the local option of switching to at-large elections. The state failed to present this measure for Justice Department review under Section 5, and was finally ordered to do so by the Supreme Court in Fairley v. Patterson, a black candidate for U.S. Senate who won two counties in the June, 1966 primary. As one state senator put it, the bill was revived "just because a few niggers voted down there [in Claiborne County]." United States Commission on Civil Rights, Political Participation, pp. 25-26.

--Legislation providing for "open primary" elections in Mississippi. This discarded "the traditional rule where the top vote-getter in a general election is the winner, whether he captured a plurality or majority of the votes. In its place was substituted a system where candidates can only win with a majority of the vote. Under this new system, black independents in white population majority electoral districts had no hope of winning office, even upon attainment of a plurality of general election votes. In recognition of the racial motive of the legislature behind the bill, the governor vetoed it, saying "this is an inopportune time for racial changes to be made in our election procedures." 1977 House Journal, pp. 1111-1112. Later versions of the open primary bill were introduced and passed by the Legislature in subsequent years, and were three times overridden by Section 5 objections from the Justice Department. The matter is currently in litigation following the initiation by the state of a declaratory judgment action under Section 5 in the United States District Court for the District of Columbia.

--A statutory package significantly increasing the burdens of qualifying and running as an independent candidate. This legislation, enacted after three black members of the

Mississippi Freedom Democratic Party announced their independent candidacy in the general election for U.S. Senate and House of Representatives, contained the following provisions: (1) A tenfold increase in the number of signatures of qualified electors needed for the independent qualifying petition; (2) a change in the time for qualifying from 40 days before the general election to 60 days prior to the primary election; (3) a new rule that no person who has voted in a primary election may run for office as an independent in the general election; and (4) a new requirement that each qualified elector who signs the independent petition must personally sign the petition and include his polling precinct and county. The state did not submit these changes for Section 5 review until ordered to do so by the Supreme Court in Whitley v. Williams, decided sub nom. Allen v. State Board of Elections. The Justice Department then objected to the legislation, concluding that it was racially discriminatory in both purpose and effect. Letter from Leonard to Summer, May 21, 1969.

While these facts should be sufficient to prove that the rights of black voters are violated by the 1981 plan, this is just the kind of direct and circumstantial evidence which post-Mobile decisions of the district court and appellate court in Kirksey v. City of Jackson held did not meet the new standard of proving discriminatory purpose.

Mr. John L. Stone
City Attorney
City of Jackson
Post Office Box 17
Jackson, Mississippi 39205

Dear Mr. Stone:

This is in reference to the annexation, with precinct lines and polling places for the annexed area, to the City of Jackson, Mississippi, submitted to the Attorney General for review under Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed by our receipt of supplemental information on October 4, 1976.

Section 5 of the Voting Rights Act requires the Attorney General to examine submitted changes that affect the voting process to determine that a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In making this determination on behalf of the Attorney General, we apply the legal principles developed by the courts in the same or analogous situations. The principal cases dealing with the proper approach to an evaluation of annexations under Section 5 are City of Richmond v. United States, 422 U.S. 358 (1975) and City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), aff'd 410 U.S. 962 (1973). Essentially, these cases require an analysis of an annexation submission to examine the impact of the boundary expansion on minority voting rights, both statistically and in the context of the local electoral system, with due consideration to the historic patterns of minority electoral participation. See also Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973); and Blacks United for Lasting Leadership, et al. v. City of Shreveport, et al., F. Supp. (Civ. Action No. 74-272 W.D. La., decided July 16, 1976.)

The decisions cited above prescribe our approach to the review of annexations under Section 5. With respect to racial effect, the Supreme Court, in reaffirming its holding in Petersburg, supra, stated in Richmond, supra, 422 U.S. at 370:

> ***the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council.

According to the information you have provided, the area annexed in 1976 is populated by 32,490 persons, of whom 23,979, or 74%, are white. The effect of including approximately three times as many whites as blacks in the annexation is that the black percentage of the city's total population dropped from 40% to 36%.

This decrease in the black percentage in Jackson could itself have a significant effect on the political strength of blacks in the city. Moreover, it continues a trend dating back at least to 1960 of the annexation of areas of

primarily white population, which has the effect of counteracting the impact of an otherwise growing black population percentage.

Year	Total	White	%	Black	%
1960 (preannexation)	120,761	70,694	58.6	49,994	41.4
1960 (postannexation)	144,422	92,793	64.3	51,556	35.7
1970 (preannexation)	153,968	92,651	60.2	61,063	39.7
1971 (postannexation)	163,063	100,338	61.6	62,471	38.3
1976 (preannexation)	200,700	120,420	60	80,280	40
1976 (postannexation)	233,190	144,399	61.9	88,791	38.1

As the above chart indicates in 1960 Jackson had a population of about 120,000, of which over 41% was black. A large annexation that year, of an area containing a population that was over 90% white, reduced the black percentage to less than 36%. In the 10 years between the 1960 and 1970 censuses there were no annexations and the black proportion of the city's population grew by about four percentage points. In that period the white population was static, declining in its proportion of the whole. The 1971 annexation interrupted this trend by adding 9000 persons, of whom 84.5% were white. At this point we raised with you the problem of selective annexation and pointed out the potentially dilutive effect of the annexation. However, with the understanding that the city planned to include two specific black areas as part of then pending annexations, we did not object to that annexation under Section 5.

The annexation of the two areas did not go forward as promptly as had been projected. Instead, they were included in the large annexation of 1976, which is now under consideration. Even though the city appears to have included all eligible black areas in the current annexation, the inescapable effect of the 1976 annexation is to continue the pattern of the earlier annexations.

Taken together, the three annexations have included whites at almost a five to one ratio to blacks (53,765 to 11, 481). They have more than offset the growth in the black proportion of the city's population that has been occurring. But for this series of annexations, the black population in the City of Jackson would be approaching a majority.

Annexations are reviewable under Section 5 of the Voting Rights Act because they affect the composition of the electorate. They are objectionable if they are designed to dilute the voting power of a minority or if they have that effect. Thus a city's electoral system as well as demographic statistics must be included in the Attorney General's consideration of the effect of an annexation.

Jackson has a three-member city council, with the mayor and two commissioners elected at large. A majority vote is required for nomination, and full slate voting is required. No black has ever been elected to the council, although several have been candidates. Our research indicates that elections in Jackson are characterized by racial bloc voting. Thus the dilutive effect of the annexation combined with a system of election that minimizes the opportunity for minorities to be elected and with the existence of racial bloc voting makes it impossible for the Attorney General to conclude that the 1976 annexation will not have a racially discriminatory effect.

Where there is a dilutive effect, an annexation may still be unobjectionable if, as the Supreme Court held in Petersburg, supra, 410 U.S. at 1031, the city also takes steps "to neutralize to the extent possible any adverse effect upon the political participation of black voters." The Supreme Court explained in Richmond, supra, 422 U.S. at 370, that "the consequences would be satisfactorily obviated if at large elections were replaced by a ward system of choosing councilmen." Although it is our understanding that the City of Jackson has the authority to make such a change in its electoral system, no such action has been taken.

On the question of racial purpose, our analysis has not disclosed any racially discriminatory motivation associated with this annexation.

Accordingly, I must on behalf of the Attorney General enter an objection to the implementation of the submitted annexation to the extent that it affects voting in the City of Jackson. It is our view that such an objection does not under federal law affect the legality or propriety of the annexation itself. However, until withdrawn or invalidated by court action, the objection does preclude the conduct of municipal elections in the annexed area.

Of course, as provided by Section 5, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this annexation has neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. In any event, we would be pleased to discuss with you any questions you may have in connection with this matter.

In regard to the precinct lines and polling places for the annexed area, no determination will be made at this time due to the effect of this objection on voting in the annexed area.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

JPT:PFH:mrk
DJ 166-012-3

17 FEB 1981

Mr. Howard C. Ross, Jr.
City Attorney
P. O. Box 17
Jackson, Mississippi 39205

Dear Mr. Ross:

I am writing to determine what action the City of Jackson intends to take to comply with the requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, concerning the annexation made by the City in 1976. As you know, a Section 5 objection to the voting changes occasioned by the annexation has been outstanding since December 3, 1976.

In the December 3, 1976, Section 5 objection we suggested that the annexation at issue might satisfy the Section 5 test if the City took action to remedy the dilution of minority voting strength resulting from the annexation, that is, "if at-large elections were replaced by a ward system" of election. City of Richmond v. United States, 422 U.S. 358, 370 (1975). Since the objection, the City has been provided more than four years to take the action described or, in the alternative, to seek Section 5 preclearance from the United States District Court for the District of Columbia. On December 21, 1976, we were notified that, upon petition of the voters, a referendum election would be held to present a proposal that the present commission form of government, elected at large, be replaced by a mayor-council form of government with the council members elected by district. The Attorney General granted Section 5 preclearance for the conduct of that referendum in the newly expanded city since the referendum appeared to be a step in the direction of resolving the concerns which led to the Section 5 objection. However, the electorate, in a racially polarized referendum election, rejected the change to the single-member district plan.

Prior to the commission elections of 1977 we again discussed with the former city attorney the City's compliance with the objection. At that time we noted that litigation had been instituted challenging, on constitutional grounds, the at-large election plan (Kirksey v. City of Jackson) and that that litigation might provide another vehicle for altering the at-large election scheme and thereby remedy the concerns which led to the Section 5 objection. On that basis, we notified the City that we would not institute legal proceedings to enjoin implementation of the voting changes caused by the annexation in the 1977 elections. However, the City opposed the relief requested by the Kirksey plaintiffs and, to this date, the litigation has not remedies the dilution which resulted in the Section 5 objection.

We are aware that municipal elections will again be conducted in June 1981. Unless the City obtains a withdrawal of the Section 5 objection prior to the election, the voting changes occasioned by the 1976 annexation may not be implemented in the 1981 election. In other words, as long as the objection is outstanding the citizens in the annexed area may not legally participate in the election. In this regard I request that you notify me within twenty days as to what action the City plans to take to comply with Section 5 in the upcoming election.

Our staff remains willing to work with you and city officials in an effort to resolve this matter. However, our efforts over the past four years to obtain voluntary compliance with federal law have not been successful and thus, if the City is unwilling to remedy the concerns which led to the objection or to exclude the annexed area from participation in the 1981 election, we will be required to institute legal proceedings to obtain compliance with federal law. Of course, the City also retains the option to seek Section 5 preclearance of the annexation from the United States District Court for the District of Columbia.

If you have any questions, please feel free to contact Mr. Robert Kwan at 202/724-7436; Mr. Kwan is the attorney in our Voting Section who has been assigned to handle this matter.

We look forward to hearing from you.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 520 • 733 FIFTEENTH STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 628-6700

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

April 29, 1981

Mr. James Turner
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

Re: Section 5 Objection to the City of Jackson Annexation

Dear Mr. Turner:

I am writing to urge the Department of Justice to file suit to enforce its December 3, 1976 Section 5 objection to the City of Jackson's 1976 annexation prior to the upcoming May 12 municipal primaries to insure that the rights of black voters in Jackson secured by the Voting Rights Act of 1965 are protected and not diluted in the May 12 voting.

On December 3, 1976 the Attorney General determined that the City of Jackson had engaged in a series of annexations of predominantly white areas (1960--over 90% white, 1971--84.5% white, 1976--74% white) which offset increases in the black population percentage and prevented blacks in Jackson from gaining a majority of the total population. Because Jackson City Council elections are conducted on an at-large basis in citywide voting, these successive annexations substantially submerged black voting strength in Jackson in the newly annexed white vote, thus preventing black voters from having a great influence in municipal elections or even electing candidates of their choice to city government. In the Section 5 objection letter, Assistant Attorney General J. Stanley Pottinger, acting on behalf of the Attorney General, concluded:

> "Thus the dilutive effect of the annexation combined with a system of election that minimizes the opportunity for minorities to be elected and with the existence of racial bloc voting makes it impossible for the Attorney General

> to conclude that the 1976 annexation will not have a racially discriminatory effect."

That objection has not been withdrawn, and no action has been filed by the City of Jackson in the District Court for the District of Columbia seeking to overturn that objection.

The Section 5 objection letter made clear to Jackson officials that "the objection does preclude the conduct of municipal elections in the annexed area." However, since the objection was interposed, the City of Jackson has conducted municipal elections in the newly annexed area and has included the precinct tallies from that area in the official returns. In his January 23, 1981 opinion in Kirksey v. City of Jackson, Civil No. J77-0075(N) (S.D. Miss.) our lawsuit challenging the constitutionality of the at-large voting system, District Judge Walter L. Nixon, Jr., found that the Department has failed to enforce this objection:

> "The Justice Department did not object to any of the citizens in the annexed area voting [since 1976], and thus, they did vote in the 1977 referendum and have voted since in all municipal elections, as evidenced by the testimony of Mrs. Evelyn Ballard, Jackson City Clerk." Supp. Mem. Op., pp. 46-47.

We urge you to take immediate court action pursuant to Section 12(d) to enforce this 1976 objection and to prevent the City of Jackson from including the votes cast in the newly annexed area in the May primary and June municipal election returns. Failure to take effective enforcement action will be widely interpreted as representing a retreat by the Department from its commitment to vigorous enforcement of the laws protecting the right to vote.

May I please have a response from you on what action you plan to take as soon as possible.

Thank you for your consideration of this matter.

Yours very truly,

Frank R. Parker, Director
Voting Rights Project

Office of the Attorney General
Washington, D. C. 20530

28 APR 1981

Mr. Jerris Leonard
Leonard, Gettings & Sher
Attorneys at Law
Suite 550
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Dear Jerris:

As you will recall, we met on April 13, at your request, to discuss the longstanding Section 5 objection to the voting changes occasioned by the 1976 annexation by the City of Jackson. At that time, I indicated to you that it was the position of the Department of Justice to enforce the outstanding objection unless the City of Jackson submitted additional information (viz., a revised demographic analysis concerning the annexation based upon the 1980 census) to demonstrate that the factual basis upon which the objection was originally based is in error or unless the City would enter into a Consent Decree with the Justice Department preserving all remedies available to the parties.

As you know, the law is quite clear in authorizing the Department of Justice to enjoin the conduct of elections in the newly expanded section of a city unless and until the necessary Section 5 preclearance is obtained. I am enclosing, for your information, one of the most recent federal court decisions regarding the effect of a Section 5 objection to annexations, Gamble v. Town of Clio, C.A. No. 80-456-N (M.D. Ala., March 5, 1981). In that case, the three judge court held that unprecleared annexations "are legally unenforceable and the votes of persons residing in these annexed areas are without effect in determining the persons legally elected to office." Id. at p.3.

As I indicated to you in our April 13 meeting, the Justice Department is willing to enter into a Consent Decree that would permit the conduct of the regularly scheduled election this year provided that the City of Jackson undertake to obtain a resolution of this issue. The matter could

be resolved in one of three ways. First the City could enact or otherwise obtain the legislation necessary to alter the at-large structure to remedy dilution and to implement the new plan. Although regularly scheduled elections would not be enjoined by the Consent Decree, the order would provide for an election in compliance with federal law at the earliest possible date. Similar relief was recently ordered in United States v. Clarke County Commission, C.A. No. 80-0457-P (S. D. Ala. Oct. 24, 1980); a copy of that decision is enclosed for your information.

Second, the City could file with the Attorney General a request for a reconsideration of the objection or, third, it could seek preclearance from the United States District Court for the District of Columbia. However, absent preclearance of the annexation by the District of Columbia court or withdrawal of the objection by the Attorney General, a new election would have to be conducted by a date certain under a new plan which remedies the dilution caused by the annexation (and therefore satisfies the Section 5 standards) or, if the requirements of Section 5 have not been satisfied by that date, a new election would have to be held without the inclusion of voters in the annexed area at issue. Of course the length of the provisional terms and the timing of the new election would be dependent upon the amount of time required to obtain the necessary legislation; those timeframes could be established through discussions between you and our staff.

I would appreciate your discussing this matter with City officials and notifying me as to whether a voluntary resolution is possible. We are prepared to discuss this matter further with you and, if you feel the idea is worth pursuing, will prepare an appropriate Consent Decree.

In our meeting of April 13, you advised me that you would respond to our proposals for resolving this matter as soon as you had the opportunity to discuss the proposals with your client. Because the election is fast approaching, I respectfully request that you respond by Wednesday, May 6. We will take no further action during this period in the hope that a Consent Decree can be prepared and filed.

We look forward to hearing from you and it is our hope that this longstanding problem will be resolved promptly.

Sincerely,

Douglas R. Marvin

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 1981

HAND DELIVERED

Jerris Leonard, Esq.
Leonard, Gettings & Sher
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D. C. 20006

Dear Jerris:

I am writing to you in your capacity as counsel to the City of Jackson, Mississippi in connection with the City's compliance with the requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

As you are aware, by letter dated February 17, 1981, we requested that the city attorney tell us as to what action the City intended to take to comply with the December 3, 1976, Section 5 objection to the voting changes occasioned by a 1976 annexation to the City. The February 17, 1981, letter stated in part:

> Unless the city obtains a withdrawal of the Section 5 objection prior to the election, the voting changes occasioned by the 1976 annexation may not be implemented in the 1981 election. In other words, as long as the objection is outstanding the citizens in the annexed area may not legally participate in the election.

Since then we have exchanged correspondence with the city attorney and have met with you on two occasions in an effort to resolve this matter. Although at our most recent meeting with you, held on May 5, 1981, you stated that the City desires to seek reconsideration of the objection, there has been no commitment that the City will comply with the objection unless and until it is withdrawn. Notwithstanding our efforts to obtain voluntary compliance with federal law, our understanding

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is that the City intends to implement the unprecleared voting changes in the election which will begin on May 12, 1981, with the first primary. A three-judge federal court has recently described similar conduct by officials of an Alabama city under like factual circumstances as follows:

> Defendants sought the approval of the Attorney General for the proposed annexation, and when they failed to get such approval, they proceeded in violation of the law. Officials charged with administering the law should be most careful to obey, not defy the statutes under which all United States citizens are governed.

Gamble v. Town of Clio, Civ. No. 80-456-N (March 5, 1981) at 2-3.

It is our understanding that the City intends to hold its 1981 elections by including in the electorate the areas annexed in 1976. Because of the short time remaining before the elections and the disruptive nature of last minute litigation, we will not seek to enjoin or delay the election process. However, if the 1981 elections are conducted in a manner violative of federal law, and if the objection is not resolved and remains outstanding, we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act. We should advise you that the relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted.

We also understand that the City intends to keep separate the ballots cast in the annexed area so as to have them available for use in any challenge which may result and we would urge that the City do so.

Because of the time constraints under which we are operating we are hand delivering this letter to your office and we will telephone the city attorney and read to him the contents of this letter. Also, because of the intense public interest we feel constrained, upon request, to provide the information in this letter to the public.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

[From the Clarion-Ledger, July 22, 1981]

COCHRAN-LOTT, ONE-TWO PUNCH ATTACK STIRS CONTROVERSY IN FEDERAL AGENCIES

(By Johanna Neuman)

WASHINGTON.—Rep. Trent Lott of Mississippi remembers standing in his Pascagoula home sometime last summer, staring out at the Gulf of Mexico as he talked on the phone to one of the mayors in his 5th Congressional District.

The mayor of Laurel, W.I. Patrick Jr., was worried that the U.S. Civil Rights Commission had chosen his city to use as the focal point for a film about the at-large system of municipal elections. The commission wanted to examine in what parts of town federal revenue sharing dollars are spent by city fathers who are elected citywide, rather than by districts.

Patrick himself was facing re-election early in 1981, and did not want any additional attention from the U.S. Civil Rights Commission. As it turned out, the film painted a picture of Laurel as a city divided by its railroad tracks and racially segregated by its economics. *Laurel-Laurel: A City Divided* was not a favorite with the mayor, who lost his re-election bid.

Lott, an eight-year veteran of Congress, did not do anything about the mayor's concern right away. In fact, the Republican congressman says, he dragged his feet.

But after Ronald Reagan, another Republican who advocated states' rights during the 1980 campaign, was sworn in as president in January, Lott, who by then had become minority whip of the House, went to work.

Joined by Mississippi's Republican senator, Thad Cochran, Lott made calls and sent letters to the commission—all with the same theme.

"I am appalled that the commission would undertake such an endeavor," Lott wrote in one letter that called the completed documentary one-sided.

Cochran, meanwhile, was blasting away at the Civil Rights Commission from his post on the Senate Appropriations Committee. During one subcommittee hearing on the Civil Rights Commission's budget, Cochran grilled Director Luis Nunez about the Laurel film.

"I assume (the film) is not an effort to influence action by the Congress to use a appropriated funds, is it?" Cochran asked.

When Nunez replied that it was not, Cochran added, "For instance, the extension of the Voting Rights Act?" The act requires certain states, primarily in the South, to obtain prior approval from the Justice Department or U.S. District Court for the District of Columbia for any voting changes that might affect minority voting strength.

Cochran, who wants the Voting Rights Act's provisions extended nationwide, said later that he never meant to threaten the commission with an implied fight over its funding. But he acknowledged with a grin that federal agency directors "tend to listen better" when they appear before an Appropriations subcommittee.

The fuss initiated by Mayor Patrick about the Laurel film and escalated with effective Washington muscle by Cochran and Lott won a 30-day delay in the film's completion so the mayor could add a protest.

Critics within the agency lament the delay, and wonder if it was not timed to give the mayor a breather during the re-election campaign, or to skirt presentation to the Judiciary subcommittee holding spring hearings on the Voting Rights Act.

This, Cochran and Lott deny. But what they do not deny—what they in fact seem proud of—is that their involvement in the dispute is only one in a series of instances where the two have intervened in the affairs of ostensibly independent federal agencies.

"I haven't done anything other members don't do or my predecessor didn't do," Lott said during an interview in his minority whip office at the Capitol. "I'm thankful I'm in a position where I can effect some change."

Added Cochran, "There's nothing remiss or out of line. I would not have been fulfilling my function if I had not brought these complaints of my constituents to the attention of the federal agencies."

Throughout the Cochran and Lott interviews runs a corollary theme. Not only do the two Mississippi Republicans see their intervention with federal agencies as part of their jobs as ombudsmen for constituents, but they also believe the federal agencies are riddled with lower-level and career bureaucrats who served under Democrat Jimmy Carter and are not especially attuned to the policies of Republican Ronald Reagan.

"Termites," said Lott in describing what he views as the infestation of the State Department with closet Carterites. Clean out the bugs, the minority whip recently

told Secretary of State Alexander Haig, or lose Republican House support for the foreign aid bill.

Some federal bureaucrats are angered by what they perceive as blatant and unethical political interference by Cochran and Lott.

"I resented it," said one federal bureaucrat who insisted on anonymity. "It has a chilling effect," said a staffer in another agency who likewise asked not to be named.

But others within the federal agencies lean more toward the view that Cochran and Lott are merely asserting the right of conservatives to call the shots now that they are in power.

"It used to be that the NAACP could walk in here and practically write policy," said one mid-level Justice Department official who also asked not to be named. "Now it's their turn."

Often in their intervention in federal agency matters, Cochran and Lott have used a good cop-bad cop routine, with the Republican senator delivering a mild letter of protest or a complaint couched as an inquiry, and the Republican whip following up with a blistering protest or dramatic insistence that something give.

The two Republicans—whose backers historically have been at war within the state Republican Party—say they usually do not coordinate their attack.

Organized or not, the Cochran-Lott, one-two punch has stirred controversy in agencies from the Justice Department to the Internal Revenue Service, from the civil rights division at Justice to the federal courthouse in north Mississippi.

The first evidence of their intervention came with the dispute involving the Civil Rights Commission's documentary on Laurel. Cochran and Lott have been rolling up coups ever since.

It is early March. Municipal primary elections in Mississippi are coming up, and city officials in Jackson are upset.

The Justice Department has just written asking Jackson to comply with the 1976 objection lodged under Section 5 of the Voting Rights Act to the annexation of white suburbs.

The administration of Dale Danks Jr., who was elected mayor in 1977, tells the Justice Department that Jackson officials assumed the annexation had been cleared with the Justice Department by the previous city administration.

The current city fathers include City Commissioner Nielsen Cochran, who called brother Thad Cochran in Washington.

Sen. Cochran gets on the phone to the Justice Department. Lott has a face-to-face meeting with the Justice Department's top political aide, Edward C. Schmults, in which he mentions the case of Jackson, a city not in his congressional district.

Rev. Jesse Jackson, the civil rights activist from Chicago, is winning national headlines with his calls for the Justice Department to enforce its 1976 objection. He charges that the annexed votes could hurt the mayoral campaign of state Sen. Henry Kirksey, a black. But less than a month before the June 2 general election, the Justice Department backs off, telling the city to hold the election but keep the annexed votes separate, in case there is a later dispute.

Cochran: "This (mayoral) administration assumed that the past administration had worked out an arrangement with the Justice Department. Then all of a sudden, the city gets this letter reminding the city that the annexation was never approved. Why didn't they say something about it two years ago?"

Lott: "It was an untenable situation. All we said to the Justice Department was, 'Can't you make a clear statement one way or the other?' I feel toward the Justice Department just like I did four years ago. Those are the same damn people."

Cochran: "I got the impression they were third- and fourth-level bureaucrats, not new administration appointees. I only asked the high echelon people to take a look at the Jackson problem."

It is late April. The Justice Department has asked U.S. District Judge William C. Keady to allow federal agents, including the FBI, to inspect local Mississippi jails. The Justice Department said it wanted to determine whether state prisoners are being housed in inadequate facilities at county jails in an effort to circumvent Keady's orders on jail standards at the Mississippi State Penitentiary at Parchman.

The state attorney general sends two emissaries to Washington to visit Cochran and Lott. Cochran calls the Justice Department to inquire about the case. Lott gets Schmults to ask the court for a three-week delay in the lawsuit while a compromise is worked out with the state attorney general's office. Keady later agrees to the compromise negotiated through Lott's office, a congressionally inspired deal that allows state officials, rather than federal agents, to inspect the jails.

Cochran: "Two assistant (state) attorneys general came by to see me. They were concerned that the Justice Department was enlarging its litigation to include all the

jails where state prisoners are temporarily housed. It sounded as if it was a case invloving policy questions that was being decided by some hyperactive low-level bureaucrats who had just been turned loose on streets in every town hall in Mississippi. I wanted to bring it to the attention of the head man."

Lott: "The Justice Department is absolutely and totally out of order trying to tell local county jails what to have in their systems. I do not back up one moment on that one. Yes, we've got penal problems in Mississippi, but they do in New York and Maryland too."

Lott is reminded that this is a pending lawsuit, not a policy decision, that a doctrine of separation of powers is involved.

"Yes, I know, I know. But I just feel so strongly about that—that it is a policy decision that the Justice Department had to make whether to send agents into county jails. It's not an individual criminal matter. It's a policy decision. It's a fundamental federalist question. I acknowledge that it is unusual, probably."

It is early March. The Internal Revenue Service has been preparing to implement regulations stripping church and private schools that discriminate against minorities of their tax exempt status. The regulations are the result of a lawsuit brought by Mississippi parents on behalf of their children, but the IRS has been trying to implement them nationwide. Because of that, Congress has attached a rider to the IRS appropriations every year precluding the agency from implementing new regulations.

This year, before the congressional battle even begins, Cochran convenes a meeting of the Mississippi delegation at the Capitol with the newly appointed commissioner of the IRS, Roscoe Egger Jr. Also attending are representatives from the Justice and Treasury departments.

Cochran tells the IRS commissioner that the regulations would unfairly single out private schools in Mississippi, that even parishioners who contributed to their church could not write off their donations as tax deductible if the church's school was found to discriminate.

Egger tells Cochran and the others, according to a staffer who sat in on the meeting, that the government is "proceeding slowly and carefully in evaluating efforts by the schools to comply with the regulations."

Three months later, while the IRS is still slowly surveying the record of Mississippi's private schools, a U.S. Circuit Court in the District of Columbia opens the lawsuit to out-of-state plaintiffs. With the case going nationwide, the IRS waits.

Cochran: "None of the efforts I made were directed toward the court. I do think that would be inappropriate. The purpose of my involvement was to see that the concerns of the school districts were brought to the attention of the federal agency so they would be fully advised of the practical effects."

Lott: "Mississippi is the only state in the nation where they have sent IRS investigators to go in there on a witchhunt to religious schools, which again gets to a fundamental constitutional question. We consciously escalated the rhetoric on that one."

Lott said he was prepared to escalate the rhetoric in the IRS case even further by filing a friend of the court brief, but backed off when it became clear that Commissioner Egger was "'very attentive," and that "since the case seemed to be taking a turn for the better that we would not press the case."

U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

July 23, 1981

Howard C. Ross, Jr., Esq.
City Attorney
City of Jackson
P. O. Box 17
Jackson, Mississippi 39205

Dear Mr. Koss:

This is in reference to the 1976 annexation to the City of Jackson in Hinds County, Mississippi, transmitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your transmittal was received on May 23, 1981. We consider your transmittal to be a request for reconsideration of the Attorney General's previous objection to the 1976 annexation. See Section 51.44 of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended.

We have carefully reviewed the materials you submitted, the information furnished by others and our entire file on this matter. Based upon our thorough re-evaluation, including consultation with the Deputy Attorney General, we have concluded that the objection to the 1976 annexation to the City of Jackson should be withdrawn for the reasons discussed below.

First, it has never been considered that this annexation of approximately 28,000 persons was purposefully designed or carried out to dilute minority voting strength in the City. Indeed, the annexation was based in part on a commitment to contradict such an inference from a largely white annexation in 1971 and in fact about one-third of the persons in the annexed area are minorities. Compare City of Rome v. United States, 446 U. S. 156 (1980). Those minority persons may now vote in City elections and will have proportionally greater voting strength than before the annexation. The voting opportunities of those persons were thus enhanced by the annexation. Indeed, as the information you submitted suggests, all black areas reasonably within the range of annexation have been included.

Second, the objection to the annexation, entered December 3, 1976, was based solely on a dilutive effect on the black vote which as originally calculated was approximately 2%. The first request for reconsideration was denied on April 26, 1977, but the denial letter acknowledged that the dilution could be as low as 1.4%. The 1980 Census data you provided confirm that as of the present time those estimates were approximately correct. Where the dilutive effect is that low, the other factors discussed in this letter assume more significance than situations where there is a more substantial effect.

Third, for the reasons described in my letter of February 17, 1981, there was no attempt to enforce the 1976 objection by seeking judicial intervention to prevent elections from being held in the annexed area and this Department, on at least two occasions acquiesed in the conduct of such elections. Although in each instance government acquiescence may have been justified by the circumstances, the holding of elections involving the annexed areas has contributed to a community sense that the new area was in fact a part of Jackson. We understand that the black citizens in the annexed area have been politically active in City elections. Moreover, as you point out in each of the three elections held since the objection, the inclusion of the vote of the annexed area did not affect the results. Actual experience in elections thus cast doubt on the apparent dilutive effect perceived at the time of the objection.

Finally, in absolute terms, the size of the minority community has increased significantly. At the time of the objection in 1976, it was estimated that the minority population in the enlarged city was about 38 percent. According to the 1980 Census information it is now 46.8%. Thus, in the intervening years it is possible that some portion of the apparent dilution discerned in 1976 has been cured by unrelated population movement.

For all of the above reasons, this case is, in many respects, an atypical one. On balance, it is concluded that the most appropriate disposition of the matter is for the Attorney General to withdraw the 1976 objection to the annexation.

I should point out, however, that this should not be construed in any way as a determination that the at-large commissioner system in Jackson satisfies federal constitutional requirements. That issue is pending on appeal before the Court of Appeals for the Fifth Circuit in Kirksey, et al. v. City of Jackson, Mississippi, et al. The United States' brief as amicus curiae in that case maintains that the at-large commissioner form of government was originally designed and has been maintained to prevent black citizens from enjoying full participation in Jackson's city government in violation of the Constitution. Under the unique circumstances presented in Jackson, we have concluded that the better means of addressing needed reforms in city governance is through a judicial decision in the pending constitutional litigation.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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QUESTIONS AND ANSWERS ON THE SECTION 2 "RESULTS" STANDARD OF S. 1992

INTRODUCTION

Section 2 of S. 1992 would amend Section 2 of the Voting Rights Act of 1965 as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section. [New matter underlined.]

This section is identical to Section 2 of H.R. 3112 which was overwhelmingly passed by the House of Representatives on October 5 by a vote of 389-24. The amendment was strongly supported by a bipartisan coalition in the House, and efforts to delete it were rejected on the House floor by a voice vote. The House bill, on final passage, received a unanimous vote from the South Carolina, Louisiana, and Florida House delegations, and received a majority of the votes of the House delegations from Alabama, Georgia, Mississippi, North Carolina, and Texas.

1. WHAT IS THE PURPOSE OF THE SECTION 2 AMENDMENT?

The Section 2 amendment is designed to resolve the uncertainty and confusion caused by the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), and to restate the original legislative intent of Congress that proof of discriminatory intent is not required to establish a violation of Section 2 of the Voting Rights Act.

Prior to Mobile, courts held that Section 2 of the Voting Rights Act

> prohibits the imposition of any practice or procedure which has the effect of denying or abridging the right of any citizens to vote on account of race or color.

Toney v. White, 476 F.2d 203, 207 (5th Cir. 1973) (emphasis added).

In City of Mobile v. Bolden, a plurality of the Supreme Court, but not a majority, construed Section 2 of the Voting Rights Act to require proof of discriminatory intent. Justices White, Blackmun and Stevens did not discuss the statutory issue, and Justices Marshall and Brennan expressed the view that Section 2 would prohibit voting practices which were discriminatory in purpose or effect. A majority of the Mobile court did, however, rule that the Fourteenth and Fifteenth Amendments prohibit only those voting practices adopted or retained for a racially discriminatory purpose.

As indicated by the House Judiciary Committee report (H.R. Rep. No. 97-227, pp. 29-30), the purpose of this amendment is to restate the original legislative intent of Congress that proof of discriminatory intent is not required to establish a violation of Section 2 of the Voting Rights Act. As Attorney General Nicholas deB. Katzenbach, who played a key role in drafting the 1965 Act and explaining the operation to Congress, testified in the 1965 hearings, Section 2 of the Act was designed to prohibit "any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." Senate Hearings, p. 191 (1965).

The original understanding was reiterated by congressional leaders when the Voting Rights Act was extended in 1970 and 1975. For example, in 1970 Attorney General John Mitchell supported a bill to repeal the Federal preclearance requirement of Section 5 and substitute a provision allowing the Justice Department to bring suit to enjoin any voting law which was racially discriminatory in "purpose or effect." This proposal was defeated after a number of Senate leaders, including several who had been co-sponsors of the original Act in 1965, explained that the Justice Department already had this authority under Section 2 of the 1965 Act. 116 Cong. Rec. 5523, 5527 (1970).

2. WHAT WOULD MINORITY VOTERS HAVE TO PROVE TO SATISFY THE NEW SECTION 2 "RESULTS" STANDARD?

As indicated in the House Report (H.R. Rep. No. 97-221, pp. 29-30), the proposed "results" standard is designed to restore the pre-Mobile understanding of the proper legal standard which focuses on the results and consequences of an allegedly discriminatory voting law rather than on the intent or motivation behind it. The application of this standard is illustrated in Whitcomb v. Chavis, 1/ White v. Regester, 2/ and Zimmer v. McKeithen. 3/ Merely a discriminatory effect measured by the absence of minority office holders would not be sufficient. Minority voters would have to prove that the challenged electoral law or practice denied minority voters equal access to the political process.

Some have erroneously charged that the new Section 2 "results" standard would lead to the wholesale elimination of all at-large election systems everywhere in the Nation. They contend that it would be difficult to imagine a political entity containing a significant minority population without proportional representation that would not be in violation of the Section 2 amendment. This is simply incorrect and grossly distorts the intent of this amendment. The House Report clearly states (p. 30):

> Not all at-large election systems would be prohibited under this amendment, however, but only those which are imposed or applied in a manner which accomplishes a discriminatory result.

In Whitcomb v. Chavis black voters challenged at-large voting in multi-member legislative districts in Marion County, (Indianapolis) Indiana. The Supreme Court held that the mere fact that black "ghetto" voters were not proportionately represented, did not show invidious discrimination

> absence evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. 4/

In White v. Regester, on the other hand, the Supreme Court held that multi-member districts in Dallas and Bexar Counties denied minority voters equal access to the political process on findings of the District Court which showed:

1/ 403 U.S. 124 (1971).

2/ 412 U.S. 755, 765-70 (1973).

3/ 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1977).

4/ 403 U.S. at 149.

--A "history of official racial discrimination in Texas, which, at times, touched the right of Negroes to register and vote and to participate in the democratic processes."

--A majority vote requirement for party primaries and a "place" or post requirement limiting candidates to a specified "place" on the ballot, which were not "in themselves improper nor invidious, [but which] enhanced the opportunity for racial discrimination."

--No subdistrict residency requirement for candidates, meaning that "all candidates may be selected from outside the Negro residential area."

--Since Reconstruction, only two black candidates from Dallas County had been elected to the Texas House of Representatives, and these two were the only blacks ever slated by the Dallas Committee for Responsible Government, a white-dominated slating group.

--The slating group did not need the support of the black community to win elections, and did not exhibit good-faith concern for the needs and aspirations of the black community.

--The slating group had employed "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community."

--The Mexican-American community of San Antonio had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."

--Mexican-Americans suffered "a cultural and language barrier that makes [their] participation in the community processes extremely difficult . . ."

--A history of a discriminatory poll tax and restrictive voter registration procedures which continued to have a residual impact reflected in disporportionately low voter registration levels.

--Only five Mexican-Americans had served on the Texas Legislature, and only two were from the barrio area.

--The Bexar County legislative delegation in the House "was insufficiently responsive to Mexican-American interests."

--A pattern of racially polarized voting showing that "race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities."

These findings showed that based on "the totality of the circumstances" Mexican-Americans were "effectively removed from the political processes . . ." 5/

This equal-access-to-the-political-process standard was then implemented and applied by the Fifth Circuit in Zimmer. The Court correctly noted that disproportionate minority representation was not sufficient to show a violation:

> Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. 6/

The Zimmer court also correctly held that the existence of two or three of these factors would not suffice:

> The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief. 7/

Applying this pre-Mobile standard, courts in numerous cases--both in the South and in the North--rejected challenges to at-large election systems alleged to dilute minority voting strength. See, for example, Whitcomb v. Chavis, 403 U.S. 124 (1971) (Indianapolis, Indiana); McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976) (Gadsden County, Fla.) (only four Zimmer elements proven); David v. Garrison, 553 F.2d 926 (5th Cir. 1977) (Lufkin, Texas) (no proof of denial of equal access to the political process); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978) (Shreveport, La.) (District Court findings inadequate to meet the standard); Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976) (Pine Bluff, Ark.) (burden of White v. Regester not met); Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) (Boston, Mass.) (no denial of equal access proven).

5/ 412 U.S. at 769.

6/ 485 F.2d at 1305 (first emphasis added).

7/ Id.

3. WHY SHOULDN'T PLAINTIFFS CHALLENGING DISCRIMINATORY VOTING LAWS BE REQUIRED TO PROVE DISCRIMINATORY INTENT?

In some areas of the country, black and Hispanic voters are denied equal access to the political process by racial gerrymandering, discriminatory at-large elections, and other electoral devices which minimize and cancel out minority voting strength. In Mobile, Alabama, for example, blacks constitute 35 percent of the population, but no black person has been elected to the all-white city council since at-large voting was adopted in 1911. Unless minority voters are able to overcome these discriminatory barriers to equal participation, these communities can continue to cling to these unjust voting schemes.

So debate over the "intent" requirement is not merely a matter of losing or winning lawsuits, as some have contended. Instead, it involves the critical issue of whether racially discriminatory voting laws not covered by the Section 5 preclearance requirement can ever be eliminated, or whether black and Hispanic voters should continue to be shut out of the electoral process.

For minority citizens whose votes are diluted or cancelled out by discriminatory voting laws, proving discriminatory intent is extremely difficult, and in most cases, impossible. Proving intent ultimately requires a determination of what was in the minds of legislators who enacted or maintained a voting law alleged to be discriminatory. And, in most cases, the best sources of evidence of discriminatory motivation are cut off by practical and legal barriers:

--Many discriminatory voting and election laws were adopted years ago by legislators who are now dead. As the Birmingham (Alabama) Post-Herald noted in an editorial supporting the House-passed bill, "It would be a neat trick to subpoena them from their graves for testimony about their racial motivations."

--Testimony from live legislators who authored or supported discriminatory legislation generally is prohibited by the "legislative privilege" rule, which prevents litigants from cross-examining legislators concerning their motivation. 1/

--Recently, the U.S. Court of Appeals for the Fifth Circuit, where most voting rights cases originate, ruled that the motivation of the voters in adopting and retaining election procedures by popular referendum is immune from judicial inquiry. 2/

1/ Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

2/ Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981).

In the absence of a "smoking gun," litigants must resort to circumstantial evidence producing "inferences," "suspicions," and "likelihoods" of discriminatory intent. Here, judges and legal commentators frequently disagree, often strenuously, on what constitutes sufficient proof. The nine Justices of the Supreme Court in the Mobile case itself were unable to agree on a majority opinion setting forth the proper legal standard for proving discriminatory intent. The plurality opinion in Mobile was strongly criticized by the Harvard Law Review as "disappointing because it refused to draw inferences [of discriminatory intent] that are reasonable in light of the Court's intent decisions . . ." 3/

Opponents of the Section 2 amendment argue that the Supreme Court repeatedly has held that direct evidence of discriminatory intent is not required, and that intent can be proved by circumstantial evidence. However, in all those cases, 4/ the plaintiffs lost and the Supreme Court held that the circumstantial evidence presented was not sufficient to show a constitutional violation.

3/ The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 147 (1980).

4/ Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights, supra; Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); City of Mobile v. Bolden, 446 U.S. 55 (1980); City of Memphis v. Greene, 49 U.S.L.W. 4389 (1981).

4. HASN'T THE SUPREME COURT ALWAYS REQUIRED PROOF OF DISCRIMINATORY INTENT?

City of Mobile v. Bolden represents a radical departure by the Supreme Court from prior voting rights cases. In prior cases, the Court had said that unconstitutional dilution of minority voting strength could be proved by "an invidious result" and "totality of circumstances" showing that a challenged practice denied minorities equal access to the political process, regardless of motivation. Both the District Court and the Court of Appeals held in Mobile that, under this prior standard, a constitutional violation had been shown. However, a slim majority of the Court reversed, applying instead a new standard requiring strict proof of discriminatory intent.

Under Mobile, as the courts have said in vacating and remanding cases decided under this prior standard for reconsideration in light of Mobile, "the rules of the game are changed;" 1/ the prior standard has been "declared to be improper." 2/

This abrupt reversal was most dramatically illustrated in McCain v. Lybrand, a challenge to at-large elections for the Edgefield County (South Carolina) Council. In April, 1980 the District Court, applying the prior cases, held that the black voter plaintiffs had proved that at-large voting unconstitutionally diluted black voting strength. Five days later, the Mobile decision was handed down, and the District Court abruptly reversed itself, vacated its prior judgment, and sustained the constitutionality of the discriminatory at-large scheme.

Here's how this change occurred:

(1) In two of the earliest vote dilution cases, Fortson v. Dorsey (1965) 3/ and Burns v. Richardson (1966) 4/, the Supreme Court indicated that multi-member districts would be unconstitutional if it could be shown that

> designedly or otherwise, a multi-member constituency scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. 5/

1/ Jones v. City of Lubbock, 640 F.2d 777, 778 (5th Cir. 1981) (Goldberg, J., concurring).

2/ Kirksey v. City of Jackson, 625 F.2d 21 (5th Cir. 1980); accord: Corder v. Kirksey, 639 F.2d 1191, (5th Cir. 1981).

3/ 379 U.S. 433 (1965).

4/ 384 U.S. 73 (1966).

5/ 379 U.S. at 439; 384 U.S. at 88.

The court indicated that this standard would be satisfied by proof of "an invidious result." 6/

(2) Then, in the Jackson, Mississippi, swimming pool closing case decided in 1971, Palmer v. Thompson, the Supreme Court held that proof of discriminatory intent was not relevant to showing a constitutional violation because of the inherent difficulties in proving discriminatory intent:

> . . . [N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. * * * First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment . . . . It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons. 7/

Prior cases, including the Tuskegee gerrymander case, Gomillion v. Lightfoot, 8/ were held not to rest on proof of discriminatory intent:

> But the focus on those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. 9/

(3) In Whitcomb v. Chavis (1971) 10/ and White v. Regester, (1973) 11/ two cases challenging multi-member legislative districts, the Supreme Court held that the focus should be, not on the motivation of the legislators, but on the "totality of the circumstances:"

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to

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6/ 384 U.S. at 88.

7/ 403 U.S. 217, 224-25 (1971).

8/ 364 U.S. 339 (1960).

9/ 403 U.S. at 225.

10/ 403 U.S. 124 (1971).

11/ 412 U.S. 755 (1973).

> produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.12/

The principles declared in those cases were implemented and followed by the lower courts in Zimmer v. McKeithen 13/ and other cases. Indeed, the Zimmer court carefully paid heed to what the Supreme Court said in the Jackson swimming pool case:

> In Palmer v. Thompson [citation omitted] the Supreme Court stated that although its past decisions contain language which suggests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot [citation omitted] focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.14/

(4) Then the Supreme Court reversed itself in Washington v. Davis (1976)15/, an employment discrimination case, and Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977)16/ a discriminatory zoning-fair housing case, and held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

(5) In Mobile, the slim majority chose to apply the Washington v. Davis/Arlington Heights standard requiring strict proof of discriminatory intent, rather than the White v. Regester/Zimmer v. McKeithen "totality of the circumstances" approach. Moreover, in doing this, Justice Stewart, writing for the plurality, openly acknowledged the prior understanding (now called a "misunderstanding") that proof of intent was not required:

> [Zimmer v. McKeithen] was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause--that proof of a discriminatory effect is sufficient.17/

12/ 412 U.S. at 765-66.

13/ 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1977).

14/ 485 F.2d at 1304 n. 16.

15/ 426 U.S. 229 (1976).

16/ 429 U.S. 252, 265 (1977).

17/ 446 U.S. at 71.

The prior standard, in effect at least since 1965, was thus repudiated,18/ and the electoral access of minority voters was conditioned on whether or not they can produce specific evidence of discriminatory intent.

18/ In Mobile and campanion cases, the Court of Appeals for the Fifth Circuit attempted to fuse these two standards by ruling that the White-Zimmer factors showing denial of equal access to the political process provided "acutely relevant" circumstantial evidence of discriminatory intent. See Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978), rev'd, 446 U.S. 55 (1980). The Supreme Court condemned this effort as "inconsistent with our decisions in Washington v. Davis and Arlington Heights" and ruled that although the presence of these indicia may afford "some evidence," "satisfaction of those criteria is not of itself sufficient." 446 U.S. at 73.

5. WOULD THE NEW SECTION 2 "RESULTS" STANDARD REQUIRE PROPORTIONAL REPRESENTATION BY RACE OR RACIAL QUOTAS?

The language of the Section 2 amendment itself makes it unmistakeably clear that the "results" test is not intended to create a right to proportional representation by race or racial quotas:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The "in and of itself" language means that a court may take exclusion of minority representation into consideration, but it would not be the determining factor.

In light of the bill's plain words, raising the specter of "proportional representation" and racial quotas amounts to nothing more than "obfuscation and dithering" (New York Times, Janry 29, 1982). "The drafters of the House bill went to some trouble to avoid this misapprehension." (Washington Post, December 20, 1981).

The misleading nature of this charge is further demonstrated by the fact that all of the pre-Mobile cases, which, according to the House Report, are intended to reflect the proper application of this standard, specifically disavow any intent to create a right to proportional representation:

Whitcomb v. Chavis:

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. (403 U.S. 124, 149.)

White v. Regester:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. (412 U.S. 755, 765-66.)

Zimmer v. McKeithen:

> Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. (485 F.2d 1297, 1305.)

Some have erroneously contended that the proposed language specifically disavowing proportional representation would apply only in circumstances in which minority candidates did not run for office, but would not apply where minority candidates ran and failed to gain proportional representation for the minority community. There is no basis for such a grossly distorted view of the House bill either in the statutory language or the legislative history in the House. The Whitcomb case itself illustrates the point that mere "political defeat at the polls" (403 U.S. at 153) for minority candidates does not establish a violation of this standard.

Frank R. Parker
Barbara Y. Phillips
Voting Rights Project

February 1, 1982

Senator HATCH. Now, our next witness will be Prof. Michael Levin of the City College of New York.

Senator METZENBAUM. Mr. Chairman?

Senator HATCH. Yes.

Senator METZENBAUM. I am going to have to excuse myself for a bit to go to another meeting, but it is my understanding that the last two witnesses, Ms. Abigail Turner and Mr. Armand Durfner, are both witnesses with respect to being against the intent standard and on the same side of the issue. If you would have no objection, I would ask that you reverse the order of calling them. In other words, call Derfner before Turner. They are both on the same side.

Senator HATCH. We put them in this particular order because of the way in which we received the testimony. We would like to keep this in this order. I don't see any reason to change it at this point unless there is some valid reason of which I am presently unaware.

We have tried to keep our witnesses in the same order that we presently have them. That is the way that we received the testimony. That is the order in which we are prepared to proceed.

Senator METZENBAUM. Well, I think that those who are supporting the opposition would like to make that request. It seems like a reasonable request. I don't see why it would in any way affect the chairman's conduct of the hearing.

Senator HATCH. I don't see any problem with that. We will be glad to do that.

Senator METZENBAUM. Thank you.

Senator HATCH. I did have it set up in the order in which the testimony was received.

Senator METZENBAUM. I appreciate it.

Senator HATCH. That kind of causes me some difficulties, but that is fine with me. We will be happy to accommodate you.

Senator METZENBAUM. Thank you, sir.

Senator HATCH. Our next witness will be Prof. Michael Levin of the City College of New York. Professor Levin has written extensively on civil rights issues including the intent/effects issue.

Now, Professor, if you can wait for a second, I have a Cabinet secretary on the phone and I had better take the call. If you will relax, I will be right back.

[Recess taken.]

Senator HATCH. Mr. Levin, I apologize for the delay. I was speaking with the Secretary of Labor, and now I have got a call from the Director of the CIA. We are involved with some very interesting matters. I may have to interrupt the hearing at any time, but I want to get going.

Let me also say that Senator Metzenbaum asked me to reverse the order of witnesses for the last two witnesses, Ms. Turner and Mr. Derfner. I agreed to do that, but I didn't realize that my staff has not even reviewed Mr. Derfner's remarks yet. I didn't have them because they were not in by 5 last night. Therefore, I am going to have to reverse it because I want my staff, at least, to have read his remarks to help me to be prepared so that I may ask some intelligent questions.

With that, we will proceed with you, Mr. Levin, and then Ms. Turner and Mr. Derfner. I apologize in open hearing to Senator Metzenbaum for not realizing that was the problem.

Go ahead, Mr. Levin

STATEMENT OF PROF. MICHAEL LEVIN, DEPARTMENT OF PHILOSOPHY, THE CITY COLLEGE OF NEW YORK

Mr. LEVIN. Thank you very much, Mr. Chairman. I am going to summarize my statement and ask that the entire statement be included in the record.

Senator HATCH. Without objection, that will be included at the end of your oral testimony.

OVERVIEW

Mr. LEVIN. In *Mobile* v. *Bolden* the Supreme Court reaffirmed the intent criterion for judging racially based violations of the right to vote: "The ultimate question remains whether a discriminatory intent has been proved in a given case." Congress now has before it legislation that would replace the intent standard of section 2 of the Voting Rights Act by an effects standard. Instead of forbidding practices which deny or abridge the right to vote on account of race, the proposed amendment to the Voting Rights Act would forbid practices which are applied "in a manner which results in a denial abridgement of" the right to vote on account of race.

I believe this change would be a catastrophic error. It would lead to enormous mischief and pervert the very meaning of the right to vote and violations of that right.

RIGHTS AND INTENT

Since the issue has become a matter of legislative policy it is necessary, in the words of Jefferson, to recur to first principles. What is a right and what is a violation of a right?

The right to do something or be something is the freedom to do or be that thing. A legal right is simply a freedom protected by law, a freedom protected against coercive interference.

Take the right to free speech which the Government is expected to protect. Clearly, this right is not categorical. Germs which constrict my throat do not violate my right to free speech, since violation is an act of the will of a rational being. The State protects me against the thwarting of my liberty by the will of another. Intent, mens rea, is integral to the idea of rights and their protection and is basic to the Anglo-Saxon legal system.

Intent is not all that difficult to determine. Juries decide every day, without benefit of telepathy or smoking guns, between manslaughter and premeditated murder. A man who purchased a one-way ticket to Brazil on the morning of his crime did not kill his wife in a jealous rage. We read intent off behavior. I know that some of you will ask me questions, even though I can't read minds.

CIVIL RIGHTS AND INTENT

The protection of civil rights applies these ideas to race. No one is entitled to thwart another's choice to vote on account of race. Discrimination is the act of thwarting this and other liberties on the basis of race. Like any act, discrimination requires intent. If I drop a banana peel in front of a polling place, I am negligent. If I drop it to disrupt the election, that is worse. But I discriminate only if I pick my victim by color.

Tay-Sachs strikes only Jews, but chromosomes are not anti-Semitic. To divorce discrimination from intent is to abandon the distinction between human action and blind natural forces.

Senator HATCH. Can I interrupt you for just a second? That phone call from Mr. Casey is here and I will be right back.

[Recess taken.]

Senator HATCH. I apologize to you. Go ahead.

Mr. LEVIN. That is perfectly all right. The point is crucial. In the absence of intent, contentious terms like "discriminatory effect" should be replaced by "differential voting patterns."

Even cases contrived to show intent superfluous actually rely on it. If a precinct with 1,000 voting-age blacks has not enrolled a single one, it is asked, do we really need independent inquiry to show discrimination?

This case is compelling only because we know in any real situation that zero black registration is impossible unless someone planned it. Asking about intent seems pointless, not because intent is relevant, but because it is obvious. But suppose intent absent. Suppose 90 percent of eligible black voters sit out an election because a visiting speaker has persuaded them to in order to protest the two-party system. Here a "disproportionately" low turnout was not caused by interference and it is absurd to call it discriminatory. An effect test would, however, forbid speakers to visit such districts before an election.

FORESEEABLE EFFECT

Foreseeable effect as a supposed compromise also falls back on intent. It is based on the notion that people intend the foreseeable effects of their actions, but suppose in our previous example the responsible officials knew beforehand they were permitting a public rally at which minorities would be persuaded not to vote. In per-

mitting the rally, the officials foresee but do not intend to lower black turnout, but only to allow all views to be heard. They do not discriminate.

In fact, foreseeable effect entails liability only when it thwarts the will of another. When Congress passes a bill it knows the President will veto, it is the President, not Congress, who is responsible for the veto. So here. The foreseeable effect was produced by the will of those who stayed home. Anyway, using foreseeable effect would press localities to use ever more sophisticated predicting methods, thus making any effect reasonably foreseeable and collapsing the foreseeable effects test into a pure effects test.

THE DOUBLE STANDARD

The House report struggles with the "confusing" and "ambiguous" intent test. Yet it finds other judicial glosses on the right to vote quite clear. It sees no difficulties in the right to "meaningful" and "effective votes" discovered in *Allen* and *White*.

Now does the right to "reliable entry into the political process" mean that your candidate must have a good chance of winning? Such problems did not bother the drafters of the House report even though intent caused much furrowing of brows.

ELECTORAL QUOTAS

Since "unintended discriminatory results" is nonsense, a Federal ban on any practice which "results in a denial of the right to vote independently of intent" can only amount to a ban on practices which have differential effects on minority voting.

Free of tortured language, this is a move toward quotas in voting itself. By making sheer numerical outcome "highly relevant" to the legality of a procedure, the House bill moves to replace the outcome of the voting as the final arbiter of an election by another a priori standard, proportionality. This is not consistent with democracy.

The framers of the House bill were aware of this implication, and their amendment promises that disproportionate representation "shall not in and of itself constitute a violation," but experience shows that such promises always foreshadow quotas.

Proponents of the Civil Rights Act promised no remedial quotas but "goals and timetables" are now firmly entrenched.

Indeed, while the House bill disavows any "right to proportional representation as a remedy," a frightening thing even to be mentioned in American legislation, the report approvingly cites *Fullilove* which did permit set-aside quotas as one of Congress remedial powers.

Since intent is not required, only further objective factors are needed to make disproportionate representation impermissible. The House report gives as an example the failure of the major parties to nominate minority candidates.

Now a popular rationale for quotas is that they prevent discrimination. The Supreme Court has already paved this path to affirmative action elections in *City of Rome* when it found the Voting Rights Act designed to eliminate even "the risk of purposeful discrimination."

The language of the House bill is a transparently inadequate safeguard against quota elections.

INTERESTS

Still more ominously, the report declares that an election scheme would be illegal if it unintentionally permitted the regular defeat of "minority candidates or candidates identified with the interest of a racial or language minority."

Who shall decide a minority's interest independently of how it votes? Some blocks, like Jews, regularly vote against what others would see as their interests.

The logic of the House bill leads, I think, to runoffs between designated minority spokesmen for reserved positions while the white population votes as usual. Surely, in selectively protecting the so-called interests of groups by color, the House bill violates equal protection.

ONE MAN/THREE VOTES

The effects test, by banning practices which "impede the election opportunities" of blacks, also runs afoul of the one-man-one-vote principle.

Imagine an at-large district that is 50-percent black and 50-percent white with 75 percent of the whites voting but only 25 percent of the blacks. Let us fall in with the myth that voting must follow racial lines and so blacks are never elected to the 10-seat city council. The courts would be empowered to gerrymander the district so that five blacks win seats even though only one-third as many blacks as whites vote, thus giving each black vote the weight of three white votes and purposefully discriminating against whites.

The protection of the opportunity to participate in elections is not a guarantee of equal results. Taken literally, the effects test would ban even registration if only "objective factors" operate and, in plain English, blacks choose to register in numbers deemed too low. Does the Senate want to discover what will happen should this standard become law?

WHY DIFFERENCES

There are those who will cry "racism" at the suggestion that differential black voting is due to choice, but it is the proponents of the effects test who raise the why question about spontaneous differential patterns. Proponents of the intent test care only that voting be free and leave spontaneous patterns to sociologists, not Government officials, to ponder.

However, if the question must be raised, let us address it honestly. Thomas Sowell has amassed considerable evidence that different value traditions, not discrimination, explain group differences in economic success. A parallel explanation for differential voting is as plausible as any ad hoc hypothesis about ever more subtle forms of discrimination and should be carefully weighed before differential voting is made "highly relevant" to bringing voting procedures under Federal scrutiny.

We can begin to open our minds by not calling low black voting disproportionate. No one calls the large number of Japanese Nobel laureates in physics disproportionate.

SUMMARY

Demagoguery and misrepresentation ought not to cloud the basic issue, which is only the retention of the intent test. The Voting Rights Act forbids racially-motivated interference with the freedom to vote. The presence of intent, *mens rea,* is inseparable from the act that the Voting Rights Act forbids. Replacing the intent standard by an effect standard would change the right to vote into a wholly different and a wholly antidemocratic presumptive right to a racially predetermined result.

It is not the tyranny of the majority we are so often warned against but the tryanny of the minority, which is tryanny pure and simple. I urge the Senate to retain the intent test.

INTENT THROUGH THE BACK DOOR

Since I see that I have a moment extra, I call attention to the fact that the previous speaker's testimony in every significant case did refer to intent. In citing the difficulties he had in Mississippi, he in every case referred to efforts by whites to enhance their power to dilute the effect of white voting—all verbs which imply the presence of intent. Even those who say that intent is superfluous tacitly rely on it.

Thank you.

Senator HATCH. Thank you. Let me just ask one question and then I will turn to Senator Thurmond.

Are you telling us that if there is no intent to discriminate there is no discrimination?

Mr. LEVIN. Yes.

Senator HATCH. In your opinion then is S. 1992 aimed solely at procuring the desired results, of an election system based on quotas?

Mr. LEVIN. I am sorry; I didn't hear the question.

Senator HATCH. In your opinion then is S. 1992 aimed solely at producing the desired results, which appears to me to be the election system based on quotas?

Mr. LEVIN. I can see no other interpretation to put on that bill.

Senator HATCH. Thank you.

Senator Thurmond.

Senator THURMOND. If the proposed change in section 2 is adopted, could its premise be applied to other groups such as political parties and ethnic groups not presently contemplated by the Voting Rights Act?

Mr. LEVIN. That thought has occurred to me. A natural extension would seem to be, for example, to women who traditionally—political scientists tend to think this so—vote for the incumbent. One could construe this as an advantage to the incumbent created by votes for women. Certainly, I certainly see the extension of it as unlimited in possibility.

Senator THURMOND. What is the biggest danger that you can conceive in the House bill?

Mr. LEVIN. The biggest danger by far, I think, is the change in section 2 to make intent irrelevant.

Senator THURMOND. In other words, the effects might make intent irrelevant?

Mr. LEVIN. Yes.

Senator THURMOND. Do you feel that if any State or political subdivision has been under this bill for 17 years it should be allowed to go into court and show that it has not been discriminating if it can do so?

Mr. LEVIN. I was asked to testify about the intent section. I am not a lawyer, and the bailout provisions are not my area of expertise.

Senator THURMOND. I see.

Mr. LEVIN. So I would prefer to leave that to others.

Senator THURMOND. I see. Thank you very much. I think that you are very kind to come and testify. We appreciate your presence here.

Senator East may have some questions that he wants to ask you.

Senator EAST. Thank you, Senator Thurmond.

As always, I like to thank the witnesses for coming and helping us with their testimony, whether it be pro or con to my own position. I think your testimony has been very valuable and very cogent.

I would just like to briefly state my own rationale on what this change in section 2 would mean in going from an intent test to an effects test. I would appreciate your reaction to it.

It seems to me, as I have noted with some other witnesses—and sometimes we have to retrace some ground here, which I suppose is valuable because we keep coming back into what seems to be our fundamental problems—that all of this, of course, commences with congressional authority and power under the Constitution, and particularly under the 15th amendment. That is where the Voting Rights Act of 1965 came from. Any alteration, extension of it, modification of it, or building upon it, whatever we are doing, must be based upon the basic power grant of the 15th amendment, it occurs to me.

Now I would contend that the 15th amendment—and, again, I am going to just explain my position and I would appreciate your response to it as to whether you think that it holds together or it is a house of cards—the 15th amendment, as I understand it and as I thought was conventionally and traditionally understood, guarantees the right of a citizen to vote, as it states, regardless of race, color, or previous condition of servitude.

Interestingly, at the time the 15th amendment was debated the question of the right to hold office came up and was rejected.

It seems to me in a fair reading of the language, and I would suspect a reasonable man's understanding of it, what the 15th amendment means is that each individual in this country, regardless of race, color, or previous condition of servitude, should have the right to register to vote and have that vote counted, or sometimes, as it is put, to have access to the voting process in this county

Now it does occur to me that if you go from an intent test to an effects test—as so much of this testimony has been bringing out and yours seems to underscore it once again—though the propo-

nents claim to the contrary, they end up giving us proportional representation because they don't give us any other criteria by which you would determine there is discrimination based upon race; that is, back to the 15th amendment, denied the right to vote because of race, color or previous condition of servitude.

The point is that you will look at the results, the effects, as they are called. I don't see how one can strain out of that anything but proportional representation, which I do not see is the right that is guaranteed in the 15th amendment. As Senator Thurmond has suggested, and I think you are useful here as a philosopher, if proportional representation is a good concept as a matter of democratic political theory—I question whether it is because in my judgment it would lead to a fragmenting of American politics and make consensus-building and coalition-building extremely difficult, as proportional representation always does.

Note, for example, the varied divisive-party/multi-party arrangements in European politics where you are encouraged to accentuate differences, philosphical and otherwise, rather than have a candidate have to run and build a broad base of consensus. It is an interesting philosophical point.

It might be that the American people would decide that democracy is better served with proportional representation. Race would be a component. Sex would be a component. Political party would be a component. Physical ability or disability might be a component and ad infinitum. It is a very interesting and fascinating subject

I think as a matter of democratic political theory one might raise the question—it is appropriate in this context—why would you confine it to racial proportional representation?

Mr. LEVIN. Absolutely.

Senator EAST. I don't quite see why as a philosophical premise one would do that. However, if we are going to walk down the road of proportional representation—and I submit with an effects test we would—why would we stop there?

I guess, rather fundamentally as a legal point at this juncture, it occurs to me we really don't have the authority under the 15th amendment to do that. If we wish to do that, we ought to amend the Constitution to allow Congress and other entities of the American federal systems to so alter the election laws of this country to facilitate the concept of proportional representation. We might decide to do it on the basis of race, political party, or whatever it may be.

I come to rest here then—and you as a political philosopher I think would at least follow my rationale, whether you agree with it or not—the two fundamental tenets of democratic political theory at stake here are, and I think they are fundamental, and proportional representation is not one: The right to register to vote, to have your vote counted, to have access. Where that is denied to you on the basis of race, color, or previous condition of servitude, it violates the 15th amendment, and it should be violative of any law that is reasonably based upon a proper understanding of the 15th amendment.

The fundamental tenet being protected here that we are talking about is the right to vote irrespective, again, of race, color, or previous condition of servitude. That is the fundamental tenet of demo-

cratic theory—the access of each and every person irrespective of those.

Second, a fundamental tenet historically has been in this country—and I think we are up against up-ending it perhaps indirectly and without consciously understanding that is what we are doing—the concept of Madisonian democracy, of the need in a great federal system to build consensus. That means that a candidate has to go out and build coalitions.

Under proportional representation the accent is upon divisiveness and exclusiveness, upon being particular and provincial. If that is a healthy premise of democratic politic theory, it certainly is contrary to the great Madisonian contribution. It occurs to me before we go that road we ought to think it through very carefully and make sure we want to do it. If we do want to do it, I submit we ought to do it by constitutional amendment.

I have been a little expansive on this. Does the scenario here make some sense? Maybe you would be critical of it or maybe you would like to expand on it.

Mr. LEVIN. Yes. I would, of course, accept the submission. I think you are entirely right. I would only expand on it in a couple of perhaps even more pessimistic ways.

It did cross my mind that the section 2 amendment might not be legislation appropriate to the 15th amendment. After all, anything which moves in the direction of proportional representation does not guarantee what the 15th amendment does. However, unfortunately, there is no saying what the courts will and won't decide is appropriate.

I also agree that ultimately this is a matter for Congress. Congress is the deliberative body and it has to decide questions of policy like this. With you, I think it would be a very unwise decision even if legally possible.

I suppose the underlying error, the underlying departure from the democratic tradition, has been a misunderstanding of what opportunity is. It used to be thought, correctly, that the opportunity to do something like vote was simply freedom from interference to do it. Unfortunately, opportunity and equality of opportunity have come to be confused not only with equality of result, but even equality of enabling means.

It is sometimes argued that, "I don't have an equal opportunity to buy shares in IBM when they go on the market because I don't have the money." This is not true. I do have an opportunity. I simply don't have the means to buy it.

Similarly, I think that the opportunity to vote does not at all entail having the means to wage a successful campaign for your candidate. It simply means and only means the absence of interference. I think that is where the fundamental departure from democratic traditions has taken place. Otherwise, I quite agree with your diagnosis.

Senator EAST. As you see it then in this proposed bill from the House of Representatives, above all other things, as I understand it, you think this probably is its fatal flaw, acknowledging you are not here as an expert witness to concentrate on the bailout problem, which we take care of later.

Our time is up. I have no further comments.

Again, I thank you for coming.

[The prepared statement of Mr. Levin and additional material follow:]

PREPARED STATEMENT OF MICHAEL LEVIN

WHY THE VOTING RIGHTS ACT MUST RETAIN THE INTENT STANDARD

Overview: Rights and Intent

In Mobile v. Bolden (1980) the Supreme Court reaffirmed the intent criterion for judging racially based violations of the right to vote: "The ultimate question remains whether a discriminatory intent has been proved in a given case." Congress now has before it legislation that would replace the intent standard of sec. 2 of the Voting Rights Act (VRA) by an effects standard.[1] Instead of forbidding practices which "deny or abridge" the right to vote on account of race, the proposed amendment to the VRA would forbid practices which are applied "in a manner which results in a denial or abridgement of" the right to vote on account of race.

I believe this change would be a catastrophic error. It would lead to enormous mischief and pervert the very meaning of the right to vote and violations of that right.

Since the issue has become a matter of legislative policy -- proponents of the amendment having found Mobile v. Bolden an insufficiently clear guide -- it is necessary, in the words of Jefferson, to recur to first principles. What is a right, and what is a violation of a right?

The right to do something or be something is the freedom to do or be that thing. A legal right is simply a freedom protected by law -- a freedom protected against coercive interference. Take the right to free speech, which the government is expected to protect. Clearly, this right is not categorical. If a meteorite hits me on the head and knocks me out just as I am about to begin a speech, the government has not fallen down on the job. My legal right to speak freely has not been violated, since violation is an act of will which meteorites are incapable of. In short, the protection of rights afforded by the state is protection against the thwarting of my liberty by another rational being, a being with a will. A meteorite cannot wrong me, nor be held accountable

for preventing me from speaking. But if you gag me as I am about to speak, you violate my rights and are liable to the law's retaliation.

Clearly, what guides our judgement in all such cases is whether my inability to exercise my will was caused by the will, the intent, of another [illegible]. It is this constraint by the will of another that the law protects me against, it is such constraint, and such constraint only, that I have a right against. Intent is thus integral to the very idea of "rights" and their legal protection. The very language of rights [illegible] their invasion, interference, abridgement, thwarting, of conspiracies to deprive -- presupposes intent. Even when we say "circumstances conspired against him," or "the situation prevented him from saying anything," we are metaphorically extending words whose literal meaning requires intent, the exercise of a will. Rights are protected against acts of violation, acts being the result and manifestation of intent. This is the basis of the Anglo-Saxon legal system.

The law virtually always proportions degree of liability to intent. There is a moral and legal difference between premeditated murder and manslaughter, a difference which corresponds precisely to the presence and nature of the intent, mens rea. If I kill you in cold blood I more seriously violate your right not to be murdered than if I drunkenly run you down. It would be absurd to punish an animal that has killed, since animals lack a rational will.[2]

People bent on subverting the intent standard in particular cases often raise the objection that intent is "too difficult to determine" to be part of a working legal system. They say it requires mind-reading or smoking guns or written declarations of intent. Curiously, those who bemoan the difficulty of ascertaining intent are often the very people who deplore the use of measures like wiretapping which would help the law meet their very demanding standards. But in any case, the supposed difficulty in ascertaining intent is all nonsense. Juries determine intent in murder

cases every day of the week, and have no trouble doing so. They do not have to read minds or written declarations of intent. A man cannot claim to have killed his wife in a fit of jealous rage if he purchased a one-way ticket to Brazil that morning.

We read intent off behavior -- not necessarily the effects, but behavior itself. If I see a jack next to a disabled vehicle, I conclude that someone intends to do some repair work. Someone fingering a garment in a clothing store is probably thinking about buying it. None of this is at all mysterious. Most scholars now agree that Shakespeare intended Hamlet's ghost to be real; Elizabethans believed in ghosts, and Shakespeare's contemporaries often used ghosts in realistic plots. If we can make reasonable conjectures about the intentions of a man who died 350 years ago, we can certainly hope to ascertain the intentions of our neighbors.

Civil Rights and Intent

The legal protection of civil rights applies these general precepts to matters of race. The fundamental idea of civil rights legislation is that ~~one~~ no-one is entitled to thwart the will of another on account of race. "Discrimination" is the name we give to the act of thwarting someone's liberty to vote, to live where he pleases, or to choose a job freely offered on the job market, because of his race.[3] Discrimination, being an act, requires intent just as much as any other rights violation. If someone slips on a banana peel I drop near a polling place, I am negligent. I am more seriously liable if I wanted someone to slip on it, but my liability is unaffected if the luckless passerby happens to be black. If my intent was actually to disrupt the election, I am more liable still. Nonetheless, I discriminate only if I intended that my victim be black, or if I selected a particular target because of his color.

Suppose that, lying unconscious in the emergency room, you cannot vote because you slipped on my banana peel. Whether I have

violated your right to vote hinges entirely on why I dropped the banana peel. Only if it was to prevent you from voting have I violated your right to vote. Only if I intended to stop my victim because of his color have I discriminatorily violated his right to vote. Once again, intent is all.

Sickle-cell anemia strikes only blacks, but blood chemistry does not discriminate. Only Jews get Tay-Sachs disease, but chromosomes are not anti-Semitic. Discrimination must be construed as the manifestation of the will to interfere with another's action on the basis of race, or we abandon the distinction between human will and the blind workings of nature. This point is so critical that I suggest we use the term "differential voting pattern" instead of the contentious and question-begging terms "discriminatory pattern" or "discriminatory effect" when describing racially linked numerical discrepancies in voting which have not been shown to be intentional.

Hard Cases

Even cases that supposedly show the intent test to be superfluous for determing civil rights violations actually show the reverse. If a precinct with 10,000 voting-age blacks has not enrolled a single black voter, it is said, an independent inquiry into intent is surely not needed to show that discrimination, or at least something impermissible, is taking place. Now, why do we find this case so compelling? We find it compelling precisely because we know that, in any real situation, the only way there could be 0% black registration is if someone planned it that way. We simply do not believe that such a situation could come about without intent. We demand no independent inquiry into the presence of intent, not because intent is irrelevant, but because its presence is so obvious. We are confident that a little poking around would turn up direct evidence of intent. But this concedes that it is intent, after all, that counts. The force of such hypo-

thetical examples, which are always being thrown up to defenders of the intent test, consistently rely on tacit retention of the intent test.

The whole point of looking at the effect of a practice is that its effect is a useful though fallible guide to the intent behind it. Subtract intent, and examination of effect loses its point. This is best seen in more fully described hypothetical cases of differential voting in which intent is assumed absent. Suppose that only 10% of the eligible black voters in a township turn out for an election because the previous week a visiting activist persuaded the other 90% to stay home on election day as a protest against the hegemony of the two-party system. Here the "disproportionately low" turnout is not caused by interference with the will of any black voter. The black voters who stayed home did so because they chose to. It would surely be absurd to say that discrimination had occurred, or that blacks had been prevented from voting, or that numbers or proportionality had anything at all to do with whether a wrong had occurred. Yet if effect were relevant independently of intent, the numerical facts would count as prima facie evidence of discrimination. The subsequent hunt for the discriminatory practice might result in a ban on permitting outside speakers to address the electorate within a week of the election!

Foreseeable Effect

"Foreseeable effect," a supposed compromise between effect and intent, also depends on intent. It is based, in the words of its advocate the Hon. M. Caldwell Butler "upon the assumption that decisions on voting changes are made by reasonably prudent individuals who intend the reasonably foreseeable effects of their actions" (House Report 97-227, p. 72; see below). These very words betray the compromise; foreseeable effects count because they evidence intent. Subtract intent and foreseeable effect ceases to be a rational basis for ascribing responsibility. Suppose, in our previous ex-

ample, that the responsible officials knew beforehand they were permitting a public rally at which minorities would be persuasively urged to boycott the election. In permitting the rally the officials foresee but do not intend a lower black turnout, their intention being to allow all views to be heard. They do not discriminate.

Or suppose the mayor of a township discovers on election eve that the gas main beneath the central polling place is leaking. The only other place with suitable facilities that can be readied in time is in an accessible but mostly white neighborhood. Suppose further that postponing the election will give one candidate an advertising monopoly. They mayor recognizes that blacks may feel uncomfortable about going to the new site, but he prefers that outcome to postponing the election or risking diaster. The mayor has not discriminated if he moves the polling place, because his intent was to get the best election possible. Had the racial tables been turned, we are supposing, he would have moved the polling place in a way that would have lowered the white turnout. Telepathy is not needed to show that a lower black turnout was a foreseeable result but not the intent of the mayor's action. A foreseeable result test would, unreasonably, find it discriminatory.

In any case, the theory on which liability for foreseeable effect rests applies only when the foreseeable effect of an action is interference with the volition of another. Congressman Butler himself recognizes this, since his example of justified liability for foreseeable effect involves opening a door and hitting someone on the other side. Now in this case the body of the person on the other side of the door was affected <u>without the consent</u> of that person, and the door-opener could reasonably have foreseen that his action would thus bypass the will of another person. But when the foreseeable effect of an action takes place via the will of another person, the foreseeable effect test for liability is inapplicable. If Congress passes a bill that it knows the President will veto, it is the President, not Congress, who is responsible

for the demise of the bill. And in the examples given in the previous paragraph and other cases as well, the foreseeable effects of a voting practice would take place via the voluntary decisions of minority voters. The foreseeable effect test would fail to discriminate these cases, in which there is no conceivable wrongdoing, from cases in which, arguably, there might be.

A further problem with the foreseeable effect test is that one man's "reasonably foreseeable" is another's "unexpected." Is being stranded at the end of a long line a foreseeable result of deciding to lunch at the Air and Space Museum? It is if I am sufficiently familiar with the crowds there. How familiar is that -- two visits? Ten visits? Knowledge of probability theory? Since mass statistical effects of a partciular practice are especially difficult to foresee, a "foreseeable effects" test for discrimination will inevitably force localities to use increasingly sophisticated methods for predicting the racial effects of their decisions, and hence hold localities accountable for any effects that are unforeseen. This will transmute the foreseeable effect test into an effect test pure and simple, thereby destroying the compromise between intent and effect that foreseeable effect was supposed to accomplish.

Strict Liability?

Law does not always demand proof of intent. It sometimes disconnects liability from intent. Since the effect test would amount to holding political units strictly liable for differential voting results, its proponents might hope to justify strict liability in the present instance by whatever justifies it elsewhere. However, strict liability is very limited in scope. It is permissible when the harm and penalty are both relatively trivial, as in ticketing illegally parked cars. It is permissible when the harm to be prevented is so grave and immediate that the threat of strict liability keeps interested parties more vigilant than they would otherwise be. This is why restaurant owners are strictly responsible for food poisoning suffered by their patrons.

Differential voting patterns fit neither case. If differential voting were a trivial matter, Congress would not be agonizing about it. Nor is differential voting the grave and immediate threat to life that food poisoning is. Certain fanatics might indeed believe that differential voting patterns are in and of themselves so evil that local authorities should guard against them as vigilantly as restaurant owners should guard against botulism, but I trust that that is not the view of Congress.

The heightened vigilance theory may not be a sufficient defense of strict liability for serious penalties -- I have mentioned it only because it is the best defense available of what may well be an indefensible standard. But let it be clear that, defended by appeal to heightened vigilance, even strict liability ultimately looks to mens rea. Vigilance being something within an individual's power, failure to be maximally vigilant is something willed even if not normally a cause for blame. The law never holds anyone responsible for occurrences recognizably beyond the control of any human will, so it is not clear that the law does really acknowledge a special kind of liability divorced from intent. If so, there can be no basis at all for holding local authorities "strictly liable" for voting patterns beyond human control.[4]

The House V.R.A. Extension and Report

The intent test is unavoidable, embraced even by its opponents when they are not explicitly rejecting it. The best and most pertinent instance of this is House Report No. 97-227 on H.R. 3112 -- the House version of the V.R.A. Extension which amends sec. 2 of the V.R.A. so as to replace the intent standard by the effect standard. (Hereafter, House Report No. 97-227 will be "the House Report".)

The House Report lists various incidents which show the persistence of discrimination in registration and voting, and hence the need to extend the V.R.A. Every such incident involves intent. It reports a case in Georgia in which white men congregated around

the polling place conspicuously displaying firearms (p. 15). This is deemed "evidence of intimidation and harassment" of black voters -- and rightly so, since it was obviously done with the intent of keeping black voters from voting. One person cannot inadvertently harass another. The House Report notes "that literacy tests and other devices have been used to prevent blacks from voting" (p. 23, my emphasis) and betrays itself further when it says its hearings "reflect the continuing existence of activity aimed at the intimidation of racial and language minority persons seeking to register and vote" (p. 21, my emphasis). Obviously these practices must be stopped, but equally obvious is the House Report's reliance on intent. "Aiming at" something is just another way of saying "done with the purpose of achieving" that thing.

Take, finally, the vexed question of "diluting" minority votes. Whether "diluting" a bloc's vote actually violates the right to vote is itself debatable (see below), but in any case every citation of this practice in the House Report involves intentional dilution, the use of devices like annexation and at-large voting for the purpose of minimizing the impact of minority votes.

Since "unintended discrimination" is a contradiction in terms, and "unintended discriminatory effects" sheer double-talk, language which seeks to define and forbid discrimination while avoiding an intent test is bound to tie itself in knots. The House Report fulfills this expectation. It explains that its amendment to sec. 2 is designed to prohibit any practice which "accomplish a discriminatory result" (p. 30). The amendment itself replaces the phrase "to deny or abridge" in the current V.R.A. with the phrase "in a manner which results in a denial or abridgement of" the right to vote. But "denial" and "abridgement" name acts, and hence involve intent. Mere events cannot be "denials or abridgements"; only human behavior can be. If we are talking English, there is no difference between my performing an act which results in denying

you something, and my simply denying you that thing. On the face of it, the House replacement redundantly forbids what the old phrase did: denial of the right to vote on account of race. Consider the following instructions: "You must not prevent me from speaking, or do such things as have the effect of preventing me from speaking." The second alternative is just a cumbersome way of repeating the first. Doing something which has as an inadvertent and unintended result my failure to speak neither prevents me from speaking nor has "the effect of preventing me" from speaking.

Affirmative Action Elections

Since Congress is not likely to be spinning empty distinctions, something more must be intended by the House amendment. That something more is clearly the proscription of differential voting effects. Cleared of its tortured and deceptive language, the House V.R.A. Extension forbids procedures which have, intentionally or inadvertently, a differential effect on minority populations.

The House amendment to sec. 2 is plainly driving toward affirmative action, quotas, in voting itself. By making numerical outcome "highly relevant" (p. 30) to the permissibility of a procedure, the House V.R.A. Extension would begin to impose a test on the outcome of an election other than its fidelity in recording and expressing the free choice of the electorate. This undermines the very idea of what a democratic election is supposed to be.

That the framers of the House V.R.A. Extension were all too aware of this implication of their language is manifest in the pains they take trying to block it. Disproportionate representation, the amendment concludes, "shall not, in and of itself, constitute a violation." Well, as I've labored to stress, the shift from "denial" to "result in denial," bf it is not just empty verbiage, does indeed suggest the use of arithmetical proportionality as a test for a procedure's being discriminatory. Even as it stands, the amendment clearly demands that arithmetical dis-

proportion be prima facie evidence for a finding of discrimination instead of the irrelevancy it ought to be in the absence of a showing of intent. The House Report contains assurance that the amendment does not "create a right to proportional representation as a remedy" (p. 30). It is distressing that this possibility should even be mentioned in legislation passed by one House of Congress. Nor should we assume that this idea is being broached only to be repudiated. "Section 2, as amended, is an exercise of the broad remedial power of Congress," says the report, and as the drafters of the House Report explicitly note, Pullilove v. Klutznick (1980) recognized set-aside quotas as one of Congress's remedial powers.

Let us recall some unpleasant facts. Proponents of the 1964 Civil Rights Act proclaimed with equal solemnity that the Civil Rights Act would not justify the use of compensatory quotas. The plain truth is that our public officials seem bent on drawing quotas from civil rights legislation, on replacing equality of opportunity by equality of result, and it is unwise to give them any further legal leverage. 1964 saw discrimination in employment banned. Then an "affirmative duty" to ban discrimination was laid on employers. Then "goals and timetables" for hiring were laid down. Then "target" populations became "protected" populations. Quotas have thus become entrenched, presumably forever.

The democratic process itself has so far been shielded from this transmutation of equality of opportunity into equality of result. The House V.R.A. Extension will pierce that shield. Sheer numerical "underrepresentation" becomes grounds for federal intervention and Congress's "broad remedial powers." Since intent need not be shown, virtually any other consideration, however flimsy, can be construed as sealing the case. Quotas are now routinely grounded on the supposed need to "prevent" discrimination. Already, in City of Rome v. U.S. (1980), the Supreme Court laid the groundwork for applying this idea to voting when it interpreted the V.R.A. as designed to eliminate "the risk of purposeful dis-

crimination." It is not unduly alarmist to fear that Congress and the courts will take the path of "preventive discrimination" if the House V.R.A. Extension becomes law.[5]

"Interests"
Putting I[redacted] Beyond the Ballot

The basic idea of democracy is that if people don't like what their rulers are doing, they can always throw the rascals out. In particular, as things stand now, if enough people get tired of a government that plays favorites toward certain groups, it can always dismiss that government. So long as no basic rights are at stake, the group which advocates its preferences and interests most effectively and intensely gets to put its candidates into office. The House V.R.A. Extension represents a complete break with this tradition: Minority groups would effectively be assured "proportional representation." In the explicit language of the House Report, "It would be illegal [for example] for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority" (p. 30). This crucial and mischievous sentence demands the closest scrutiny.

A) Notice how coyly and evasively this sentence uses "identified" in the passive. Who is supposed to identify the interests of a racial minority? Federal officials? Self and media-appointed spokesmen? Remember, the leading lights of the civil rights movement remain adamantly behind busing and quotas, even though every poll shows that most blacks oppose both. The drafters of the House Report knew that to specify a method for identifying the interests of a voting group independently of how they vote is to advocate bypassing elections themselves. If we can identify the interests of a voting bloc, and it is illegal for those interests to be suppressed by whatever cause, why not simply appoint spokesmen for those interests, or hold intra-group runoffs for the position of spokesman? Once a test of the outcome of a vote

threatens to displace voting as the final court of appeal, democracy is undermined.

B) There are many racial and voting groups whose interests the House V.R.A. Extension will not protect. Is it fair to take the failure of one group's interests to be "proportionately represented" as an impermissible wrong, while taking the failure of another group's interests to be "proportionately represented" as just the luck of the ballot box? In footnote 69, the House Report stresses the high voter registration of, e.g. German and French speaking minorities, the purport of this remark being that since these groups participate actively in the democratic process on their own, they don't need government protection. But surely it is unfair to demand one group play by a stricter set of rules <u>just because</u> its members more actively get out the vote. Remember, since the House V.R.A. extension abandons intent, no claim is being made that group differences in registration must be due to anyone preventing members of "protected" minorities from registering. Surely we have here a potential violation of the equal protection clause of the 14th Amendment. Taken to its logical conclusion, the House Report's reasoning again justifies 11% legislative set-asides for blacks, while letting whites elect their own representatives.

C) The House Report's evasiveness on how one should determine the "interests" of minority voting blocs reveals as well its profound confusion about what a bloc's interests are and are perceived to be. There is a tendency to assume that voters always choose advocates of policies beneficial to themselves, and that blocs will always vote for one of their own, but this is not always so. For example, Jews have been harmed by affirmative action, yet Jewish voters consistently support proponents of that policy. 60% of the Jewish vote went to Jimmy Carter in the 1980 Presidential election despite Mr. Carter's vigorous advocacy of affirmative action and Mr. Reagan's oft-stated opposition. Nor is Jewish representation

in elected office as "disproportionate" to the number of Jews in the population as is Jewish participation in such other high-status activities as college teaching. Jews typically vote for "progressive" candidates whose policies do not benefit Jews and who need not be Jewish. Any attempt to identify Jewish "interests" with what helps Jews, and to gauge an election by how "fairly" it furthers these putative interests, would actually disenfranchise Jewish voters. And what reason is there to think that the "interests" of any other "voting bloc" can be more easily identified?

Even if the interests of the groups covered by the V.R.A. coincide with their self-interest, is it not bias to guarantee their interests and not those of other groups? In any case, anyone who thinks that voter interest follows color -- as if German, Jewish, Italian and W.A.S.P. blocs will automatically coalesce into a unifying whiteness just to oppose blackness -- is attributing to the ordinary voter a preoccupation with race more usually found in Nazi propaganda.

Judicial Review and the Double Standard

The House Report further reveals a troubling double standard about legislative policy as a response to Supreme Court decisions and past legislation. It lets pass without question Supreme Court decisions that at least stretch the letter and spirit of past civil rights legislation, and prepares new legislation to ratify these judicial inventions. At the same time, the House Report repeatedly finds "unclarity," "confusion" and "ambiguity" in Mobile v. Bolden, an exercise in judicial moderation.

The intent criterion, as enunciated in Mobile v. Bolden, is clear as crystal. It contains "ambiguities" (see House Report, p. 2) only for those who want the right to vote to mean more than freedom from interference in voting. The "confusion" (p. 29) the House Report professes to find in Mobile v. Bolden is entirely of its own making. (I note parenthetically that those who shriek loudest when legislators contemplate circumventing Supreme Court

deicisions on busing or abortion have remained silent on the present attempt to override the Court's interpretation of the 15th Amendment.)

The House Report experiences no comparable trouble with other decisions that might seem more perplexing. It worries at length about the "effectiveness" of minority participation and about "procedures that effectively exclude minority participation from all stages of the political process" (p. 14; my emphasis). The House Report bases these concerns on the Supreme Court's finding in Allen v. State Board of Education (1969) that "the right to vote can be affected by a dilution of voting as well as by an absolute prohibition on casting a ballot," and the Court's finding in White v. Regester (1973) that the right to vote entails a right "to enter into the political process in a reliable and meaningful manner." It never occurs to the drafters of the House Report that these decisions may be "confusing," that the 15th Amendment and the V.R.A. which implements it, may not confer the right to "meaningful" or "effective" participation. On the face of it, the right to vote is right to participation, period. Astonishingly, the House Report can discern a clear right to a "meaningful" vote and "reliable" entry into the political process, while balking at the idea that discrimination must be intentional.

Equally puzzling is the House Report's attitude toward Fullilove v. Klutznick and, implicitly, the legislation which created the case. In Fullilove the Court conceded to Congress the right to legislate racial set-asides in federal contracting as part of Congress's power to enact "remedial" legislation which goes beyond but is still "appropriate to fulfill the purposes of" the 14th Amendment. Yet instead of being at all troubled about the wisdom of exercising remedial power by enacting racially specific legislation, the House Report uncritically cites Fullilove as a virtual blank check for using an effect test for remedying and "overcoming the effects of...past purposeful discrimination" (see House Report, p. 31). Surely there is greater unclarity in how to trace

and overcome the effects of past discrimination than there is in the idea that discrimination requires intent. Surely legislative policy designed to achieve the former really requires near-omniscience. Yet the House Report endorses the "overcoming" of the effects of past discrimination as something legislators can do as a matter of course, while making extraordinarily heavy weather about the simple intent test. The House Report's standard of clarity does not bear scrutiny.

The Effect Test in Action

The House V.R.A. Extension sets the stage for contention and aggrevated racial animosity. Consider a political unit with 10 City Council seats elected at large, and which contains one subgroup, say Jews, whose voter turnout has historically been high. Suppose 50% of the voting population is Jewish, of whom 75% vote, while the other 50% of the population is black, of whom only 25% vote. The Jewish vote is thus three times heavier than the black vote and -- falling in with the myth that voting interest always follows color lines -- no black candidate ever wins a Council seat. The House V.R.A. Extension sees this fact as "highly relevant," not to say suspicious. If there are other "objective factors" that "impede the election opportunities" of blacks (see House Report, p. 30) -- intent not being required, the failure of blacks to win party nominations might be one such "objective factor" (ibid) -- we have an impermissible discriminatory effect. Suppose the court demands gerrymandering of the political unit into 10 racially defined precincts so that, in the court's judgement, even a 25% black turnout will send 5 blacks to the City Council. What has happened is that the blacks who vote have been given as much say as the Jews in the composition of the City Council, even though only a third as many blacks as Jews voted. The court has given each black the equivalent of three Jewish votes!

This prospect is not acceptable. The NAACP has a slogan, "At the voting booth each vote counts as one." This is precisely what

would cease to be true if the House V.R.A. Extension becomes law. The value of individual votes of the minorities who fall under it would grow in direct proportion to their "underrepresentation." The value of non-protected votes would shrink in proportion to their number. This penalizes members of assiduous voting populations, voters who have done nothing wrong,[6] and subverts the very democratic process. This is not the tyranny of the majority we are so often warned about, but tyranny of the minority, tyranny in its purest form.

There is simply no avoiding the fact that replacing intent by effect has invariably led to score-keeping. Busing became an integral feature of public education when de facto segregation replaced de jure segregation as the trigger. Quotas came into being as "discriminatory effect" replaced "discriminatory intent" as the standard for "denial of equal opportunity." It is entirely unrealistic to deny that, in making intent at best peripheral to violations of the right to vote, the House V.R.A. Extension carries us a giant step closer to electoral quotas.

It does not require great imagination to see how the effect test would effectively destroy the present system of voting. Suppose that blacks simply choose not to register in proportion to their number in the population. This in itself would make the process of registration impermissibly discriminatory. Imagine elections conducted without registration. Would political units have to adopt instant registration on election day and incur all its predictable abuses? How about automatic registration by birth records? And what if that didn't produce the "right" turnout? I suggest that retaining the intent test will spare us the hazards of finding out.

Why Discrepancies?

Many will object that all these considerations are moot because the only explanation there could conceivably be for significant differential effects in registration and voting is real,

purposeful discrimination. Replacing the intent test by the effect test, they say, will simply streamline the evidentiary process. But quite apart from the fact that we should explicitly retain the intent test if intent is really what counts, there just is no reason to assume a priori that persistently low minority voting must be due to increasingly subtle forms of discrimination. Thomas Sowell has argued convincingly that different minority groups have different "value traditions," and that it is these value traditions which explain group differences in economic success, not discrimination. These same value traditions may well account for group differences in political participation. Such a suggestion is certainly more plausible than increasingly fantastic hypotheses and assumptions about increasingly subtle forms of discrimination, and should be weighed carefully before differential voting behavior is made "highly relevant" to bringing any and all voting procedures under federal scrutiny.

Let those who reflexively cry "racism" at this suggestion reflect that it is the proponents of the effect test, not its opponents, who cause such issues to be raised. Those who believe in guarding everyone against coercive interference, and letting all vote if and as they please, are uninterested in numerical results. Let sociologists investigate spontaneous voting patterns, not public officials. All that matters is that the voting is spontaneous. Any result is fair which is the result of free choice. Only someone who distrusts free choice and gauges its results against some preferred standard must explain why democracy "fails." Certainly, anyone who insists on raising the issue of "disproportionality" should be prepared to address it honestly, and keep his mind open to the possibility that black voting is "too low" simply because, for one reason or another, "too many" blacks choose not to vote. We might begin the process of opening our minds by ceasing to call low minority voting "disproportionate," a word which needlessly implies inherent badness. No-one calls the large number of Japanese who win Nobel Prizes in physics "disproportionate."

A Final Question

A switch from district to at-large representation is an example often cited, in the current V.R.A. debate, of a discriminatory technique used to "dilute" minority votes. Now many political scientists believe that such a switch might often be advantageous for minorities -- as well as non-discriminatory.--By making every elected official at least somewhat heedful of the demands of minority voters. But let us assume that such a switch invariably blunts a minority's impact, and even that there is a genuine right to a maximally concentrated vote that such dilution violates. One problem remains. If switching to an at-large system thus dilutes the votes of former precinct residents, then if my City Council switches to an at-large system, my vote will be diluted. Now such a switch and consequent weakening of my vote would be consistent with the House V.R.A. Extension, since I am white. My vote is not protected against dilution in the way a black man's is. Is this fair? Should the law decide on the basis of color whose vote to protect from dilution? I think the answer must be a resounding "No." Surely, color-based selective protection against vote dilution violates the equal protection clause of the 14th Amendment. Not only is the House V.R.A. Extension not "appropriate legislation" for enforcing the 15th Amendment, replacing the intent test by the effect test, and using the effect test only for minorities, appears inconsistent with the 14th.

I mention this problem in passing. There is no way of knowing whether a color-conscious effects test would in fact pass muster before the present or any other Supreme Court. My main objections to the effect test remain its regression to a primitive idea of responsibility, and its clear malign consequences.

Summary

The 15th Amendment and the V.R.A. proscribes discrimination, which is the racially motivated act of interfering with the liberty

to vote. The presence of intention, mens rea, is inseparable from the notion of an act and hence from discrimination. Replacing the intent standard by an effect standard would change the right not to be interfered with in the exercise of the franchise into a quite different, wholly undemocratic presumptive right to a racially predetermined result.

Apart from the intrinsic absurdity of finding discrimination without discriminators, such a change would bring irresistable pressure on localities to turn voting into a quota system. The language of the proposed amendment that would change the intent test for discrimination into an effect test offers transparently inadequate safeguards against this consequence. Adopting the effect standard would confer undue power on those who manage to identify themselves with the "interests" of minorities, and pit race against race even more bitterly than busing and quotas have done. It is questionable whether democracy itself could survive this perversion of the electoral process.

It would be unfortunate if demagoguery and misrepresentation beclouded the basic issue. No-one disputes that the right to vote must be protected at all costs. No one advocates a return to grandfather clauses, poll taxes and discriminatory literacy tests. What is at issue is only the use of the intent test or the effect test in judging when the right to vote has been violated. I urge the Senate to retain the intent test.

NOTES

1. In what follows I will generally refer to this replacement as "the amendment." I will be ignoring other changes in the V.R.A. contained in H.R. 3112.

2. There was indeed a time when men tried animals and punished them, and cursed stretches of land on which a hero died. We regard such practices as barbaric and barely comprehensible, as resting on an animistic view of nature in which the world is

filled with quasi-human forces and spirits. All legislation which detaches guilt from intent moves us back toward that archaic state.

Remarkably, even quite bizarre evidentiary proceedings turn out to rest on intent. Thus trial by combat, even the combat of designated champions, was based on the belief that God, knowing which side was in the right, would see to it that the right side won. Trial by combat is distinguished mainly by a curious view about how intent is manifested. Similarly, trial by submersion for witchcraft were based on the belief that women who knowingly consorted with the devil had the ability to float.

A purely philosophical question, which fortunately need not be answered here, is <u>why</u> intent is so central to the notion of responsibility, and hence any rational legal system. The utilitarian theory explains this by noting that we can control behavior only by rewarding and punishing people for what they will. There is no point in punishing someone for what he does by accident, since so punishing him will not reduce the likelihood that it will happen again. The Kantian tradition sees intent as a direct expression of the self, and notes that selves are uniquely valuable. Whether these two approaches can be completely reconciled is an open question.

3. The theory behind civil rights legislation is that when I put something on the market -- where this includes the job market or the housing market -- it ceases to be completely mine; I have agreed to surrender it to whomever meets my price. Whether a prospective buyer wants to take possession of what I have offered therefore lies completely within his will. If having put something on the market I refuse to deal with someone because of his race, I have thwarted his will because of race, and hence discriminated.

4. Liability completely divorced from intent might have some place when the only malefactor is a legal fiction, such as a corporation, but such cases and the voting case are utterly disanalogous.

5. The doctrine of "preventive discrimination" has all the disadvantages of preventive detention with none of the advantages -- it does not reduce any immediate threat to life or property.

6. If a local practice which has the putative effect of diluting a vote violates the 15th Amendment, federal intervention with the same purpose and without a showing of wrongdoing seems a more serious violation of the 15th Amendment.

Senator EAST. Our next witness is Ms. Abigail Turner of Alabama. She is an attorney from Mobile, Ala. We welcome her this afternoon.

Ms. Turner, thank you for coming and assisting us in evaluating this important matter.

You may proceed with your statement. As you know, your written remarks will be made a part of the record permanently. Therefore, if you would prefer to abbreviate and state the essence of your thinking extemporaneously, that is fine, too—whatever you are most comfortable in doing. However, I would remind you that your written statement will be a permanent part of the record and will be included at the end of your oral testimony.

STATEMENT OF ABIGAIL TURNER, ATTORNEY, MOBILE, ALA.

Ms. TURNER. Yes, sir. I would like to summarize that. I would also like to have placed in the record a report I have done on the Voting Rights Act in Alabama since 1975.

Senator EAST. That shall be done.

Ms. TURNER. I appreciate the opportunity to appear before your subcommittee today to urge your support of S. 1992. I appear on behalf of my clients, black voters in Alabama, who are fearful that their right to vote will be taken from them if the preclearance and bailout provisions as passed in the House bill are weakened or modified.

OTHER REIDENTIFICATION BILLS PASSED IN 1981 TO DISENFRANCHISE BLACKS

In Alabama, a weak bailout provision will mean the same thing as failure to extend section 5. The same devices that were used prior to the Voting Rights Act in Alabama are being used in some counties at this time.

For example, in the 1981 Alabama legislative session, legislators from three majority black counties passed voter reidentification bills. These are actually voter reregistration bills. The same information that is required under the Alabama constitution to register and vote is required under the voter reregistration questionnaires, except citizenship.

That such bills have a discriminatory effect and discriminate against blacks can be seen from what happened in Choctaw County

in a similar voter reidentification plan in 1978. Choctaw County, as these other three counties, is also located in the black belt.

Seven hundred eligible blacks who should still be on the voting roles, according to an analysis made by the Choctaw County Voters League, were removed as a result of that reidentification. Members of the league contacted the Justice Department to find out why that was precleared. They were told by the Justice Department that black elected officials had said the bill was all right. Those black elected officials denied that. They said they were not contacted by the Justice Department.

You have to look at this in light of the history of voter discrimination in Choctaw County. The Justice Department itself had brought suit in the early sixties under the Civil Rights Act of 1957 because blacks were being discriminated against in registering to vote. The Federal court enjoined the county from refusing to provide assistance to black voters that had been provided to white voters. That was particularly the case for persons who were illiterate. The county's response was enacting a more difficult literacy test. The judge struck it down again.

In the meantime, the Voting Rights Act passed and was signed into law. Three days after that happened, the county again filed a motion in the court to ask that they be allowed to require all the voters to reregister. By that time a number of blacks had been registered by the Federal referee. The county's petition to the court included a literacy test which at that point obviously had been struck down by the Voting Rights Act. So you see, the same mechanisms that were used prior to and immediately after the Voting Rights Act are still going on in Alabama.

What has happened with the Sumter County voter reidentification act? That was passed in 1981 after a black was elected to be district judge in Sumter County and three of the five members of the board of education were black. The timing is important because major offices are up for reelection this fall in the general and primary elections. Under the Sumter County bill the voters had only 9 months to reidentify to vote. This contrasted with other plans in Alabama where voters had 2 or more years.

The Sumter County act was submitted to the Justice Department. Blacks commented about how it discriminated against them. Judge Hardaway, who is the newly elected black judge, testified about the inequities in the bill before the House subcommitee, but Justice refused to object. They asked for more information. They negotiated with the county and struck a deal, in my clients' minds, that Justice would not stop the reidentification if the county agreed to amend the act in certain respects.

The act was amended in a special legislative session, but the amendments that were agreed on, were not enacted. Once again, Justice did not object. Last week they asked for more information.

At this point my clients have lost faith in the Justice Department's enforcement of section 5. My clients believe that deals were struck that they were not part of. They believe that, once their complaints about discrimination got above the line level in the Justice Department to those who make the political decisions, the evidence of discrimination was ignored.

STATES SHOULD NOT BE ALLOWED TO BAILOUT UNTIL ALL COUNTIES CAN MEET BAILOUT REQUIREMENTS

I would like to comment very briefly on the question about whether a State should be able to bailout when its counties are still covered. In Alabama, the voting laws are very thoroughly defined by State law. There is no home rule in Alabama. Therefore, everything from how one becomes a candidate, to how one registers, to conducting elections is covered by the State code.

The responsibility to enforce those laws, as well as the responsibility to enforce compliance with the Voting Rights Act, is inextricably intertwined between the State and local governments. To suggest that Alabama as a State could bailout without its counties having to prove that they have met bailout requirements makes no sense.

TO BAILOUT A JURISDICTION SHOULD BE REQUIRED TO SHOW IT HAS ELIMINATED BARRIERS TO VOTING

In Alabama, blacks still face barriers to registration and voting. You had an exchange with the previous witness about people being able to register without problems. That is not the case in Alabama, particularly in the black belt counties. That is documented in the report that I have put in the record.

There are problems that blacks face in registering. For example, the voter registration form in Alabama requires that a person specify his or her social security number. Many blacks who have worked in agriculture or other uncovered employment, and this is particularly true in the black belt area, do not have a social security number.

In Monroe County in 1980, black persons seeking to register, were asked for their social security numbers. When they said that they didn't have one, they were denied the right to register. It is this kind of fact that we think merits the strong bailout provisions that now appear in S. 1992.

Blacks engaged in registration and voting in Alabama in some counties still face intimidation and harassment. In Pickens County, located in the black belt, when blacks appeared in 1980 to register in groups, they were confronted by the sheriff. He and his deputy stood over them while they registered. Ms. Theresa Burroughs from Hale County testified in the House about how she was harassed, and the police were called to her at the polls. Again, we think this is evidence that strong bailout provisions must be enacted.

The Voting Rights Act in terms of providing equal political opportunity for Alabama blacks was only a first step. We still have a long way to go. We think the positive effect of the bailout provisions, as they are now worded, would provide an incentive to Alabama to change its procedures which make voter registration and participation burdensome and dangerous in some respects.

COMPLIANCE WITH PRECLEARANCE PROVISIONS SHOULD BE REQUIRED FOR BAILOUT

I also urge you to retain the bailout requirement that a jurisdiction must show that it has complied with the act by submitting voting changes for preclearance.

Jurisdictions in Alabama have escaped the effect of the act by not preclearing. For example, in 1968 the town of Hayneville incorporated. Hayneville is located in Lowndes County, which has a majority black population—77 percent. The boundaries of the town of Hayneville were drawn in the shape of a cross, and the blacks were kept out because they were located outside the corners of the cross and were not included in the town.

We represented some blacks in 1978 who wanted services from the town, and we made an inquiry about whether the incorporation had been precleared. It had not even been submitted. Blacks who lived close to Hayneville were denied services and the opportunity to participate in that town's government for 10 years simply by the town's ignoring that provision of the act.

This is not an isolated example. In 1975, the Alabama Legislature passed 81 acts that relate to registration, voting, and election matters. As of last June 1981, 38 of those still had not been submitted for preclearance under section 5.

We plead with you not to allow jurisdictions that have avoided the effects of the act by refusing to submit things for preclearance to bailout, to exercise a bailout loophole, if you will, and to argue that they are in compliance with the act.

In short, I encourage your support of S. 1992. A weaker bailout will mean that hard-won rights to vote and to elect candidates of their choice by blacks in Alabama have been eroded.

Senator EAST. Thank you, Ms. Turner. I appreciate your abbreviating your remarks, which will give us some time here for discussion.

I would like to probe here on several points with you. It is sort of a confusing day on the Judiciary Committee. They have another meeting going on over at the Capitol at 4:30. The operation of the U.S. Congress is an uneven business, as you probably have known and gathered.

Ms. TURNER. Yes, sir.

Senator EAST. As you are aware, the two things that seem to be the greatest bones of contention under this proposed law from the House—and you have touched upon both of them, properly so—one is the effects test question and the second is the bailout matter, both of which you have touched upon.

First, let me just give you my response to your comments on the need for the effects test. It strikes me you are citing examples of continued voter discrimination based upon race in Alabama with your clients, as you have noted. I am really not, of course, in a position to contest that. I obviously am not saying it is so or it is not so. My point would be what you are describing by the very facts you give us is a denial of the right to vote of specific individuals, of either registering or voting, having that vote counted, or participating meaningfully and with access to the voting apparatus, with which I have no quarrel. I don't know that those of us on the com-

mittee who have been opposing the effects test are really quarreling over that. We are quarreling over upping the ante whereby you determine that there is discrimination based upon effect or result, not upon specifics or concretes.

I think that what you describe, legislation that deals in a reasonable, fair, and effective way with abuses of that kind, is very consistent with the 15th amendment. However, what troubles me is where legislation goes way beyond what I think is the constitutional mandate in the 15th amendment and is in effect mandating decreeing effects. I will not retrace all that ground because you were here earlier and I think it gets you into proportional representation.

I think it is a wholly different proposition than the problem that you raise, and I don't make light of the problem you raise. However, the intent test would clearly be applicable there and legislation could be designed and utilized to deal with that, but our contention is this again is not that situation. It is not that kettle of fish. It is a totally new proposition spun out of wholly new constitutional cloth. Let me just state that proposition on the effects test.

Then on the bailout provision, we haven't really been getting into this but you are very right in suggesting this and you are very concerned about it. My concern with the S. 1992 bailout provision is that really in effect I would say it is a misnomer. There really isn't any bailout.

It is so devised and constructed in ways that as a practical matter in the real world of voting and politics jurisdictions could never get out from under it. They are consigned in perpetuity to coming to Washington to the Federal district court. Frankly, there really is not a whole lot of incentive to try to have a constructive and effective record on this question of eliminating all vestiges of discrimination based upon race.

For example, you get this requirement that a jurisdiction has to show "that it is engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this act."

When you look at the total bailout provision here, as does Congressman Hyde, the ranking minority member of the House Judiciary Committee, in fact, it is not a bailout. What we really would be putting in place is a very novel piece of legislation, one permanently fixed upon these affected areas where they in fact as a practical matter could not get out from under it. The bailout provisions are not clear and precise. It is hopeless. It is hopeless.

You would look at it and you would say there is not any way. We will always be boxed in. Just shrug your shoulders and forget it and live with it permanently.

I don't think that is good legislation. I don't think that it is healthy. I don't think it sets a good goal for wanting to have a good record.

And then, again, another major flaw in it is this effects test, which again we think leads us down this troubled road of quotas and proportional representation. It seems to me a piece of legislation that is going to saddle the American democratic electoral process with these two things is frankly fatally flawed.

The intent test is one thing. A fair, equitable, and reasonable bailout; a specific concrete rule of law clearly defined is another. We, the legislative body, as I see it, would be just dumping all of this right back into the courts. There are no guidelines. We haven't really done anything in terms of setting legislative policy, direction, or course. The rule of law is going to be trampled on here because you are just back to bureaucratic and judicial control of these affected areas and looking for such vague and elusive things as effects.

I don't wish to overreact to it, but you are a lawyer. I suppose the thing that has been frustrating to those who have suffered discrimination in voting based upon race, as you suggest in some of the litany you went through, there is always some sort of vague objection, always some sort of—perhaps where it was practiced—some sort of procedural dreamed-up-out-of-whole-cloth objection thrown in the way.

I submit that it isn't a healthy practice where the cure for that practices the same thing. It promises bailouts, but in fact it won't give bailout. It promises that it is giving individuals the right to vote, but in fact it is designed to guarantee results, quotas, proportional representation, et cetera. It smacks me as a little bit of the old con game. We contend we are giving you good folks this, that, and the other thing, but as a matter of fact we aren't. I wonder if it isn't violating the same spirit of the law that it found in the older practices of the type you are suggesting.

Let me get specific on one thing. I have just given you my own reaction to it. I would be happy to have you comment on any facet of that, but let me just ask you this question.

You bring up the question of bailout. You already know my position on effects, but if you want to comment on that that would be fine because you heard me with the earlier witness.

What would you consider a reasonable bailout? Do you think I misstate the character of the bailout in the House act? Is there some validity to what I am saying about as a practical matter it isn't there? You run the risk—and I am not faulting you, but in the Judiciary Committee you have lawyers come, and they always like to skew the law to help their clients. You have clients in your case. That is fine. You have people who want to make the law as malleable as they can to serve their ends. To the extent you can get us to modify or change the law, that will make it easier for these people to prevail; naturally they want it.

Prosecutors always, I presume, would like to come in and say, "Gosh knows, let's get rid of intent. That's very hard to show. Let's make it easier to prosecute and convict."

I don't mean that taints your testimony, but we have to look at it in a little broader perspective as to all the parties involved. You do have the problem here of giving some reasonable assurance to State and local government officials that what you are saddling them with here is fair and equitable; that there is some light at the end of the tunnel; that the key is to let people register, vote, and participate and to have it counted.

The key is not to guarantee some particular result. The key is, if they do a good job and if they keep their own house in order, they

could in fact get release from this on a permanent basis. That would be a badge of distinction and progress.

After all, the law ought to give some incentive. Is it not a good characteristic of the law to encourage that kind of positive result? I don't see that it is here.

Ms. TURNER. Senator, I think you have some measures to determine that here in S. 1992. In my report that I had submitted for the record, we had done a chart on the jurisdictions in Alabama where Justice had objected to changes under section 5. It is far less than all of the counties. I would say that it is probably far less than 50 percent of the counties. In the rundown of counties that had failed to submit, there were very few counties. There are measurable ways to determine whether counties in Alabama will be eligible for bailout.

With respect to the intimidation question, it is my understanding that the bill is constructed where both sides will be able to present evidence to a court about whether there has been intimidation. As I said in my testimony, I think you need to give States like Alabama and counties like the ones I talked about incentives to clean up their acts, to remove barriers to registration and voting. I think this bill does that.

In my view, the way section 5 is being administered at this point it is not the jurisdictions who are having such a hard time; it is the blacks who are complaining about the discrimination. Section 5 as it is being administered at this time bends over backward for the submitting jurisdiction. I think the Sumpter County litany that I went through proves this. The balance is not with the blacks who are complaining. The balance is with the jurisdictions.

I am not an expert on section 2. I can make one comment, but I think Mr. Derfner is better prepared to answer your questions about that.

My understanding is the effects test in section 5 is very different from the results test in section 2. The burden of proof is different, and that makes a lot of difference in the burden of proof for parties in lawsuits.

Senator EAST. Thank you. I think my time is up. Senator Hatch?

Senator HATCH. Thank you, Senator East.

Ms. Turner, first, I apologize to you for not having been here but I was on the phone. We appreciate having your testimony. Thank you for coming.

[The prepared statement of Ms. Turner and additional material follow:]

PREPARED STATEMENT OF ABIGAIL TURNER

Mr. Chairman, and members of the Subcommittee, I am Abigail Turner, an attorney in Mobile, Alabama. I appear before you today to urge your support of S-1992, the bill to extend the Voting Rights Act. I appear on behalf of clients I represent in voting matters; my clients, who are black voters, are fearful that if the provisions of S-1992 concerning preclearance and bailout are weakened or modified their rights to vote will once again be taken from them.

In Alabama, the Voting Rights Act finally halted the decades of devices such as the poll tax, literacy tests, and voucher requirements which kept black citizens from registering and voting. Prior to the passage of the Act, only 57,500 blacks had registered. The number had grown to about 417,000 in 1980.

This dramatic increase in black voter registration led to black participation in the political process, especially in counties with large black-majorities. When the white power structures in several of these counties began to lose their monopoly on the political and economic power in these counties, they local bills by the state legislature. Under this custom, called "local courtesy", a legislator outside the local area will not vote against a local act. In essence, these bills were passed under a gentleman's agreement.

The voter reidentification bills violate the Voting Rights Act, my clients contend, because they are simply a device to remove blacks from registration rolls. They have filed suit challenging the act under Section 5, the Constitution, and the laws of Alabama. It is their contention that Alabama laws of statewide application provide sufficient mechanisms

to remove dead persons and other disqualified voters from the rolls. These voter reidentification bills repeal protections guaranteed to black voters by the Constitution and laws of Alabama. The Alabama Constitution guarantees that a voter will not have to reregister, unless s/he changes residence or becomes disqualified for another reason and removes that disqualification. Amendment 223 and Code of Ala. §17-4-125.

This so-called reidentification is actually reregistration. Voter registration requirements under the Alabama Constitution are: 1) citizenship; 2) age; 3) residence; and 4) no disqualification because of incompetency or conviction of a disqualifying crime. Amendment 223. That same information is required in the reidentification questionnaires, except for the citizenship developed new devices to disenfranchise blacks and retain control. The white politicians got the Alabama legislature to pass so-called voter reidentification bills, requiring voters to reidentify before the county boards of registrars. The story behind these bills and how the Justice Department has dealt with them illustrates why the bailout provisions of S-1992 should be passed intact by the Senate. The implementation of these voter reregistration bills shows that a weak bailout provision would mean the same thing in Alabama as a failure to extend the Act.

The Voter Reidentification Acts

In 1981 white legislators from three majority-black counties in Alabama's Black Belt introduced so-called voter reidentification bills in the legislature. Each of the counties has a substantial black population: Sumter (70%), Wilcox (69%) and Perry (60%). In each, blacks had for the first time in the 1978 general elections achieved some degree of political success by electing candidates of their choice to countywide offices.

These bills, which were actually voter reregistration bills, were treated as local acts by the legislature. This means that only the local legislative delegation considers them. There is generally no active discussion of these question. In short, black persons, many of whom were registered by federal referees only after federal court orders under 42 U.S.C. §1971 or by federal examiners under the Voting Rights Act, are forced to reregister.

That these bills discriminate against blacks can be seen from what happened in Choctaw County which required voter reidentification in 1978-- the year two black county commissioners were elected for the first time since Reconstruction. After that reidentification, the Choctaw County Voters League has documented over 700 eligible blacks who were dropped from the rolls, a number large enough to spell defeat for a black candidate or for a white candidate supported by or sympathetic to the black community's interests. Anthony Butler, president of the League, characterized many of those who failed to register as elderly people who have vivid and bitter memories of past experiences with registrars.

The history of blacks' struggle to gain and protect their rights to vote in Choctaw County is typical of the struggles in Alabama's Black Belt. Only 176 blacks were registered to vote in Choctaw County in 1963 after the Justice Department brought suit under the Civil Rights Act of 1957, 42 U.S.C. §1971. The federal court enjoined the county from a variety of discriminatory practices in registering black voters, including refusal to assist black applicants, particularly illiterates, in registration; failure to notify blacks whether their applications were approved and failure to disclose the reasons applications were rejected. United States v. Ford, Civ. No. 2829 (S.D. Ala. 1964). The County responded by imposing even more onerous literacy requirements. During the year following the preliminary injunction, 114 of

the 119 white applicants were registered; only 34 of the 112 black applicants were registered. In June 1965 the court held the county in contempt and enjoined the use of the literacy test which included questions about type of government and the constitution; the failure to assist black applicants; and a variety of other practices applied unequally for whites and blacks.

Choctaw County persisted in its efforts to keep the number of black voters low. On August 9, 1965, three days after the Voting Rights Act was signed into law, the county requested the court to permit it to require all voters to reregister. The application papers proposed by the county included a literacy test, outlawed by the Voting Rights Act. The court denied the motion. Following the contempt order, thousands of black citizens in Choctaw County were registered. When considering amendments to the House passed bailout, one must remember that the 1981 devices are the same ones used prior to 1965.

What has happened when these voter reidentification acts were submitted to the Justice Department? The Department approved the Choctaw County bill in 1978 apparently disregarding the history of voter discrimination evidenced in its own suit. According to the President of the Choctaw County Voters League, when inquiries were made at the Justice Department as to why the legislation was not objected to, he was told that two black elected officials contacted by telephone had indicated that they approved of the submission. Both of these individuals deny that they were contacted or that they approved the change.

Sumter County had a reidentification bill passed in 1981 after the November 1980 elections when blacks for the first time held three of the five seats on the board of

education and a black was elected as district judge. The timing of this bill is important because major county offices will be elected in November 1982: circuit judge, tax collector, probate judge, sheriff, tax assessor, three county commissioners, and the state representative. All of these offices are now held by whites.

Sumter County submitted the act to Justice. Black citizens informed Justice of the discriminatory effect of the bill. Further they pointed out that passage of the bill violated the requirement of the Alabama Constitution that voter registration and purging requirements be uniform across the state. The black voters stated that the county had been purging the voting lists according to Alabama law, and that if ineligible persons remained on the rolls, the detailed provisions of state law were adequate to insure that dead persons or non-residents were removed. Judge Eddie Hardaway, the newly elected black judge, testified about the inequities in the bill before the House Judiciary Subcommittee in the Voting Rights Act hearings.

Despite extensive evidence that the bill violated the Voting Rights Act, Justice did not object. It negotiated with county officials and set forth in a letter of October 2, 1981 the amendments the county would have to pass to meet Section 5 requirements. It is our position that these protracted negotiations and the advisory nature of the October 2 letter and a second letter of October 16 violated Justice's own Section 5 regulations' prohibiting consideration on the merits of bills prior to final enactment. 28 C.F.R. Part 51 §51.20.

A more flagrant violation of the Act is the Department's notifying the county that it would not seek to enjoin implementation of the voter reidentification plan. The Department's permitting

the reidentification program to proceed when it had not been precleared violates the express language of Section 5.

Sumter County had amendments passed in the special legislative session in November 1981 and submitted the amended act to Justice. The amendments still failed to include provisions allegedly agreed upon in Justice's negotiations with the county, as reflected in the October letters. Under Section 12 of the Sumter reidentification act, laws of statewide application which conflict with the act are repealed. Thus, protections normally applicable were stricken. These deficiencies are major:

> Notice to persons purged. There is no notification provision for persons whose names are purged. This failure to include the notice required by Justice means that black voters will be denied the minimal protection in the Alabama Code. It contravenes notice provisions and the voter's right to appeal the removal of his or her name set forth in the Alabama Constitution and statutes. If an applicant is denied registration, the Alabama Code, §17-4-123, requires that s/he receive written notice of the reason. An applicant denied registration may request a jury trial to contest that denial. §17-4-124. Similar guarantees apply when voters' names are proposed to be stricken from the list. Prior to the names being stricken, notice of names proposed to be removed must be published in a county newspaper. §17-4-132. A person purged has a right to appeal to the state court and can have a jury trial. Amend. 41, Alabama Constitution and §17-4-132.
>
> Assistance for illiterates. The amended act fails to insure that illiterates will receive assistance in reidentifying. The Voting Rights Act struck down literacy requirements for registration and voting. The Alabama Code expressly provides that applicants for registration who cannot read or write be assisted by the board of registrars. Section 12 of the reidentification act repeals that requirement with respect to reregistration.
>
> Reregistration by disabled voters. Justice's October 2 letter required an amendment that disabled voters could be registered at their place of residence. There is no provision for this home registration in the amended act.
>
> Residents temporarily out of the county. Justice further required that persons temporarily out of the county may be reidentified pursuant to Alabama Code, §17-4-134. The county failed to include this amendment. The omission is not inconsequential. Section 17-4-134 allows members of the armed

> forces, persons employed outside the United States, persons at institutions of higher learning and their spouses and children to register by mail. The amendments cover only the armed forces. Furthermore, about 400 Sumter County residents (12.2% of the population) work outside this very rural county. (1980 Alabama County Data Book) Thus, students must travel back to the county to reidentify as must persons who work outside the county.

The omission of the agreed upon amendments pertaining to persons registered by federal examiners under Section 7 of the Voting Rights Act should almost automatically cause Justice to object. The voter reidentification act will purge persons so registered if they fail to reidentify.

Despite the county's failure to amend the act as agreed upon in the negotiations, last Friday, January 29, 1982, the Department failed to object. Instead it asked for more information. The reidentification program, which has not been precleared, continues in violation of Section 5. Failure to object to Sumter's reidentification appears even more inexplicable, since Justice objected to Wilcox County's reidentification act because it failed to protect persons registered under Section 7. My clients in Sumter County and some black people in Choctaw County have lost confidence in the Justice Department's enforcement of Section 5.

Alabama's Voting Laws Show Why a State Should Not Be Allowed to Bailout Until All Counties Can Meet Bailout Requirements.

The necessity to retain coverage for a state until all its counties can meet the requirements to bailout is underscored by the structure of voting laws in Alabama and their impact on local voting practices, such as reidentification. The Alabama Constitution requires the legislature to pass uniform voter registration and voter purging laws. Amend. 41. The voter registration questionnaire is prescribed by the supreme court of Alabama and must be uniform across the state. §17-4-122. The legislature has enacted comprehensive voter registration and purging statutes, pursuant to constitutional

commands. Ala. Code §§17-3-9-17-3-13, 17-4-120-17-4-139. Virtually the entire body of laws regulating voting and elections is prescribed by state law: what offices will be elected; when elections are held; candidate qualifications; location of voting places; publication of voting lists; naming of registration and election officials; duties of election officials; and procedures for conducting elections, tabulating votes, and contesting elections. Responsibility for implementing and enforcing those laws is held jointly by state, county, and municipal officials. As noted above, Alabama has no home rule. To allow the state to bailout when its counties and/or municipalities are still covered makes no sense. The responsibility in Alabama to make the voting and election machinery work, including compliance with the Voting Rights Act, is inextricably intertwined between state and local officials.

To Be Exempt from Preclearance, A Jurisdiction Should be Required to Show It Has Eliminated Barriers to Voting.

Barriers to registration and voting still hinder black Alabamians from equal political participation. Unless a jurisdiction can make a showing that it has eliminated all such barriers, it should not be allowed to bailout. After my colleagues and I had represented black citizens in several cases charging Section 5 violations, we asked the question whether these were isolated examples of noncompliance. To ascertain the answer, with the assistance of a number of volunteers interested in voting problems, we conducted a survey to determine what had happened in Alabama since 1975 with respect to compliance with the letter and the spirit of the Voting Rights Act. Information was gathered from governmental officials, representatives of voter organizations and other citizens across the state. I would like to ask that a copy of that report be made a part of the record of my testimony.

The study shows that a significant number of jurisdictions in Alabama have failed to remove barriers to registration and voting. (pp. 7-14) The voter registration form, for example, calls for an applicant's Social Security number. Black leaders in Monroe County reported that blacks had been denied registration because they did not have Social Security cards. They did not have cards because they had worked in agriculture or other employment that was not covered. It has been reported that blacks reidentifying in Perry County are asked to show two forms of identification, although the act calls for only one.

Blacks assisting in registration compaigns in Pickens County reported that on at least two occasions registrars called the sheriff when groups of blacks appeared to register. The sheriff, a deputy and the courthouse grounds keeper stood over the applicants as they attempted to complete the forms. Pickens County has a 42% black population, yet 67% of the registered voters are white. Ms. Theresa Burroughs testified before the House Judiciary Subcommittee how she has been harassed by the police at the polls in Hale County.

Mary Gamble, one of my clients, believes she faced serious economic problems because she was a black candidate for town council in Clio. Ms. Gamble asked me to represent her when she lost a town council race; voters had included persons who lived in an area annexed without preclearance under the Voting Rights Act. Ms. Gamble had a loan, secured by a second mortgage on her home, from the only bank in Clio. The white man who has been mayor of Clio for more than 25 years is the president of the bank. Two weeks before the election, the mayor, president of the bank, notified her that she had three days to bring her note to a current status. After she filed an election contest in state court, the mayor came to her house about the note.

Boards of registrars' schedules have the effect of frequently making it difficult for black persons to register. Ms. Burroughs in her testimony before the House Judiciary Subcommittee told how the registrars failed to notify citizens when they would sit; at other times the registrars would fail to sit according to the notices. State law prescribes the maximum number of days registrars sit in regular session. In 53 of Alabama's 67 counties, the boards of registrars sit a maximum of 168 days. Other limitations reported to us were that (1) applicants could register only at the courthouse, (2) between 9:00 a.m. and 4:00 p.m., (3) on poorly advertised days, and (4) no Saturday registration.

A Jurisdiction Which Has Failed to Submit Voting Changes for Preclearance Cannot be Assumed in Compliance with the Act, and Thus Eligible for Bailout.

Alabama jurisdictions continue to avoid or postpone the requirements of the Voting Rights Act by failing and/or refusing to comply with Section 5.

Hayneville Incorporation.

The Town of Hayneville, which lies in the heart of Alabama's Black Belt, incorporated in 1968 and drew its boundaries so that 85% of the electorate were white. Hayneville is the county seat for Lowndes County, which in 1970 was 77% black. The incorporation was not submitted to the Justice Department until 1978. We represented black citizens excluded from the town and provided evidence to the Justice Department that the intent and effect of the incorporation was to exclude blacks. Justice objected to the incorporation under Section 5 and suggested that the town expand its boundaries to include the contiguous black neighborhoods whose residents desired to be in the incorporated area. Consequently, the town passed a resolution to incorporate the additional

areas, and the legislature enacted the new boundaries in 1980.

Clio Annexations.

The Town of Clio annexed territory in 1967 and 1976 and did not submit the changes to the Justice Department under Section 5. The United States Attorney General requested submission of the 1976 annexation and warned the town that it could not legally implement the annexation as it affected voting until the town had complied with Section 5. Ignoring this, Clio held municipal elections in July 1980. Persons in the annexed areas voted. An all white five-member council was elected which included two residents from the annexed areas. Clio's population in 1980, including the annexed areas, was 47% black.

As I mentioned above, we represented Mary Gamble in challenging the failure to preclear the annexations. In March 1981, the three-judge federal court found the annexations violated Section 5 of the Voting Rights Act. The court terminated immediately the terms of the two persons residing in the annexed area, and the terms of the remainder of the council and the mayor in 120 days. Gamble v. Town of Clio, Civil Action No. 80-1456-N (M.D. Ala. 1981). New elections were held, and the town complied with Section 5 procedures in annexing additional areas.

These are not isolated occurrences. In 1975, the Alabama legislature passed 81 acts which changed voting laws. Thirty-eight of those still had not been submitted for preclearance, as of June 1981.

In summary, I urge you to pass S-1992 without modifying its bailout provisions. Weaker bailout provisions will mean for blacks in Alabama that hard won rights to vote and elect candidates of their choice will be eroded.

THE VOTING RIGHTS ACT IN ALABAMA
A CURRENT LEGAL ASSESSMENT

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I. BLACK POLITICAL PARTICIPATION IN ALABAMA HAS INCREASED DRAMATICALLY SINCE PASSAGE OF THE VOTING RIGHTS ACT, DESPITE CONTINUING OBSTACLES

A. Introduction

The effectiveness of the legal tools provided in the Voting Rights Act is illustrated by three recent instances in which the Legal Services Corporation of Alabama has represented black citizens in Alabama challenging racial discrimination in voting rights. The Legal Services Corporation of Alabama is a private, non-profit Alabama corporation funded by Congress to represent low income persons in civil proceedings. This includes representation in civil rights matters such as voting discrimination.

Although the Voting Rights Act has provided black citizens new political participation opportunities, Legal Services' clients continue to encounter barriers to exercising their right to vote:

> Hayneville Incorporation. In 1968, the Town of Hayneville incorporated and drew its boundaries so that 85% of the electorate were white. Hayneville is the county seat for Lowndes County, which in 1970 was 77% black. The incorporation was implemented and was not submitted to the Justice Department for pre-clearance, as required by Section 5 of the Voting Rights Act, until 1978. Legal Services represented black citizens excluded from the town and provided evidence to the Justice Department that the intent and effect of the incorporation was to exclude blacks. The Justice Department objected to the incorporation on December 29, 1978, and notified the town that it could comply with the Act by expanding its boundaries to include the contiguous black neighborhoods whose residents desired to be in the town. Consequently, the town passed a resolution to incorporate the additional areas, and the legislature enacted the new boundaries in 1980.
>
> Clio Annexations. The Town of Clio annexed territory in 1967 and 1976 and did not submit the changes to the Justice Department. The United States Attorney General asked for submission of the 1976 annexation, warning the town that it could not be legally implemented without compliance with the Act. Ignoring this, the town held municipal elections in July 1980 with persons in the annexed areas voting and

running for office. Mary Gamble, a black citizen, lost her town council race by five votes. On her behalf, Legal Services Corporation of Alabama filed suit challenging the annexations as violative of the Act. The three-judge court in Gamble v. Town of Clio, Civil Action No. 80-0456-N (M.D. Ala. 1980) found the annexations violated Section 5 of the Voting Rights Act, terminated immediately the terms of office of two persons residing in the annexed area, and the terms of the remainder of the council and the mayor in 120 days. New elections were held on June 9, 1981.

Wilcox County. No black person was registered to vote in Wilcox County prior to enactment of the Voting Rights Act. With the Act's passage, federal registrars came to this majority black county and registered several thousand black voters.

In 1978, black men were elected to the positions of sheriff and tax collector. Before the next local elections in 1980, the Wilcox County Board of Registrars decided to purge voters who had been convicted of disqualifying crimes or had died. Registered voters to be purged were not notified as required by state law. They learned that their names were being removed only when the United States Office of Personnel Management, pursuant to Section 7 of the Voting Rights Act, began contacting the persons on the list who had been registered by the federal registrars. One of our client's name had been removed erroneously supposedly because of death. Another's child had died, and the parent's name had been removed. The name of a third person was removed because of an alleged first degree murder charge; he had never been charged.

The Office of Personnel Management found that many registered voters to be purged were properly registered and had been victims of an inaccurate investigation by the Board of Registrars. Most of the persons on the purge list were black.

When the board proceeded with the purgation despite the inaccuracies, black citizens complained to the Department of Justice and the Office of Personnel Managment. It was necessary for our clients to file suit to enjoin the purgation, so they could vote in the September 1980 primary. The Justice Department observors at the primary insisted that the persons purged be allowed to vote; Justice later disapproved the purgation of federally registered voters. At the preliminary injunction hearing prior to the November 1980 general election, the defendants consented to restore the persons' names improperly removed and to purge in accord with state and federal law.

These cases demonstrate the continuing value of the Voting Rights Act and the need to preserve the legal remedies provided in it. However, a survey of black political participation in Alabama was necessary to demonstrate more fully that these cases were not isolated examples. The survey was designed to determine the dimensions of black political participation in Alabama since 1975, when the Act

was last renewed. It also examined barriers to full participation. Information was gathered by Legal Services staff from governmental officials, representatives of voter organizations and other citizens across the state. The results reported below are not meant to be an exhaustive explanation of every facet of black political participation. The report serves the limited purpose of documenting the remedial effects of the Act and the need for amending Section 2 and renewing Section 5 of the Act in light of continuing barriers to equal political participation.

B. Increased Political Participation.

The Voting Rights Act led to dramatic increases in registration, candidacy, holding of elective office and voting of formerly disenfranchised black Alabamians. Because the act of registering is not only a prerequisite to voting but also to running for and holding elective office, registration figures are strong indicators of minority political participation and impact. In the past 20 years, the increase in the number of blacks registered to vote in Alabama has markedly increased. While only 57,470 blacks had registered in 1960, by 1970, 284,717 were on the rolls,[1] and this number had grown to an estimated 417,000 by 1980.[2] See Table 1 in the Appendix for registered voters by county. Similarly, as shown below, the percentage of the black voting population which is registered to vote has increased dramatically.

	Black Voting Age Population	Blacks Registered	Percent Voting Age Population Registered
1960	481,320	57,470	12%
1970	457,806	284,717	62
1980	609,000	417,000	68

Sources: Black Voting Age Population 1960 - United States Department of Commerce, Bureau of the Census, General Population Characteristics 1960, table no. 16, p. 2-31, 1970 - United States Department of Commerce, Bureau of the Census, General Population Characteristics 1970, table no. 20, p. 2-52, Abstract of the United States 1980, table number 852; Registration figures 1960, 1970 - Elizabeth Sanders, Political Science Department, Rice University[3] 1980 - Legal Services Corporation of Alabama Survey[4]

The exact number of blacks elected to office in Alabama between Reconstruction and the passage of the Voting Rights Act is not known. However, in 1965, Lucius D. Amerson was elected Sheriff of Macon County, the first black Alabamian elected to a county office in nearly a century.[5] By 1968, three years after passage of the Act, only 24 blacks held office.[6] Thus, the 278 black elected officials who now serve at the state, county and municipal levels represent a significant increase. The distribution by the types of office held by blacks in 1980 is shown in Table 2 of the Appendix.

The simple numbers of black elected officials, however, do not tell the whole story. No black has been elected to a statewide office, none has been elected to Congress. Of the 20 black mayors only four were elected in towns of over 5,000; only one of the 20 towns had less than 50% black population. See Table 3 for list of towns with black mayors.

It is generally believed that newly registered Alabama blacks have voted in substantial numbers since passage of the Act. Although records of voting by race are unavailable in Alabama, a comparison of voter turnout nationally and in Alabama indicates a trend which substantiates this belief.[7] The voter turnout in Alabama in 1964 was far below the

national average. Voter turnout in Alabama sharply increased from 1964 to 1980 at a time when turnout across the country decreased.

Voter Turnout In Presidential Elections 1964 to 1980

Year	Percentage of Voting Age Population Voting	
	U.S.	Alabama
1964	61.8%	35.9%
1968	60.7	52.7
1972	55.7	44.2
1976	54.0	47.3
1980	53.9	49.7

Sources: Data for 1964, 1968, 1972, 1976 -League of Women Voters, Washington, D.C.; Data for 1980 - Committee for Study of The American Electorate "Non-Voting Study"

Further evidence of the effectiveness of the Voting Rights Act can be seen in the number of blacks who have sought elective office in Alabama in recent years. The survey has identified at least 692 black candidates who have run for office in Alabama since 1975. Their distribution by type of office sought is shown in Table 4 of the Appendix.

FOOTNOTES

SECTION I

[1] Registration figures for 1960 and 1970 were provided by Elizabeth Sanders, Rice University, who collected the data during preparation of her doctoral dissertation "Political Adjustment in Dixie: Suffrage Expansion and Policy Change." See her footnote for source.

> "[8] . . . . In the early 1960's, Governor Wallace's voting consultant on the State Sovereignty Commission, Martha Witt Smith, undertook a county-by-county compilation of black voter registration, principally in order to demonstrate to local registrars the results of changed literacy requirements. Local registrars cooperated by granting her access to their informal codes as well as formal records. Smith's county figures for 1960 and a subsequent enumeration in 1970 were made available to the writer."

[2] This registration estimate is based on data compiled during the Legal Services Corporation of Alabama's survey. For counties where voter registration records by race are not maintained, estimates made by informed observers, i.e., probate judges and/or black political leaders, were relied upon.

[3] Supra, n.1

[4] Supra, n.2

[5] Staff telephone interview with Lucius D. Amerson 5/29/81

[6] U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After. January 1975. Table 5, p. 50.

[7] In the publication of "The Voting Rights Act: Ten Years After" the U.S. Civil Rights Commission compares national voter turnout and turnout in states covered by the Act in order to test the assertion that increased registration of blacks after the Act resulted in increased voting by blacks.

II. BARRIERS KEEP BLACKS FROM FULL POLITICAL PARTICIPATION

In addition to demonstrating the Act's remedial effect of increased participation, the survey examined the context in which the Voting Rights Act functions in Alabama at the present. This section provides additional factual information to show the socio-political context of elections held in Alabama from 1975 through 1980. Many of the barriers described were encountered during the elections of July through November 1980. The factual information was obtained primarily through interviews with black citizens across Alabama and reflects their accounts of irregularities in voting practices and their prevailing perceptions of continued barriers to equal participation.

A. Registration Requirements Hinder Black Citizens.

Registering to vote in some Alabama counties can be an onerous process tailored for the convenience of registrars with the effect of frequently making it difficult for black persons to register. Each applicant must appear in person before the board of registrars or a deputy registrar. Ala. Code §17-4-122 (See infra at 9 for discussion on deputy registrars). The only persons entitled to register by mail in Alabama are members of the armed forces, persons employed outside the United States, persons away at college, and the spouses and children of such persons. Ala. Code §17-4-134. Other limitations registrants face in some counties include (1) registration only at the courthouse (2) between 9:00 A.M. and 4:00 P.M. (3) on poorly advertised and limited days and (4) no Saturday registration.[1]

Alabama laws of general application prescribe the maximum number of days registrars may meet per year for fifty-nine counties.[2] (The other eight operate under the provisions of local bills.) However, registrars are not required to meet even this limited number of days.

Number of Counties	Maximum Number of Days Boards of Registrars Meet
35	120
18	168
5	216
1	150

While the law states that as many as 25 session days may be used for special registration sessions,[3] in 20 counties, black citizens reported that such special sessions were rarely or never held.[4]

The Voting Rights Act forbids the use of a "test or device" as a condition for registering to vote in jurisdictions, such as Alabama, where these devices have historically prevented black people from registering. 42 U.S.C. §1973b. The prohibited tests or devices include any requirement that a person

1. demonstrate the ability to read, write, understand, or interpret any matter;

2. demonstrate any educational achievement or knowledge of any particular subject;

3. possess good moral character; or

4. prove his or her qualifications by the voucher of registered voters or members of any other class.

The Fifth Circuit struck down Wilcox County's requirement that a registrant have a registered voter complete a portion of the registration form and affirm that the applicant is a resident. This voucher device was stricken, prior to the passage of the Voting Rights Act, because it had a discriminatory effect on black applicants. United States v. Logue, 344 F.2d 290, 292 (5th Cir. 1965).

Despite these prohibitions on vouchers, they are utilized in Monroe County. Black political leaders in that county report that blacks have been denied registration by the all white board of registrars because they did not have Social Security cards.[5] They did not have cards because they had never worked in covered employment. Others who were unable to state the name of two registered voters who could vouch for them were denied registration.[6] These practices perhaps account for the low registration of Monroe County blacks; although 44% of the population is black, only 20% of the registered voters are black.

In other counties also, the registrant must produce a Social Security card or, less frequently, birth certificate or school record.[7] Furthermore, these documents are not a condition of registration for all applicants in all counties. In Bibb County, the Social Security number is simply listed as unavailable if the applicant does not have his or her card,[8] but in Russell County applications have been torn up when blacks could not produce their Social Security cards.[9] Blacks with no Social Security card must buy a copy of their school record in order to register in Marengo County,[10] a county in which 70.1% of blacks in 1970 had incomes below the poverty level;[11] purchase of a school record for low income blacks in that county is a real financial barrier as was the $1.50 Alabama poll tax outlawed by the Voting Rights Act. This school record purchase is not required in other counties.

In Chambers County, blacks attempting to register in 1976 and 1977 were denied because they did not know their beat or precinct number.[12] In other counties, it is considered to be the responsibility of the registrars to determine an applicant's voting place.[13]

There were reports that blacks have been treated in an unpleasant and intimidating manner by registrars, according to persons from Elmore, Hale, Lee, Marengo, Marshall, Monroe, Morgan, and Russell Counties.[14] None of these counties has any minority registrars. Pickens County registrars have called the sheriff when several blacks came to the office to register. The sheriff, a deputy and the courthouse groundskeeper then stood over the applicants as they attempted to complete the forms.[15] It had a chilling effect.

People who have promoted and encouraged black voter registration have in recent years been jailed and prosecuted in Russell[16] and Pickens counties.[17] In Morgan County, a black activist appeared before the County Commission to get additional polling places in black neighborhoods, over the opposition of the chair of the board of registrars. Immediately following the Commission meeting, the white woman chair went to the black man's probation officer and to the trial judge and initiated an effort to get the man's probation revoked. The black leader spent five days in jail, and his probationary period was extended. The voting activist believes that revocation proceedings would never had been brought nor his probation extended had he not been involved in black voter registration activity.[18]

In 1978, the Alabama legislature passed legislation stating that boards of registrars "may" appoint deputy registrars. Ala. Code §17-4-158. At the same time, the statute requiring boards to visit each precinct of their county was repealed. Subsequent to the passage of this Act, the NAACP State Conference of Branches mounted an intensive

campaign to get black people appointed as deputy registrars. Contacts were made in person and in writing to county boards urging the appointment of black citizens. Lists of black people willing to accept these unpaid volunteer positions were provided.[19] After a year of frustration, the NAACP enlisted the help of the Governor.[20] Governor Fob James sent letters on May 6, 1980 to all boards of registrars urging that they comply with the spirit and intent of the law. (See Appendix 5) Despite all these efforts, registrars in many counties with sizeable black populations have refused to appoint deputy registrars. The absence of these deputies correlates directly with low black registration figures.

Counties of 25% or More Black and No Black Deputy Registrars	Percent Black Population	Registered Black Voters Percent of Total Registered Voters
Barbour	45	33
Chambers	36	23
Coosa	35	23
Dallas	55	45
Hale	63	53
Henry	38	28
Marengo	53	34
Monroe	44	20
Pickens	42	33
Pike	35	22
Tallapoosa	27	18

*Except where otherwise noted, population data used in the report is based on Total Population By County: Alabama 1980, U.S. Census of Population Preliminary provided by Alabama Office of State Planning and Federal Planning.

In several counties where black deputy registrars were appointed, when their diligence and productivity became obvious, unreasonable restrictions were placed upon them or they were permitted to serve only for a short time.[21] In Lee County, one of three deputized black women was informed that completed applications must be returned on the same day that they had been picked up from the registrars' office.[22] After turning in a large number of completed applications, another of these women was told that she could no longer sign the forms but would have to help in the office under a registrar's supervision. The stated reason was because of errors she had made. In fact, there was one error on one form - the beat number was listed incorrectly.[23] Finally the plans of these women to conduct a registration drive in the rural areas of the county were completely frustrated, when they were denied forms altogether.[24] In effect, they were no longer deputy registrars.

Deputy registrars were very effective when used. The NAACP reported that the utilization of minority deputy registrars in Jefferson County contributed to the marked increase in black voters in that county and to the election of a black mayor in Birmingham, Richard Arrington.[25] In Conecuh County, ten black deputy registrars registered almost 800 people in only two months.[26] More than 2,500 names were added to the voting rolls in Wilcox County by these volunteers.[27] Similar successes are reported in Bibb County.[28] Two Russell County deputy registrars added 1,980 blacks to the registration rolls.[29] The efforts of deputy registrars to register black college students and others in Montgomery County helped make possible the election of two black county commissioners in 1980, one of whom ran unopposed.[30]

In the 1981 session of the Alabama legislature, at least three bills were introduced which would have facilitated voter registration in Alabama. None passed. Two of these

would have authorized certain officials - - high school principals, college and university personnel and city clerks - - to serve as registrars. S. 324, S. 9.

B. 1981 Reidentification Legislation Will Erase Substantial Numbers of Qualified Blacks From the Voting Lists.

A series of what are called voter reidentification bills have been passed by the Alabama legislature during the current session. Actually, the process prescribed by these bills more closely resembles reregistration than it does reidentification. Black political leaders believe that they were systematically drafted with the purpose of disenfranchising black voters in large numbers in counties with majority black populations. "It took us 15 years to get these people registered," said Wilcox County Sheriff Prince Arnold, the County's first black sheriff. "We've only been able to vote for 15 years. Now, we'll have nine months to do what took 15 years," he said, adding that the bill "appears to be deliberately aimed at blacks."[31]

This opinion is substantiated by the following facts. Five of the counties for which this legislation was introduced have substantial black populations.

Lowndes	75.1%
Perry	60.2
Sumter	69.5
Wilcox	68.9
Dallas	55.2

Bills were passed requiring purges in Perry, Sumter and Wilcox Counties. Blacks have finally achieved some degree of political success by electing blacks to countywide offices in each of these counties.

The bills state that registrars will visit each beat for the purpose of enabling registered voters to reidentify. The visit will be between 9:00 A.M. and 5:00 P.M. on a week day. In Sumter and Perry Counties, a person can only reidentify at the courthouse or the beat where s/he lives, not in the beat where s/he works. Weekend or evening sessions are not authorized or specified, making reidentification burdensome for low income working people, the majority of whom are black in the counties which will purge. Also, negatively impacted are students attending colleges in other areas. This is significant in Perry County because of an intense and successful campaign to have black college students participate in local elections by using absentee ballots.[32]

The prescribed method of notification of reidentification - - one notice in a county newspaper - - appears to be designed to ensure that few people will know about it. It almost excludes low income and poorly educated citizens, most of whom do not buy and read newspapers.

Persons reidentifying must complete a questionnaire which repeats many of the same questions asked upon initial registration. Wilcox County's questionnaire requires Social Security and driver's license numbers with no other identification options noted.

The fear expressed by black political leaders that the implementation of this legislation will be devastating is based on the impact of an almost identical enactment on Choctaw County two years ago. Introduced after two black county commissioners were elected for the first time, the purge resulted in a major reduction in black registered voters. The Choctaw County Voters League has documented over 700 eligible blacks dropped from the rolls (approximately 20% of registered blacks), and they believe there were many more.[33] This, of course, is a number large enough to spell defeat for minority candidates. Anthony Butler, president

of the League, characterized many of those who failed to re-identify as elderly people who have vivid and bitter memories of past experiences with registrars.[34]

C. Black Registrants Have Been Omitted From Poll Lists.

In a number of counties, legally registered black people have found that their names have been left off the voting list at their ward or precinct place. In Chambers County, a black man who worked at the polls between 1975 and 1978 reported many registered blacks were unable to vote at their polling place for this reason. He believed that this occurred because there were no minority registrars, and the white registrars were unfamiliar with black neighborhoods and communities.[35] In Chilton County, it was reported that polling places were changed shortly before an election in 1980 and many black citizens were unaware of the change. In at least one case, a black married couple found that their names appeared on the lists of two widely separated polling places.[36]

A large number of voters' names were omitted in Conecuh County during the 1980 election for Evergreen City Council. Dozens of blacks who had been voting in Evergreen for years were informed that they could not vote as their names were not on the list of registered voters. Voting a challenged ballot, an optional procedure under Alabama law, was not mentioned by poll workers. Ala. Code §17-12-3. Instead, they were told they would have to go to the courthouse or city clerk and get a note verifying their eligibility. Many did not make that extra trip. The incumbent black mayor pro tem, running for a second term, lost by four votes.[37]

D. Assistance to Illiterate Voters Has Been Circumscribed.

In at least eight counties, serious violations of election law have occurred when illiterate or handicapped blacks have been denied the right to have the person of their choice provide them needed assistance, as provided under Alabama law. Ala. Code §§17-8-29; 17-9-25. Our survey revealed this in Marshall, Monroe, Russell, Marengo, and Conecuh counties.[38] In Washington County and Pickens County in the 1980 election, and Perry County in 1978,[39] people who assisted more than one voter were harassed and threatened with arrest.

E. Blacks Seeking to Vote Absentee Were Intimidated.

Absentee ballots have been the object of continuing controversy in the Alabama election process. Lack of confidentiality and inequitable eligibility criteria were two problems which were corrected in 1978 by legislative action. However, blacks continue to maintain that they have been unfairly denied the use of absentee ballots and/or that they have been harassed and threatened because they did use them. In Russell County, it was reported that a number of minority voters were visited by "a man from the D.A.'s with a big gun on his hip" who questioned them about their absentee votes.[40] One elderly black woman,[41] thoroughly frightened, said she might never vote again.

F. Black Voters Perceive Economic Threats.

Blacks continue to fear economic retaliation for voting or "voting wrong". Welfare recipients in Autauga County reportedly were advised by case workers to vote for a certain candidate for mayor, who they were told, would be good to them.[42] In Washington County, it is widely believed by blacks and Indians that how a person casts his or her vote is known by others and can result in serious repercussions. An Indian woman reported that her vote for Gallasneed Weaver, an Indian running for county commissioner, resulted in her termination from the county administered CETA program.[43]

Mary Gamble believes she faced serious economic problems because she was a black candidate in July 1980 for town council in Clio. Ms. Gamble had a loan, secured by a second mortgage on her home, from the only bank in Clio. The white man who has been Mayor of Clio for more than 25 years is the president of the only bank in Clio. Two weeks before the town council election, the Mayor, president of the bank, notified her that she had three days to bring her note to a current status. After she filed an election contest in state court, the Mayor came to her house about the note.[44]

G. Candidacy Information Is Difficult to Obtain In Some Counties.

Black citizens describe repeated instances of deadlines missed and opportunities lost because of a lack of accurate and timely information. Black persons in Hale County report that upcoming elections are never publicized in the Newbern community so that qualifying deadlines pass without their knowledge.[45] District Court Judge Eddie Hardaway, the first black elected to a major Sumter County office other than school board, reported that one local official volunteered information intentionally designed to mislead him as to what positions would be available in the upcoming November 1980 election.[46]

FOOTNOTES
SECTION II

[1] Staff interviews with Sally Hadnott, Autauga County, 4/1/81, Robert Ellis, Baldwin County, 3/27/81, Ernestine Myles, Butler County, 4/4/81, Amos Gunn, Chambers County 3/4/81, John Sims, Chilton County, 4/4/81, Anthony Butler, Choctaw County, 3/20/81, Elma Brock and Bernest Brooks, Coffee County 4/4/81, Tommy Duncan and Beverly Stone, Coosa County, 4/6/81, Charles Blaylock and Lewis Washington, Elmore County 4/8/81, H. K. Matthews, Escambia County, 2/25/81, Sam Pendleton, Lauderdale County, Franklin County 5/16/81, Teresa Burroughs, Hale County 3/81, Annie Mae Martin, Henry County, 6/5/81, Hoover White, Lawrence County 4/81, Ed Ayers and Roosevelt Agee, Marengo County, 3/14/81, James Minson, Marshall County 4/4/81, Ann Walsh, Mobile County 3/25/81, Ernestine Odom, 4/4/81, Willie Frank Marshall 5/27/81 and George Brown 2/24/81, Monroe County, James Guster, Morgan County 4/20/81, Albert Turner, Perry County, 3/25/81, Geraldine Sawyer, Pickens County, 4/23/81, Judge Eddie Hardaway, Sumter County, 3/24/81, Marrel Hayes, Tallapoosa County, 3/6/81, Bryant Melton, Tuscaloosa County 4/81

[2] Alabama Code §17-4-156

[3] Ibid.

[4] Staff interviews with Sally Hadnott, Autauga County, 4/1/81, Robert E. Ellis, Baldwin County, 3/27/81 Ernestine Myles, Butler County, 4/4/81, Amos Gunn, Chambers County 3/4/81, John Sims, Chilton County, 4/4/81, Anthony Butler, Choctaw County, 3/20/81, Elma Brock and Bernest Brooks, Coffee County, 4/4/81, Charles Blaylock and Lewis Washington, Elmore County, 4/8/81, H. K. Matthews, Escambia County, 2/25/81, Sam Pendleton, Lauderdale County, 5/16/81, Teresa Burroughs, Hale County 3/81, Annie Mae Martin, Henry County, 6/5/81, Hoover White, Lawrence County 4/81, Ed Ayers and Roosevelt Agee, Marengo County 3/14/81, James Minson, Marshall County 4/4/81, Ernestine Odom 4/4/81 Willie Frank Marshall 5/27/81, and George Brown 2/24/81, Monroe County, James Guster, Morgan County 4/20/81, Albert Turner, Perry County, 3/25/81, Geraldine Sawyer, Pickens County 4/23/81, Judge Eddie Hardaway, Sumter County 3/24/81.

[5] Staff interview with Ernestine Odom, 4/4/81

[6] Staff interview with Willie Frank Marshall 5/27/81

[7] Staff interview with Sally Hadnott, Autauga County 4/1/81, Ernestine Myles, Butler County 4/4/81, Amos Gunn, Chambers County 3/4/81, John Sims, Chilton County, 4/4/81, Anthony Butler, Choctaw County 3/20/81, Charles Barron, Clarke County, 2/26/81, Reverend Lathonen Wright, Clay County, 4/14/81, Bernest Brooks, Coffee County, 4/4/81, Larry Fluker, Conecuh County, 2/23/81, Harvey Smith, Coosa County, 4/6/81, Teresa Burroughs, Hale County 3/12/81, Annie Mae Martin, Henry County, Nancy Gibb, Lee County, 5/27/81, Charles Smith, Lowndes County, 3/25/81, Roosevelt Agee, Marengo County, 3/14/81, Ernestine Odom, Monroe County, 4/4/81, Albert Turner, Perry County, 3/25/81 Geraldine Sawyer, Pickens County, 4/23/81, Judge Eddie Hardaway, Sumter County, 5/24/81, Charles Woods, Talladega County, 3/20/81, Bryant Melton, Tuscaloosa County, 4/81, Albert Ridgeway and Robbie Reed, Washington County, 3/12/81.

[8] Staff interview with Eddie Brown 5/6/81

[9] Staff interview with Arthur Sumbry 3/5/81

[10] Staff interview with Roosevelt Agee 3/14/81

[11] United States Department of Commerce, Bureau of the Census, General Social and Economic Characteristics of Alabama, Census PC(1)-C2 Alabama, Table 128 p. 2-204.

[12] Staff interview with Amos Gunn 3/4/81

[13] Staff interview with Beverly Stone and Harvey Smith, Coosa County Registrars 4/6/81, S. I. Harry, Elmore County Registrar 3/30/81, Nancy Gibb, Lee County Deputy Registrar 5/26/81, and Eddie Brown, Bibb County Deputy Registrar 5/6/81

[14] Staff interviews with Charles Blaylock, Elmore County 4/8/81, Teresa Burroughs, Hale County,5/28/81, Barbara Pitts, Lee County, 5/1/81, Roosevelt Agee, Marengo County, 3/14/81, James Minson, Marshall County 4/4/81, Ernestine Odom, Monroe County, 4/4/81, James Guster, Morgan County, 4/20/81, Arthur Sumbry, Russell County 3/5/81

[15] Staff interview with Geraldine Sawyer, Pickens County 4/23/81

[16] Staff interview with Arthur Sumbry 3/5/81

[17] Staff interview with Geraldine Sawyer, Pickens County 4/23/81

[18] Legal Services of North Central Alabama, staff interview with James Guster 4/20/81

[19] Staff interview with Charles Woods, NAACP State Conference President 3/20/81

[20] Ibid

[21] Staff interview with Ernestine Myles 4/4/81

[22] Staff telephone interview with Barbara Pitts 5/1/81

[23] Staff interviews with Sarah Thomas 5/1/81 and 5/20/81

[24] Staff interview with Barbara Pitts 5/1/81

[25] Letter to Representative John Teague from Charles Woods, NAACP State Conference President 12/9/80

[26] Ibid

[27] Ibid

[28] Staff interview with Eddie Brown 5/6/81

[29] Phenix City Ledger Enquirer article 10/5/80

[30] Staff interview with Catherine Coleman 4/4/81

[31] Selma Times Journal article 4/12/81

[32] Staff interview with Albert Turner 3/25/81

[33] Staff telephone interview with Anthony Butler, League President 3/20/81

[34] Ibid.

[35] Staff interview with Amos Gunn 3/4/81

[36] Staff interview with John Sims

[37] Staff interview with Larry Fluker, President, Conecuh County NAACP 2/23/81

[38] Staff interviews with James Minson Marshall County 4/4/81, Willie Frank Marshall, Monroe County 5/27/81, Arthur Sumbry, Russell County 3/5/81, Ed Ayers, Marengo County 3/14/81, and Larry Fluker, Conecuh County 2/23/81

[39] Staff interview with Reverend Albert Ridgeway, Washington County 3/13/81, Geraldine Sawyer, Pickens County, 4/23/81 and Albert Turner, Perry County 3/25/81

[40] Staff interview with Arthur Sumbry 3/5/81

[41] Phenix City Ledger-Enquirer Article 10/19/80

[42] Staff interview with Rosetta Jackson 4/1/81

[43] Staff interview with Nola Reid 1/13/81.

[44] Staff interview with Mary Gamble 6/1/81.

[45] Staff interview with Teresa Burroughs 3/15/81.

[46] Staff interview with Judge Eddie Hardaway 3/24/81.

III. THE ACT HAS BEEN USED SUCCESSFULLY TO PROTECT BLACK VOTING RIGHTS IN THE STATE

The judicial and administrative remedies provided for by the Voting Rights Act have been used successfully in Alabama to eliminate many racially discriminatory voting laws and procedures and to prevent the substitution of new laws designed to serve the same purpose. The tools provided in the Voting Rights Act - - Section 5 pre-clearance, authorized litigation and the use of federal examiners and observers - - have proved to be reliable weapons in the fight to protect the voting rights of blacks in Alabama.

The Section 5 pre-clearance requirement has been an effective remedy. 42 U.S.C. §1973c. It has provided the mechanism by which the U.S. Attorney General could prevent the implementation in Alabama of racially discriminatory voting legislation. Further, it is believed to have served as a deterrent to the enactment of flagrantly discriminatory legislation.[1]

The Attorney General has acted to interpose his objection to 72 voting changes submitted by the state, as of February 28, 1981. That is, the Department of Justice determined that on the basis of the information submitted that the proposed change was discriminatory in purpose or effect. An examination of the types of changes to which the Attorney General has objected reveals the numerous methods

by which jurisdictions have attempted to thwart effective minority political activity. Alabama submissions objected to by the Attorney General are shown below:

Year	Change	County
1969	Garrett Act	State
	Poll list signature	Baldwin
	Poll list signature	Dale
	Poll list signature	Morgan
	Poll list signature	Montgomery
	Poll list signature	Mobile
	Poll list signature	Lee
	Poll list signature	Escambia
	Poll list signature	Russell
	Poll list signature	Mobile
1970	Absentee registration literacy requirement	State
	Numbered posts	Jefferson
		Birmingham
	Anti-single shot	Talladega
	Numbered posts	Jefferson
		Birmingham
1972	At-large election	Autauga
	Residency requirement	Autauga
	At large elections	Autauga
	Majority vote requirement	Autauga
	Residency requirement	Autauga
	Assistance to illiterates restricted	State
	Assistance to illiterates restricted	State
	Independent candidate signature requirement	State
	Elective to appointive justices	State
1973	Candidate qualification procedures	Mobile
1974	At-large elections	Pike
	Majority vote requirement	Pike
	Residency requirement	Pike
	Staggered terms	Pike
1974	Multi-member districts	Sumter
	Anti-single shot	Sumter
1975	Numbered posts	Talladega
	Annexation	Jefferson
	Annexation	Shelby
	Annexation	Shelby
	Annexation	Shelby
	Annexation	Shelby
	Annexation	Shelby
	Annexation	Jefferson
	Annexation	Jefferson
	Annexation	Jefferson
	Annexation	Jefferson
	Annexation	Jefferson
	Annexation	Jefferson
	Annexation	Jefferson
	Staggered terms	Russell
1976	Primary date contested elections	State
	Reapportionment of Democratic Party Executive Committee	Pickens
	Combines 2 counties for judicial district	State
	Form of city government and specified duties for commissioner	Mobile
	Redistricting	Pickens
	At-large nomination and election of county commission	State

Year	Change	County
	At-large election of Board of education and commissioners	Chambers
	Numbered posts	Chambers
	Majority vote requirements	Chambers
	Staggered terms	Chambers
	At-large election	Hale
	At-large election	Colbert
	Residency requirement	Colbert
	At-large election	Hale
	At-large election	Hale
	At-large election	Hale
1977	Annexations	Shelby
	Method of electing county commissioners	Barbour
	Method of electing county commissioners	Barbour
	Incorporation	Lowndes
	At-large election of county commissioners	Clarke
1980	Annexation	Jefferson
	Redistricting	Dallas
	Voting machines	Sumter
	Numbered beats	Sumter
	Polling places	Sumter

While the clear intent of Section 5 was that all changes in voting laws or practices be submitted to the Justice Department, or that a declaratory judgment be obtained in the federal court in the District of Columbia, significant numbers of changes have not been submitted. For example, in 1975, there were at least 90 acts passed by the Alabama Legislature dealing with voting. Thirty-eight of these acts were never submitted to the Department of Justice for preclearance. See Table 6 in Appendix for list of these acts. As a result, new pieces of discriminatory legislation have been implemented.

The fact that many concerned black individuals and groups do not possess sufficient knowledge as to preclearance protections and procedures is another serious hindrance to the effectiveness of Section 5. For example, in Washington County, black and Indian leaders did not learn until a visit by a Southern Regional Council staff member on September 3, 1980, that they could voice their concerns to the Justice Department about a change to at-large elections for the County Commission which had been enacted in 1969. Unfortunately, the submission, which was not made until December of 1979, had already been approved on August 8, 1980.[2] A similar situation took place in Choctaw County regarding a voter re-identification bill which was approved by the Department of Justice in August of 1978. According to the President of the Choctaw County Voters League, when inquiries were made at the Justice Department as to why the legislation was not objected to, he was told that two black elected officials contacted by phone by Justice had indicated that they approved of the submission. Both of these individuals deny that they were contacted or that they approved the change.[3] Again, black community leaders voiced their opposition too late, the submission had already been approved and implemented with dire results - at least 700 eligible black voters were dropped from the voting rolls.[4]

FOOTNOTES

SECTION III

[1] Staff interviews with George Brown 2/24/81, Albert Turner 3/25/81, Eddie Hardaway 3/24/81, Charles Woods 3/20/81, Albert Ridgeway 3/13/81, Charles Blaylock 4/8181, Roosevelt Agee 3/14/81.

[2] Staff interview with Reverend Albert Ridgeway and Gallasneed Weaver 3/13/81 and telephone interview with David Bell 5/20/81.

[3] Staff telephone interview with Anthony Butler 3/20/81.

[4] Ibid.

IV. AT-LARGE ELECTION STRUCTURES DILUTE THE CHANCE OF BLACKS BEING ELECTED TO COUNTY AND MUNICIPAL OFFICES

A number of Alabama's political subdivisions are governed by election laws which by intent or effect dilute the vote of minority electors. Perhaps the most pervasive of these is the at-large system of election. In counties or municipalities where blacks constitute less than a majority of the electorate, and racially polarized voting occurs, this election system in most cases results in failure for minority candidates.

The courts have not definitively decided the legality of at-large systems as found in Alabama. Whether an at-large system of electing members of a county or municipal governing body which dilutes minority voting strength violates Section 2 of the Voting Rights Act, 42 U.S.C. §1973, was not fully resolved in City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490 (1980) Only Justice Stewart's plurality opinion addressed this question, answering it in the negative. One Fifth Circuit panel post- Bolden has held that Section 2 prohibits intentional vote dilution. United States v. Uvalde Consolidated Independent School District, 625 F.2d 547 (5th Cir. 1980) cert. denied, #80-1237, 49 L.W. 3680 (1981). A second panel stated in dictum that a Section 2 cause of action was coextensive with the fifteenth amendment claim. Lodge v. Buxton, 639 F.2d 1358, 1364, n.11 (5th Cir. 1981). A third panel adopted Justice Stewart's view that a vote dilution claim cannot be made out under Section 2. McMillan v. Escambia County, 638 F.2d 1239, 1243 n.9 (5th Cir. 1981).

The breadth of the fourteenth and fifteenth amendments' protection of minority voting rights from the dilutive effects of at-large systems is also unsettled. In Bolden a majority of the Justices agreed that vote dilution may violate the fourteenth amendment, but there was no majority view of whether discriminatory purpose as well as effect must be proved under the fourteenth or fifteenth amendment. The Stewart plurality in Bolden would require a showing of invidious purpose to make out a fourteenth amendment claim. 100 S.Ct. at 1497, 1501. According to the Stewart plurality, the fifteenth amendment does not extend to dilution claims. 100 S.Ct. at 1499. Fifth Circuit panels have reached conflicting results on these questions. See Lodge v. Buxton, supra; McMillan v. Escambia County, supra; and United States v. Uvalde Consolidated Independent School District, supra.

The survey results show clearly that in Alabama the at-large systems serve to keep black representation at extremely low levels. This situation demonstrates the need to amend Section 2 of the Act to outlaw voting practices which have the "effect" of diluting minority voting strength.

A. County Commissions

The vast majority of the 67 county commissions in Alabama are elected at-large. According to our survey and one recently completed by the Association of County Commissions of Alabama, county commission election forms are as follows:[1]

Systems for Electing County Commissions

At-large election with residence requirement in numbered district	40
At-large election with no residence requirement	5
Nominated by district and elected countywide	6
Single member nominations and elections	16
	67

At-large county commission election plans have inhibited black candidates from being elected to county governing bodies, except where blacks constitute a large majority of the population. In counties where blacks constitute more than three-fifths of the population, they can, not surprisingly, elect county commissioners in at-large elections.

County	Percent Black Population	At Large Commission Total*	Black
Macon	84.2%	5	5*
Greene	78.0	5	5*
Lowndes	75.0	5	4
Wilcox	68.8	5	2
Bullock	67.6	5	4*
Perry	60.1	5	3

*Includes Probate Judge

Even in heavily black counties, the at-large system often prohibits the election of black candidates to the commissions. In sixteen counties where blacks exceed 25 percent of the total population, no black sits on the Commission.

Counties More Than 25% Black	Percent Black Population	At-Large County Commission	
		Total	Black
Sumter	69.3%	4	0
Dallas	54.6	5	0
Marengo	53.3	5	0
Barbour	44.4	5	0
Monroe	43.0	5	0
Clarke	42.7	5	0
Butler	38.7	5	0
Henry	37.9	5	0
Coosa	34.7	5	0
Jefferson	33.3	4	0
Washington	28.1	5	0
Escambia	29.6	5	0
Talladega	30.8	5	0
Tuscaloosa	27.2	4	0
Tallapoosa	27.0	6	0
Crenshaw	26.2	5	0

Conversely, single-member district elections facilitate the election of black candidates to the county commission. In the following counties where commissioners are elected by district, blacks serve on the county governing body:

County	Percent Black Population	County Commission Total	Black
Hale	62.8%	5	1
Choctaw	43.5	5	2
Montgomery	39.4	5	2
Mobile	31.5	3	1

In each of these counties, except Choctaw, single-member district elections were gained only as a result of federal court orders. Hale County illustrates the importance of the Voting Rights Act in protecting newly enfranchised blacks from dilution of their votes through institution of at-large election procedures. Prior to passage of the Act, Hale County Commissioners had been elected by district. In November 1965, Hale County changed to an at-large system. This change was not precleared under Section 5. In United States v. County Commission Hale County, Alabama, the three-judge court invalidated the change to at-large elections. 425 F.Supp. 433 (S.D. Ala. 1976), aff'd per curiam, 430 U.S. 924 (1977). See also Brown v. Moore, 428 F.Supp. 1123 (S.D. Ala. 1976) (Mobile), Hendrix v. McKinney, 460 F.Supp. 626 (M.D. Ala. 1978) (Montgomery).

The election of black commissioners even where county commission elections are by district has been hindered by other voting rules. An Alabama statute which requires a run-off unless a candidate receives a majority of votes dilutes the strength of black votes. Ala. Code §17-16-36 Under a plurality-win system, a black candidate has a better opportunity to win if white voters split their votes among several white candidates and blacks engage in "single-shot voting" for the black candidate. In City of Rome v. United States, the Supreme Court in affirming the lower court's finding regarding the effect of plurality-win requirements explained single-shot voting, 446 U.S. 156, 100 S.Ct. 1548, 1566 (1980).

> Consider [a] town of 600 whites and 400 blacks with at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.
> U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, 206-207 (1975).

Thus, if a black candidate runs against two whites for a commissoner's position, s/he cannot win by gaining a plurality. In a run-off, a black candidate is in most cases running against a white candidate.

Other voting rules frequently employed in Alabama also serve to decrease the likelihood of a black's being elected. In City of Rome the Supreme Court affirmed the lower court's conclusion that numbered posts, staggered terms and residency provisions force head-to-head contests between blacks and whites and deprive blacks of the opportunity to elect a candidate by single-shot voting. 100 S.Ct. 1548, 1566

(1980). For example, if four commissioner seats are open and the places are numbered, there are four individual races, instead of a true at-large election where the four persons with the greatest numbers of votes get the four seats. Residency requirements similarly lead to head-to-head contests. Staggered terms have the same effect: "'if each member has a 4-year term and one member is elected each year, then the opportunity for single-shot voting will never arise.'" Supra at 1548 citing to City of Rome v. United States, 472 F.Supp. 221, 244 n.95 (D.D.C. 1979) (quoting U.S. Commission on Civil Rights, supra, n.19, at 207-208).

The effect of these voting rules is shown by the absence of black commissioners in counties which have district elections with other dilutive rules:

Counties With District Elections Where No Blacks Hold County Commission Posts

County	Percent Black Population	Dilutive Voting Rules: Staggered Terms	Dilutive Voting Rules: Numbered Posts
Pickens	41.8%	X	
Conecuh	41.1	X	X
Chambers	35.5	X	X
Pike	35.0	X	

B. County School Boards

At-large election plans also have the effect of minimizing the numbers of blacks elected to county school boards. Blacks hold only 37 of the 344 county school board seats in Alabama. The large majority of these black elected board members reside in counties with large black populations:

Percent Black Population	Number Black School Board Members
100-75%	14
74-50	15
49-25	8
24-0	0

Of the eight black board members serving in counties less than 50% black, three were elected in county elections districted by court order[2] and one was appointed to fill an unexpired term.[3] Thus, only four of Alabama's 37 black board members were elected at-large in counties less than 50% black.

The following Alabama counties with a black population over 25% have no blacks serving on the county board of education. Black enrollment (1979-80) as a percent of the total is also shown.

Counties with No Blacks on County School Board

County	Percent Black Population	Percent Black Enrollment in County Schools
Dallas	55%	75%
Clarke	43	65
Pickens	42	60
Conecuh	41	59
Chambers	36	55
Pike	35	54
Henry	38	53
Coosa	35	52
Washington	33	41
Escambia	32	40
Tallapoosa	27	39
Crenshaw	27	36
Lee	25	34
Tuscaloosa	28	23
Jefferson	34	16*

Source: Enrollment Figures - State Department of Education, Business Office[4]

* The majority (89%) of the black population of Jefferson County resides within municipalities served by city school systems.

This pattern which requires large black voting majorities to elect black school board members is repeated in the election of black candidates for county superintendent of schools. Only five heavily black Alabama counties have black superintendents:

Counties with Black School Superintendents	Percent Black Population
Macon	84%
Greene	78
Lowndes	75
Bullock	68
Perry	60

C. County Sheriffs

The county sheriff in Alabama is not only the chief law enforcement officer, but he, also, has substantial responsibilities related to elections. He, along with the probate judge and county clerk, selects poll workers for primaries and general elections. Ala. Code §17-6-1. He distributes voting materials and keeps the peace during elections. Ala. Code §§17-16-22, 17-16-70. Blacks have been elected sheriffs in only six of the eight majority black counties:

Counties With Black Sheriffs	Percent Black Population
Macon	87%
Greene	78
Lowndes	75
Wilcox	69
Bullock	68
Perry	60

D. Other County Offices

Only three blacks have been elected to serve as circuit clerks; the same number have been elected coroner. There are four black tax assessors and five tax collectors. Black citizens have been successful in being elected to these offices only in heavily black counties:

County	Percent Black Population	Circuit Clerk	Coroner	Tax Assessor	Tax Collector
Macon	84%	X	X		X
Greene	78	X	X	X	X
Lowndes	75		X	X	X
Wilcox	69				
Bullock	68	X		X	X
Perry	60			X	X

E. Municipal Officials

Alabama's twenty-one black mayors are found almost exclusively in municipalities with black majorities. Only one has been elected in a municipality which is less than 50 percent black.

Percent Black Population	Municipalities with Black Mayors
100-75%	12
74-50	7
49-25	1
24-0	0

(Census data was unavailable for White Hall which has a black mayor, as it is unincorporated.)

Most municipal elections in Alabama are conducted on an at-large basis. Only four of the 428 cities and towns hold elections by district according to information supplied by the Alabama League of Municipalities.[5]

The at-large election system has the same dilutive effect on election of municipal governing bodies as it does on county elections. Two-thirds of the blacks serving on municipal councils or commissions are in cities or towns with black majorities. Most (71%) serve in towns of less than 5,000 people. Only twelve of the elected black council members are serving in cities or towns with populations 25% or less black.

Black Members of Municipal Governing Bodies

Percent Black Population	Number Elected Blacks
100-75%	62
74-50	35
49-25	36
24-0	12
	145

Table 7 in the Appendix shows Alabama municipalities which have black elected officials.

Black residents of cities and towns across Alabama are unable to elect blacks to at-large city councils and commissions. The large majority (101) of the 152 municipalities with this election system and with populations at least 25 percent black have no black elected officials. The table below lists towns of over 2,500 population, with at least one-fourth the population black, which have no black council members.

Cities/Towns At-Large Elections	Total Population	Black Population
Mobile	199,392	36
Tuscaloosa	73,228	35
Bessemer	31,720	51
Opelika	22,087	34
Alexander City	13,747	28
Troy	12,600	34
Eufaula	12,097	34
Greenville	7,807	39
Bay Minette	7,455	25
Lanett	6,897	31
Jackson	6,073	34
Roanoke	5,901	37
Monroeville	4,846	29
Wetumpka	4,341	25
Evergreen	4,171	40
Lafayette	3,647	57
Dadeville	3,263	39
Brundidge	3,213	54
Greensboro	3,248	61
Abbeville	3,185	36
Livingston	3.176	47
Brent	2,820	42
Linden	2,753	49
Graysville	2,642	35

See Table 8 in the Appendix for a complete listing of Alabama municipalities with at-large election systems and no black council members. Twenty-seven of these cities and towns have black majorities, as indicated in Table 9 of the Appendix.

As in county elections, single-member district elections facilitate the election of black candidates to the council. Each of the four cities which have this form has black elected officials.

City	Percent Black Population	City Council Total	Black
Selma	53%	11	5
Anniston	40	4	1
Montgomery	39	9	4
Phenix City	36	4	1

This section clearly shows that the effect of at-large election structures in Alabama's counties and municipalities is to make it almost impossible for black persons to be elected to those offices. The section is not meant to argue for proportional representation. It is merely the accepted academic technique for an initial step in examining the effect of election structures.[6] These results make a strong case for amending Section 2 of the Act to cover such structures. Regardless of the purpose of their adoption, the effect in Alabama is unquestionably discriminatory.

FOOTNOTES

SECTION IV

[1] Staff telephone interview with Mary Lou McHugh, (Association of County Commissions of Alabama staff member) 5/21/81.

[2] Choctaw, one black school board member, districted by Johnson v. Board of Education of Choctaw County, No. 77-169-P (S.D. Ala. March 24, 1978) and Mobile, two black school board members, districted by Brown v. Moore, 428 F.Supp. 1123 (S.D. Ala. 1976), aff'd, 575 F.2d 298 (5th Cir. 1978), vacated and remanded sub nom Williams v. Brown, 446 U.S. 236 (1930), elections held by districts pending decision on remand Moore v. Brown, ___ U.S. ____ 101 S.Ct. 16 (1980).

[3] Staff interview with William V. Neville 5/28/81.

[4] Staff telephone interview with Ruth Lockett, State Department of Education, Business Office 6/10/81.

[5] Staff interview with Julie Sinclair, Librarian, Alabama League of Municipalities 5/4/81.

[6] Richard E. Engstrom and Michael McDonald, The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on Seats/Population Relationship American Political Science Review, June, 1981.

Conclusion

That the Voting Rights Act has made effective participation in the democratic process a reality for scores of formerly disenfranchised black Alabamians is clearly shown in this report. That serious obstacles continue to confront black voters is documented as well. The reported problems underscore the need for extension of Section 5 and the amendment of Section 2 of the Voting Rights Act in order that these barriers may finally be removed and all Alabamians may freely take part in this most basic of rights.

TABLE 1

REGISTERED VOTERS BY COUNTY, 1980

County	Percent Black Population[1]	White Registered Voters		Black Registered Voters	
		Number	Percent of Total	Number	Percent of Total
Autauga	23%	11,900*	68%	5,600*	32%
Baldwin	16	39,037*	82	8,569*	18
Barbour	45	9,280	67	4,535	33
Bibb	24	6,636	82	1,440	18
Blount	2	Not Available			
Bullock	68	3,057	35	5,677	65
Butler	39	9,817	73	3,622	27
Calhoun	19	Not Available			
Chambers	36	11,612	77	3,448	23
Cherokee	8	10,509*	90	1,168*	10
Chilton	12	17,300*	94	1,200*	6
Choctaw	44	5,200*	63	3,000*	37
Clarke	43	12,693	68	5,868	32
Clay	17	Not Available			
Cleburne	5	7,185	96	268	4
Coffee	18	Not Available			
Colbert	17	28,291	88	3,815	12
Conecuh	41	7,404	66	3,814	34
Coosa	35	4,481	77	1,325	17
Covington	13	19,921	91	1,979	9
Crenshaw	27	6,912	72	2,688	28
Cullman	1	36,467	99.64	130	.36
Dale	19	20,830	89	2,519	11
Dallas	55	17,479	55	14,133	45
DeKalb	2	Not Available			
Elmore	23	14,246*	72	5,540*	28
Escambia	32	17,576	82	3,743	18
Etowah	14	56,857	90	6,331	10
Fayette	13	9,932*	86	1,617*	14
Franklin	5	Not Available			
Geneva	13	16,566	91	1,638	9
Greene	78	2,151	29	5,331	71
Hale	63	4,010	47	4,590	53
Henry	38	6,300	72	2,400	28
Houston	23	37,000	89	4,800	11
Jackson	5	26,136	96	1,089	4
Jefferson	34	251,247	73	92,544	27
Lamar	12	10,271	90	1,141	10
Lauderdale	10	33,600*	89	4,103*	11
Lawrence	17	16,265*	90	1,806*	10
Lee	25	34,084*	90	3,916*	10
Limestone	15	21,942	92	1.804	8
Lowndes	75	2,701	31	5,921	69
Macon	85	2,945	20	11,493	80
Madison	21	80,925	88	11,239	12
Marengo	53	11,290*	66	5,800*	34
Marion	3	Not Available			
Marshall	2	40,583	99	410	1
Mobile	32	109,101*	69	48,918*	31
Monroe	44	11,511	80	2,848	20
Montgomery	40	88,200	74	31,800	26
Morgan	10	45,312	95	2,514	5
Perry	60	5,531*	56	4,269*	44
Pickens	42	8,525	67	4,280	33
Pike	35	10,900	78	3,100	22
Randolph	24	9,050*	78	2,552*	22
Russell	40	15,150*	54	12,906*	46
St. Clair	10	Not Available			
Shelby	11	32,978	89	4,076	11
Sumter	70	5,490	45	6,710	55
Talladega	31	30,464*	69	13,687*	31
Tallapoosa	27	19,310	82	4,239	18
Tuscaloosa	28	56,905*	83	11,655*	17

County	Percent Black Population[1]	White Registered Voters Number	White Registered Voters Percent of Total	Black Registered Voters Number	Black Registered Voters Percent of Total
Walker	7		Not Available		
Washington	33	8,533	78	2,407	22
Wilcox	69	3,875*	31	8,625*	69
Winston	.6	12,507*	99.8	25*	.2
Total	25.6	1,455,980		416,665	

*Records of voter registration by race not maintained; numbers represent estimate of informed observers, i.e., Probate Judge and/or local black political leader(s)

[1] Population data: Alabama Office of State Planning and Federal Planning, Total Population By County: Alabama 1980, U.S. Census of Population Preliminary

TABLE 2

BLACK ELECTED OFFICIALS IN ALABAMA
FOR SELECTED POSITIONS
1981

	Total	Black	Percent of Total
State			
Senators	35	3	9%
Representatives	105	13	12
County			
County Commissioners	308	27	9
Probate Judges	67	2	3
Sheriffs	67	6	9
Judges	200	5	2
Coroners	67	3	4
Circuit Clerks	67	3	4
Tax Collectors	64[a]	5	8
Tax Assessors	68[b]	4	6
Superintendents of Schools	39	5	13
School Board Members	344	37	11
Municipal			
Mayors	428	20	5
Council Members	2041	145	7
Total	3900	278	7

a. The positions of tax collector and tax assessor have been combined into a new position called revenue commissioner in Cullman, Morgan and Pickens counties. These officials are included under Tax Assessors on this table.

b. Jefferson County has two tax assessors, one of whom serves Bessemer.

TABLE 3

ALABAMA MUNICIPALITIES WITH BLACK MAYORS
1981

Municipalities	Population	Percent Black
Akron	604	76%
Birmingham	284,413	56
Brighton	5,308	86
Camp Hill	1,623	62
Forkland	429	76
Franklin	133	26
Geiger	200	75
Gordon	362	70
Hobson City	1,288	99
Lisman	402	71
McMullen	164	76
Memphis	95	100
Mosses	649	100
Prichard	39,541	74
Ridgeville	182	97
Roosevelt City	3,352	99
Triana	285	98
Tuskegee	11,028	94
Union	358	84
Uniontown	2,112	71

TABLE 4

DISTRIBUTION OF BLACK CANDIDATES
BY TYPE OF OFFICE SOUGHT
1975-1980

Federal:	
U.S. Congress	1
State:	
Senators	4
Representatives	21
Other[1]	1
County:	
County Commissioners	83
Probate Judges	5
Sheriffs	22
Judges	6
Superintendents of Schools	6
School Board Members	71
Other Officials[2]	76
Municipal:	
Mayors	43
Council Members	353
	692

[1] Secretary of State.

[2] Includes circuit clerks, tax collectors and assessors, and representatives to Democratic Executive Committees.

bc Mr. Woods
NAACP

STATE OF ALABAMA

MONTGOMERY 36130

FOB JAMES
GOVERNOR

May 6, 1980

TO ALL BOARDS OF REGISTRARS,

It has come to my attention that many citizens in this state have applied for Deputy Registrars with their county Boards of Registrars. In some cases, because of confusion and the lack of understanding of the intent of the law, some boards have not appointed eligible persons as Deputy Registrars.

Therefore, I am calling on board members individually and collectively to appoint those citizens who apply to become Deputy Registrars, in keeping with the spirit and intent of the law. By appointing Deputy Registrars, you will be helping many citizens of this state to fight the high cost of gasoline and inflation, by making registration more accessible to all; particularly, since Deputy Registrars serve free and on a voluntary basis.

To ensure that the working people have a chance to register and vote, I am asking that you revise your working hours, where appropriate, by staggering them and holding some Saturday and evening sessions. Please know that I am counting on you to carry out this patriotic commitment on behalf of the people of Alabama.

Sincerely,

Fob James

TABLE 6

ALABAMA ACTS PASSED IN 1975 CONCERNING VOTING
AND NOT SUBMITTED UNDER SECTION 5

Annexations

Act Number	County	City
640	Morgan	Flint
167	Baldwin	Gulf Shores
719	Morgan	Hartselle
283	Morgan	Trinity
134	Morgan	Trinity
687	Etowah	Walnut Grove
708	Marshall	Albertville
589	Fayette	Belk
728	Morgan	Falkville
478	Escambia	Flomaton
882	DeKalb	Fort Payne
1067	Cullman	Good Hope
674	Lauderdale	Killen
1003	Talladega	Lincoln
610	Mobile	Chickasaw
689	Blount	Snead
1078	Randolph	Wedowee
1170	Randolph	Wedowee
115	Barbour	Blue Springs
120	Sumter	Cuba

Other Acts Concerning Voting

Act Number	County	Description
836	Madison	Provides for election of president and vice president of Huntsville City Board of Education
1162	State	Repeal of act requiring election of city boards of education in cities with population of 70,000-300,000
841	Baldwin	Amendment to act 239 to alter districts of commissioners
325	Calhoun	Anniston council-manager form of government abandoned
151	Tuscaloosa	Regulates use of voting machines
608	Montgomery	Mayor-council form of government established
957	Tuscaloosa	Appointment of Board of Registrars
995	Marshall	Use of voting machines approved
996	Marshall	Use of voting machines approved
136	State	Registration districts redefined and registrars appointed
72	Pickens	Board of Education creation by election
762	DeKalb	Provides for general election of members of county commission
1150	Mobile	Board of School Commissioners districts reapportioned, terms, and election dates fixed

448	Randolph	Probate judge given power to appoint registrars
743	Randolph	Probate judge given power to appoint registrars
678	Chambers	Board of Education election from districts
914	Marshall	Establishes committee to review county government
113	Jefferson	Amendment creating procedures for change of districting and exclusion of districts from municipalities. Limited to districts with 2400-3000 housing units.

Total of 38 acts not submitted

Source: Alabama Laws (and Joint Resolutions) of the Legislature of Alabama, 1975. Index and Volumes I-IV. "Index of Section 5 Submissions as of February 28, 1981," compiled by the United States Department of Justice.

TABLE 7

Alabama Municipalities with Black Elected Council Members

Municipality	Population		Elected Council Members	
	Total	% Black	Total	Black
Memphis	95	100%	5	5
Mosses	649	100	5	5
Hobson City	1,268	99	5	5
Roosevelt City	3,352	99	5	5
Triana	285	98	5	4
Ridgeville	182	97	5	5
Tuskegee	12,716	94	5	4
Brighton	5,308	86	5	4
Union	358	84	5	4
Midway	593	81	5	3
Akron	604	76	5	5
Forkland	429	76	5	4
McMullen	164	76	5	4
Geiger	200	75	5	5
Prichard	39,541	74	5	3
Lisman	402	71	5	5
Uniontown	2,071	71	5	3
Gordon	362	70	5	1
Union Springs	4,431	69	5	1
Hillsboro	278	66	5	1
Camp Hill	1,623	62	5	4
Autaugaville	843	59	5	1
Hurtsboro	752	46	5	1
Union Springs	4,431	69	5	1
Birmingham	284,413	56	9	3
Selma	26,684	53	11	5
Fairfield	11,040	53	13	8
Demopolis	7,678	49	5	1
Pickensville	132	48	5	1
Margaret	744	46	5	3
Atmore	8,789	44	5	1
Uphme	1,406	42	5	1
Thomasville	4,287	43	4	1
Brewton	8,680	40	5	1
Anniston	29,523	40	4	1
Montgomery	178,157	39	9	4
Silas	949	38	5	1
Lockhart	843	38	5	1

Municipality	Population Total	Population % Black	Elected Council Members Total	Elected Council Members Black
Talladega	19,128	37	5	1
Castleberry	847	36	5	1
Phenix City	26,353	36	4	1
Sipsey	678	35	5	2
Coffeeville	448	35	5	1
Coosada	950	35	5	1
Coosada	950	35	5	1
Ashford	2,165	32	5	1
Millport	1,287	32	5	1
Ashville	1,489	31	5	1
West Blocton	1,147	29	5	1
Adamsville	2,498	28	5	1
Ozark	13,188	23	5	1
Millbrook	3,101	27	5	2
Chatom	1,122	26	5	1
McKenzie	605	26	5	1
Dothan	48,750	26	4	1
Keenedy	604	25	4	1
Sylacauga	12,708	23	5	1
Slocomb	1,883	23	5	1
Florala	2,165	21	5	1
Citronelle	2,841	20	5	1
Attalla	7,737	18	5	1
Jemison	1,828	17	5	1
Riverside	849	17	5	1
Auburn	28,471	16	9	1
Hollywood	1,110	15	5	1
Jacksonville	9,735	12	5	1
Piedmont	5,544	10	5	1
Bayou La Batre	2,005	10	5	1

TABLE 8

TOWNS 25%-50% OR MORE BLACK WITH NO BLACK ELECTED COUNCIL MEMBERS 1981

Town	Population	Percent Black Population
Abbeville	3,155	36%
Alexander City	13,807	27
Alicevile	3,207	45
Ashland	2,052	30
Ashville	1,489	31
Bay Minette	7,455	35
Benton	74	31
Boligee	164	49
Brantley	1,151	33
Brent	2,842	42
Camden	2,406	40
Carrollton	1,104	43
Cherokee	1,589	28
Childersburg	5,084	26
Columbia	881	25
Dadeville	3,263	39
Daviston	334	26
Dozier	494	39
Eufaula	12,097	34
Evergreen	4,171	40
Faunsdale	174	34
Franklin	133	26
Fulton	606	32
Gadsden	47,255	25
Gantt	314	28
Georgiana	1,993	50

Town	Population	Percent Black Population
Glenwood	341	35
Gordo	2,112	38
Goshen	365	26
Graysville	2,642	35
Greenville	7,807	39
Grove Hill	1,912	34
Haleburg	106	25
Harpersville	934	40
Headland	3,327	34
Jackson	6,073	34
Lanett	6,897	31
Leighton	1,218	50
Lincoln	2,081	42
Linden	2,773	39
Lineville	2,257	40
Lipscomb	3,741	43
Livingston	3,176	47
Loachapoka	335	36
Louisville	791	43
Lowndesboro	207	41
Madrid	238	30
Maplesville	754	32
Millry	956	40
Mobile	199,392	36
Monroeville	4,846	29
Mount Vernon	1,038	41
Mulga	405	44
Myrtlewood	252	28
New Brocton	1,392	30
Notasulga	851	27
Oak Hill	63	38
Opelika	22,087	34
Parrish	1,583	33
Pine Apple	298	47
Providence	363	33
Reform	2,245	37
Repton	313	36
River Falls	669	41
Roanoke	5,901	37
Rockford	494	34
Silas	393	38
Town Creek	1,201	27
Trov	12,600	34
Tuscaloosa	73,228	35
Vincent	1,652	28
Wadley	532	28
Waldo	231	38
Waverly	190	42
Wedowee	908	34
Wetumpka	4,341	25

TABLE 9

ALABAMA MUNICIPALITIES OVER 50% BLACK
WITH NO BLACK ELECTED COUNCIL MEMBERS

	Population	Percent Black	County
Gantts Quarry	71	86	Talladega
Vredenburgh	433	86	Monroe
Newbern	307	84	Hale
Dayton	911	81	Marengo
Epes	399	80	Sumter
Beatrice	558	71	Monroe
Gainesville	207	66	Sumter
Newville	814	64	Henry
North Johns	243	64	Jefferson
Fort Deposit	1,519	63	Lowndes
York	3,358	62	Sumter
Goodwater	1,895	62	Coosa
Greensboro	3,248	61	Hale
Moundville	1,269	61	Tuscaloosa
Hayneville	592	60	Lowndes
Five Points	197	59	Chambers
Lafayette	3,647	57	Chambers
Bessemer	29,611	55	Jefferson
Brundidge	3,213	55	Pike
Pollard	144	54	Escambia
Eutaw	2,444	53	Greene
Thomaston	679	53	Marengo
Georgiana	1,993	50	Butler
Leighton	1,231	50	Colbert

Senator HATCH. Our last witness will be Mr. Armand Derfner of the Joint Center for Political Studies in Washington, D.C. We consider him to be an authority on the Voting Rights Act.

Mr. Derfner, I apologize to you for making you wait until last. Just to make the point again, I hope we can get all witnesses to get their statements in at least by the night before.

Mr. DERFNER. We will try to do that.

Senator HATCH. We have a 3-day rule really, but please go ahead.

STATEMENT OF ARMAND DERFNER, THE JOINT CENTER FOR POLITICAL STUDIES

Mr. DERFNER. Thank you, very much, Senator. I have a prepared statement which I would like to submit for the record.

Senator HATCH. Without objection, that will be placed in the record at the conclusion of your oral remarks.

Mr. DERFNER. And I think because some of the topics in here have been covered before and because of the lateness of the hour, I would like to cut it down and simply summarize it. I will be happy to answer questions because I know some of the things that I will not be going through are in fact some of the things that have been debated between members of the subcommittee and various witnesses.

Senator HATCH. All right.

Mr. DERFNER. I would like to focus just on two particular things in the statement. One has to do with the test for proving dilution or discrimination as I understand it existed during most of the 1970's. This is the test that I understand the amended section 2 is

designed to return to. The results test of section 2 is supposed to be a return to the standard of *White* v. *Regester* which was familiar in a good number of cases during the 1970's until the *Mobile* case essentially supplanted it.

I would like to say that in that test under *White* v. *Regester* one of the most important things about that test is, quite the contrary of what a number of witnesses have spoken about in connection with section 2, there never was any sense of a quota system or a principle of proportional representation. Quite the contrary, that notion was specifically rejected.

In *White* v. *Regester* there was a specific statement that said:

> To sustain such claims—that is, claims of voting dilution—it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. Plaintiff's burden is to produce evidence to support findings that political processes leading to nomination and election were not equally open to participation by the group in question; that its members has less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Mr. Chairman, the same unvarying theme is involved in all these cases—no requirement of proportional representation.

I would like to mention at this point that there has been a lot of discussion about the second sentence or the additional sentence of amended section 2 which says, as I recall it, that the failure of a minority group to elect legislators in numbers equivalent to its proportional population is not in and of itself a violation.

My understanding is that basically it is the same as the first sentence in the portion that I read from *White* v. *Regester;* that is, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. Therefore, if there are people who are questioning whether that additional sentence of amended section 2 means what it sounds like or is an opening to something else or is in fact designed to do something else, I would urge them to look at *White* v. *Regester* to see if their quarrel is with the faithfulness of the sentence in section 2 to *White* v. *Regester* or if their quarrel is with the principle of *White* v. *Regester.*

Now I said that the unvarying theme of all the cases before *Mobile* was that there was absolutely no requirement—in fact, there was a rejection—of the principle of proportional representation. If you will read the cases—and I might say on this, Mr. Chairman, that we are preparing a summary and a collection of those cases and we hope to present those to the subcommittee soon, so that we will have some raw material for you to look at—you can compare and actually look at sentences and paragraphs rather than talking in the abstract, as I am afraid a number of the witnesses have been doing.

Senator HATCH. That will be helpful.

Mr. DERFNER. I think that the best place to look is not in the cases we won but in the cases we lost, of which there were a good number. I have heard it said repeatedly that all that is necessary to prove these cases under a results test is at-large elections, lack of proportional representation, and an additional scintilla of evidence. There was some discussion, as I recall, with some of the earlier witnesses today.

I think I am a pretty good lawyer. Others may disagree. Some of the other lawyers you have heard here are also pretty good lawyers. If the statements about how little is needed to prove these cases were accurate, then I wonder why we did lose some of those cases—cases in which we were able to show that there was nothing near proportional representation and that there was a lot more proof of exclusion besides. I have listed in my statement just several of the cases that we lost.

Why did we lose cases in Lee County, S.C.; Moultrie, Ga.; Fairfield, Ala.; Marengo County, Ala.; Jackson, Miss.; Pine Bluff, Ark.; Lufkin, Tex.? Those are all cases in which there is no question that there was proof of at-large elections, lack of proportional representation—in fact, far from anything that might be dreamed of as proportional representation; and much more than scintillas of evidence besides. Yet, those cases were decided adversely.

In fact, in Lee County, S.C., the judgment was rendered by Hon. Robert F. Chapman who I will be discussing in a minute in connection with Edgefield County. He looked at the facts in the two cases and determined that we had made out our case in Edgefield County but we had not made out our case in Lee County.

Senator HATCH. Why did you lose those cases if, in fact, the results test was the prior test?

Mr. DERFNER. Because the judges decided that we hadn't shown enough to prove the necessary lack of access; that we hadn't shown enough to show that the result was in fact discriminatory as opposed to simply losing elections in the normal process of politics.

In other words, the Supreme Court in *Whitcomb* v. *Chavis* had a case in which it was claimed there was a lack of access. The court there decided that what was shown was simply that the normal process of politics had resulted or had led to blacks losing elections or not being represented in the numbers that they would like.

That was distinguished in *White* v. *Regester*. By those two cases and the succeeding cases, the courts built up standards by which they could determine what was really lack of access, denial of access, and discrimination as opposed to simple lack of success.

Senator HATCH. My contention is that the true test during that period of time really has and always had been the——

Mr. DERFNER. I am sorry; I can't hear you.

Senator HATCH. My contention is that the test always has been the intent test.

Mr. DERFNER. Well——

Senator HATCH. That may be part of the problem; I don't know.

I don't know many witnesses who have come in and said that it would be easy to prove cases under the intent test. I don't think it is easy, but I also don't think that it is tremendously difficult, either. I think you can make a case out through circumstantial evidence. I think the ones that have been made out, certainly the last two, the *Escambia* case and the *Buxton*, have been made successfully with the intent test even though, admittedly, it is certainly more difficult than the simple results or effects test would be. Degree of difficulty shouldn't be dispositive in any event.

Mr. DERFNER. *Escambia County* is a smoking gun case, Mr. Chairman.

Senator HATCH. That is arguable.

Mr. DERFNER. *Lodge* v. *Buxton* is an unusual case. I think that is a case that is absolutely extreme in every single respect. Yet, even so, I am not sure that it will be successful in the end. It is on appeal to the Supreme Court, as you know. In fact, it is due to be argued 3 weeks from today. I hope we will win it, but I wish I could be more confident.

I wonder if I could go back for a moment to a comment you made a moment ago, and that is about what the test was before *Mobile.*

Senator HATCH. Right

Mr. DERFNER. You have indicated your belief that there was still an intent test. I know that as a witness I am not supposed to be asking questions, but I wonder if there is something that I could be pointed to in *White* v. *Regester* that shows there was a notion of intent there.

I have read *White* v. *Regester* many times. I was involved in the case, in trying the case and in appealing the case. I don't remember any notion of intent in the preparation of the case, in the argument of the case, or in the opinion that I have seen.

Senator HATCH. Well, of course, I haven't had the extensive contact with *White* that you have, but the Supreme Court concluded that that was the case. Certainly, Justice Stewart did.

Mr. DERFNER. Well, that is what Justice Stewart said in *Bolden*——

Senator HATCH. That is right.

Mr. DERFNER [continuing]. In describing *White.*

Senator HATCH. Well, they decided the case. I presume that he knew what he was talking about; maybe he didn't. Certainly that is a dictum, but nevertheless——

Mr. DERFNER. Pardon me?

Senator HATCH. Certainly, that is a dictum; nevertheless, they held it to be a case decided under the intent test.

Mr. DERFNER. But if we go back to *White,* if I could just read a sentence or two from the *White* case in talking about the Mexican-American claims in Bexar County which is the county that San Antonio is located, the court says:

> The district court considers the Mexican-Americans in Bexar County to be an identifiable class for 14th amendment purposes and proceeded to inquire whether the inpact of the multi-member district on this group constituted invidious discrimination.

I don't see anything about intent in the *White* case. Frankly, I don't see anything about intent in the paragraph describing the *White* case in *Bolden.* It may well be, now that Justice Stewart has said in *Bolden* that this is what *White* meant, that that is what we must understand it to be but it simply was not there in *White.* The fact remains that there were cases—and maybe this is the proof of the pudding—which were won before *Mobile* that have gone the other way, the very same cases, after *Mobile.* I think in my testimony I have described one of those cases. It is a case that I have been involved myself with for a number of years. That is the *Edgefield County* case.

Edgefield County is perhaps the absolute controlled experiment because that is the case that we won on the 17th of April 1980. *Mobile* came down on the 22d of April 1980. Following *Mobile,*

Judge Chapman was forced to withdraw his opinion and to change his mind.

This fits right in with cases like *Cross* v. *Baxter,* which is Moultrie, Ga., and cases like *Thomas County,* the *Thomasville Branch of NAACP* v. *Thomas County.* The *Thomas County* case is an interesting one because if you look at the order——

Senator HATCH. If you will excuse me, I have a call from the White House; I will be right back. I am sorry for all these delays.

One point which stands out in my mind about the *Mobile* case is that the Supreme Court itself admitted that it was not clear on what *White* really stood for; at least that is how I interpreted their decision. If that is so, why should we write *White* into the law now since nobody seems to know what the case actually stands for, despite Justice Stewart's decision stating that *White* meant intent?

Why don't you go ahead and make a record on that while I am gone?

Mr. DERFNER. In connection with the *Edgefield County* case—I will just turn to that for a minute now—the judge in the case was Robert F. Chapman, who was appointed to the bench by President Nixon. He has recently been appointed to the court of appeals by President Reagan and there is no question that Judge Chapman is quite a cautious, conservative judge.

As I say, on April 17, 1980, he handed down his ruling declaring that the at-large elections for Edgefield County Council were discriminatory. I have brought a copy of the opinion and, when the chairman comes back, I will ask permission to put that into the record.

Rather than go into detail about the findings and conclusions in the case, I would like to put that opinion into the record, but I will summarize it very briefly.

First, the court analyzed the series of elections and found as follows:

> The court's overall finding is that blacks were virtually totally excluded up to 1970 and that since that time they have progressed to minimal tokenism.

The court noted the failure to appoint any significant number of blacks as election officials and said of this:

> Evidence concerning the past few years' elections in Edgefield County showed exclusion of blacks by officials exercising State action in a critical part of election process.

The court went on:

> Mr. Crouch, secretary of the Edgefield County Democratic Party, testified that blacks do not participate as equals in the electoral process of Edgefield County and that the present system is the legacy of a long history of racial segregation. He said that there has been some improvement but it must come slowly and indicated that no greater speed would be possible voluntarily, that it would take a court order.

I have a vivid recollection of that testimony because Sam Crouch, who is a very nice fellow, was up on the stand and he was talking about why there weren't blacks appointed as polling officials, poll managers, or poll clerks; why blacks hadn't been in other parts of the election process.

We took a stab and we asked him what he traced it to, and he said,

Well, it's just the way it has always been here in Edgefield County. The whites do this and the blacks do that.

Emboldened and, I guess, encouraged by the fact that he seemed to be talking candidly, we asked him another question. We said, "Well, how long do you think it will go on that way?" He said, "It will go on that way until you get a court order."

Judge Chapman went on and, based on these findings and many, many others that are in this 20-page opinion, Judge Chapman concluded that we had met the standards of *White* v. *Regester* and *Zimmer* v. *McKeithen*, which I think he understood quite well—notwithstanding the question the chairman has raised, I think the judges dealing with these cases have understood the standards quite well

Judge Chapman put it this way, and this is a rather long quote but, if you don't mind, I would like to read it:

There is still a long history of racial discrimination in all areas of life. There is bloc voting by the whites on a scale this court has never before observed, and all advances made by the blacks have been under some type of court order. Participation in the election process does not mean simply the elimination of legal, formal, or official barriers to black participation. The standard is whether the election system as it operates in Edgefield County tends to make it more difficult for blacks to participate with full effectiveness in the election process and to have their votes fully effective, equal to those of white.

Black voters have no right to elect any particular candidate or number of candidates, but the law requires that black voters and black candidates have a fair chance of being successful in elections. The record in this case definitely supports the proposition and finding that they do not have this chance in Edgefield Court.

If black candidates lose in the normal give-and-take of the political arena, then the courts may not interfere. Under no theory of the law can a court direct a white to vote for a black or a black to vote for a white. However, if there is proof, and there is ample proof in this case, that the black candidates tend to lose not on their merits but solely because of their race, then the courts can only find that the black voting strength has been diluted under the system and declare the same unconstitutional.

With all due respect, I think that is what the *White* standard is about. That is what the results test is about. That is what section 2 is about. That is the standard we had. That is the standard we would like to go back to.

Mr. MARKMAN. May I ask you one question, Mr. Derfner, before Senator Hatch gets back?

Mr. DERFNER. Sure.

Mr. MARKMAN. This will, of course, be on the permanent record, as you know.

Mr. DERFNER. Excuse me?

Mr. MARKMAN. This question will of course be for the permanent record, and I guess that's the significance of it all.

When you testified before the House Judiciary Committee, you indicated that there was a difference between the effects test in section 5 and the proposed results test for section 2, but at the same time you told Congressman Hyde—and I believe it is on page 922 of your House testimony, and I quote you:

"My understanding of the word 'result' is that it is not designed to introduce a new uncertainty into the area, that it is not designed to go any further, for example, than the word 'effect' in your own amendment."

I am just a little confused. Is the results test synonymous with the effects test or is it not?

Mr. DERFNER. I think it is not synonymous. I think part of that had to do, of course, with the fact that Representative Hyde had introduced the bill in which he proposed an effects test in section 2. His bill was significantly different in the sense that his effect test would have been for prospective cases only and not retrospective or past cases. However, certainly the results test is not designed to go further than the effects test and, in fact, it is not designed to go as far.

The effects test under section 5 is obviously different because it is a different burden of proof. The burden of proof is on the submitting jurisdiction, not the voter.

There is also a retrogression standard that has been built into section 5 as a result of the *Beer* case. Those kinds of things create some of the difference.

What I was talking about there was that the result test that we understood was designed to be similar to what Representative Hyde had in mind when he talked about an effects test. If you will look at either his testimony or, I believe, his letter of June 23 to Chairman Rodino, he talked about his effects test as being equivalent to *White* v. *Regester.*

Mr. MARKMAN. Despite the fact that you recognize that we are talking about a new test for section 2, you are comfortable with your assertion that it is not "designed to introduce a new uncertainty" into this area?

Mr. DERFNER. No; I don't think that it is because it is a new test only in the sense that it is not the test only that we have today. The test that we have today is the *Mobile* test, which requires proof of purpose. However, it is not a new test in the sense that it is a return to the test that was familiar to the courts in *White* v. *Regester, Whitcomb* v. *Chavis, McCain* v. *Lybrand,* and those cases.

Mr. MARKMAN. You are comfortable with that despite Senator Hatch's point, which seems unmistakeable that the court in *Mobile* was somewhat confused as far as what the *White* v. *Regester* test was?

Mr. DERFNER. In our system of jurisprudence one of the problems we have is that cases come along and are supposed to be reconciled with previous cases. I think it is always necessary to take with a grain of salt what one court says about prior cases.

Perhaps the best example of that is *Gomillion* v. *Lightfoot. Gomillion* v. *Lightfoot* is a case that has been discussed in many ways in these hearings. It is a case that probably could be read either way—as an effects case, a purpose case, an inevitable effects case. It has, in fact, been read all those ways or called all those things by the Supreme Court.

In *Palmer* v. *Thompson* in 1971 the Supreme Court said that *Gomillion* v. *Lightfoot* was not a purpose case because in fact purpose is irrelevant in our law; that it was an effects case.

In 1976, in *Washington* v. *Davis* they said, "*Gomillion* v. *Lightfoot* was a purpose case. In fact, if there are earlier cases of ours in which we have said things that sounded like it was an effects case, well, we really mean it was a purpose case."

I do think that it is necessary to take later characterizations of earlier cases with a grain of salt. As I refer to it in the statement here, one of the reasons I went back to check my recollections with

other people, and specifically with briefs in Supreme Court—another lawyer and I went back and read the parties "briefs in about 10 cases in the Supreme Court from 1965 to 1975, cases in which there would have been discussions of at-large elections, *Whitcombe* v. *Chavis, White* v. *Regester, White* v. *Regester* a second time, *Taylor* v. *McKeithen, Kilgarlin* v. *Hill, Fortson, Burns,* and several others. We never once found any indication by anybody that there was an argument based on purpose.

Some of those briefs were filed by eminent lawyers. In fact, *White* v. *Regester* in the State of Texas was represented by Leon Jaworski. I read his brief with great care. I am bound to say that, from what I could tell of that brief, he thought that there was not a purpose requirement.

Senator HATCH. Well, let me ask you this, Mr. Derfner: Are you opposed to the concept of at-large elections?

Mr. DERFNER. No.

Senator HATCH. You are not?

Mr. DERFNER. Not at all. In fact, I know that a great majority of the local governments in this country are elected at large. I think in most cases that is a matter of indifference to the court; that is, it has no legal or judicial significance. It is a political question for the people to decide.

Senator HATCH. If you are not opposed, how do you explain your comments before the House Subcommittee on Civil and Constitutional Rights on March 17, 1975, in which you stated, "And I would hope that maybe 10 years from now we would have learned and progressed enough to say that for some of the things that section 5 has done we no longer need it while for other things it might be time to put in permanent bans. For example, we might want to put in permanent bans that bar at-large elections not only in the covered States, but perhaps in the rest of the country as well." Do you remember making that statement?

Mr. DERFNER. I don't remember it specifically, but I am sure I did.

Senator HATCH. Have you changed your opinion between that day and today or do you still feel that at-large elections should be permanently banned?

Mr. DERFNER. No; I don't feel they should be permanently banned. It is hard for me to recreate what I was thinking about then.

Senator HATCH. All right.

Mr. DERFNER. I will say, interestingly enough, that the notion of banning at-large elections permanently was first raised, to my recollection, by Congressman Caldwell Butler. I remember it was from his suggestion that I started thinking about the notion of whether it made any sense.

No, I don't think at-large elections should be banned because I think for the most part, as I say, they are not discriminatory. Whether you like it or not depends on your preferences. You may find that they suit you in one place and don't in another. However, again, as I say, that is a matter of judicial indifference.

Senator HATCH. Do you like them?

Mr. DERFNER. Pardon me?

Senator HATCH. Do you like at-large election systems?

Mr. DERFNER. I am trying to think of places in which I have had at-large elections or district elections. I think, with a couple of exceptions in the South, they have been matters of indifference to me. In other words, I didn't have any strong feeling that I was better represented by one or the other.

Senator HATCH. OK. In the testimony of Archibald Cox before the House Judiciary Committee last year he attacked racial gerrymandering stating the following: "Pockets of minority voters can be dispersed throughout many districts or packed into a few districts to dilute minority representation."

If, as Professor Cox suggests, it is possible to dilute the minority vote in both of these ways, how is the Government able to tell when it has precisely the correct racial mix?

Mr. DERFNER. There is no precisely correct racial mix. There is a range of things. If I could go back for just a minute to the at-large elections, the at-large elections that I have been litigating or that I have been focusing on are those in which the result of those at-large elections is basically to shut out the minority voters. It is not a question of whether they will get more or less or whether the majority voters will get more or less. It is a question of some versus nothing.

If you turn to what happens in the district system, I think there is likely to be a great range of what is permissible. In fact, I think that the Houston example that Dr. McManus talked about is probably a good example. In that case there was a plan to be drawn for the Harris County Commissioners Court, which has four members on it. There is a substantial minority black population. I think there is also a fair-sized Hispanic population.

There was a lot of debate between some blacks who wanted the districts drawn in such a way that there one district was 49 percent black, 13 percent Hispanic, 62 percent minority, if you count them together. There were other blacks that thought that they would have more influence as blacks or with people with whom they were politically associated if black voters were dispersed. Therefore, rather than having 49 percent blacks in one district and maybe small percentages in others, they might have 30 percent in two or three districts.

I don't know enough about Houston to be confident about this—but that Houston maybe the kind of city now where in fact a minority can exercise some influence; where you don't have the kind of frozen situation we have been talking about in the Edgefield Counties and Moultrie, Ga. You don't have the frozen situation, so that blacks can have some influence as a minority.

If it is that kind of situation, my belief is that either method that would have been adopted by the governing body could have been regarded as permissible. In fact, they adopted the plan that had 49 percent blacks in one district and the Department of Justice approved it. If they had adopted the other plan, the Department might have approved that, too. As I say, I don't know enough about Houston to be confident about that.

Therefore, I don't think there is any precise racial mix. What there is, is a range that you look at just from comparing alternatives to see if in fact a group has really been unfairly throttled, and it can happen in a variety of ways.

Senator HATCH. Thank you, Mr. Derfner. We appreciate your testimony. We appreciate the effort and you are going to send us some additional information, to that which you have supplied here today, which we will incorporate into the record.

Mr. DERFNER. Yes; we will.

[The prepared statement of Mr. Derfner and additional material follow:]

Prepared Statement of Armand Derfner

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the Voting Rights Act. I agree with your statement that these hearings are quite important, and I hope to shed more light than heat on the subjects I discuss today.

Since early last year I have been with the Joint Center for Political Studies, studying and analyzing the Voting Rights Act in detail. The Joint Center is a nonpartisan research organization which focuses on issues relating to the participation of blacks and other minorities in the political process. Throughout its eleven year history, it has been noted for its analyses and publications on these issues, including studies of minority participation and voting patterns in local, state and national elections, annual surveys of black elected officials, and two editions of a book entitled "Federal Review of Voting Changes."

Before coming to the Joint Center for Political Studies, I was in active practice in Charleston, South Carolina. My own experience with the Voting Rights Act goes back to August 1965, within one week of its passage, when I went to Greenwood, Mississippi, to look into a problem involving the federal examiners assigned to Leflore County, Mississippi. Since that time, I have

been involved in much of the litigation that this Subcommittee has heard described, including Allen v. State Board of Elections, 393 U.S. 544 (1969); City of Richmond v. United States, 422 U.S. 358 (1975); White v. Regester, 412 U.S. 755 (1973); and the Edgefield County case, McCain v. Lybrand.

In my statement today, I will try to build upon what others have said by summarizing the major points, but will try to avoid beating dead horses.

I would like, today, to talk about section 2 of the Act. To me, the amended section 2 adopts a clear test which cannot give rise to the fears expressed by some witnesses and Members of the Subcommittee. It restores the test (commonly known as the test of White v. Regester) that was in use for a decade before Mobile v. Bolden dramatically changed the law. The White v. Regester test, which would be restored by amended section 2, does not require any proof of discriminatory purpose, and it has a number of important virtues: it came to be well understood by the courts and litigants; it is circumscribed in application because the specific facts that have to be shown will arise in only a small fraction of our political subdivisions; and it is a test that rejects quotas or any requirement of proportional

representation.

In contrast, the discriminatory purpose requirement of Mobile which is now in the law is unsound and unworkable, because it focuses on a requirement that generally has nothing to do with how the system now works in fact; it is almost always impossible to prove; and it thereby immunizes elections systems that are extraordinarily discriminatory.

The White v. Regester test incorporated in amended section 2 has a clear track record which shows it to be sound and workable. On the other hand, the Mobile v. Bolden test (proof of discriminatory purpose is required) has a track record which shows it to be unworkable and to leave intact blatant discrimination.

I would like to describe these two records briefly, and then address some of the objections of the opposition witnesses and Members.

The White v. Regester Test in Amended Section 2

At the outset, two points are worth making here. First, the test of amended section 2 is put in terms of "result," not "effect." According to my understanding, this choice of words was designed to make it easier to give the test a specific, well defined content; that is,

that of White v. Regester. The "results" test under section 2 is not the same as the "effects" test under section 5, which shifts the burden of proof and which has a non-retrogression standard built in. (I should say here that I disagree with Dr. McManus: I do not see a proportional representation rule in section 5, and I doubt that Mr. Reynolds does either.)

Second, the test under amended section 2 was built up in a number of cases, some of which intermingled concepts of section 2 and the 14th and 15th amendments. By and large these have been used in the same way, and many cases have included claims brought under the first, 13th, 14th and 15th amendments and section 2 and 42 U.S.C. § 1971. Because the applicable principles draw from each of these sources of law, it is not useful to go back and try to create separate lines of authority.

Whatever Mobile has to say about what is the correct rule of law, it is clear to me that before Mobile, courts and litigants uniformly operated in fact on the rule that proof of discriminatory purpose was not necessary to make out a case of voting discrimination. This understanding is confirmed, as Mr. McDonald has pointed out, by the Mobile plurality itself. 466

U.S. at 71.

It has also been confirmed by every witness who has come before you who had any experience in those cases. That recoll-ction is also the same as my own, and to check that recollection I have, with another lawyer, gone back over the briefs in the relevant Supreme Court cases in the decade beginning with Fortson v. Dorsey, 379 U.S. 433 (1965). We found no trace of any argument that discriminatory purpose was required.

The pre-Mobile rule for at-large elections was first suggested in Fortson v. Dorsey, and the following year in Burns v. Richardson, 384 U.S. 73, 88 (1966), where the Supreme Court said

> Where the [equal population] requirements of Reynolds v. Sims are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the population.

In both Fortson and Burns, the dilution claims were rejected because no proof was presented, but the doctrine was fleshed out in two cases decided in 1971 and 1973: Whitcomb v. Chavis, 403 U.S. 124 (1971) (Indianapolis) and White v. Regester, 412 U.S. 755 (1973)

(Dallas and San Antonio, Texas). In the course of rejecting the voters' challenge in Whitcomb and upholding both the Black and Hispanic voters' challenges in White, the Supreme Court described the proof that had to be presented. Oversimplified, the doctrine laid down in these two cases was that a claim of dilution cannot rest upon a showing that voters of a racial minority are simply unsuccessful in politics, but depends on evidence that voters of a racial minority are isolated within a political system and are thus denied access in a practical sense (not in the sense of formal barriers to registration and voting). The types of proof necessary to make the requisite showing were spelled out in these and succeeding lower court cases. The precise proof might vary, but the essential element of proving that the racial minority was "shut out," i.e., denied access -- not simply to winning offices but to the opportunity to participate in the electoral system -- was always required.

This, then, was the definition of a system that operated "designedly or otherwise" to minimize or cancel out the voting strength of voters of a racial minority. It was the rule that was applied by the lower courts over the next several years, and it is the rule that amended

section 2 adopts.

It was never an easy rule. The cases were long (often taking several years), arduous (because the proof required a detailed analysis of the political system of the political subdivision involved), and, for that reason, limited in number.

I have attached to my statement a list of cases prepared by the Department of Justice, showing a total of ten final judgments since 1974 in which a federal court made a finding of voting discrimination. (Two of these appear not to involve at-large elections.) While this list omits consent decrees and some cases of which the Justice Department is not aware, its size shows that there was hardly a floodgate of cases.

An examination of these cases and others also shows that no quota system of principle of proportional representation was ever considered by any of these courts. Indeed, in White v. Regester, as in Whitcomb v. Chavis, that notion was specifically rejected:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members

> had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-66.

Mr. Chairman, the same unvarying theme is involved in all these cases -- no requirement of proportional representation. In fact, the best place to look is not the cases we won, but the cases we lost, of which there were a good number. I have heard it said repeatedly that all that is necessary to prove these cases under a "results" test is at-large elections, lack of proportional representation, and an additional scintilla of evidence. Well, I think I'm a pretty good lawyer, and the other lawyers you have heard here are pretty good lawyers. If those statements about how little is needed to prove these cases were accurate, why did we lose cases in which we could show that there was nothing near proportional representation and a lot more proof besides? Why did we lose cases in Lee County, South Carolina? In Moultrie, Georgia? In Fairfield, Alabama? In Jackson, Mississippi? In Pine Bluff, Arkansas?

I suggest that anyone who wants to describe the rules of these cases ought to look at them first.

- - -

Proof of Discrminatory Purpose Under the Mobile Test

Just as I have heard speculation about the "results" test, I have also heard speculation about how ordinary and straightforward proof of purpose is under Mobile. Here, too, though, there is a track record, and it is dismal.

The simplest way of showing what has happened since Mobile is to note that each of three lawyers who have testified here, Mr. McDonald, Mr. Avila, and Mr. Walbert (who collectively have accounted for a healthy percentage of all the dilution cases that have been filed), says he has filed no dilution cases since Mobile. Not one case by all three lawyers combined. In fact, I know of exactly one dilution case that has been filed since Mobile. Obviously, there may be one or two that I may have missed, but I doubt there would be more.

More telling, though, is some evidence about a case that has been tried since the Mobile decision -- in fact, it is the Mobile case on remand. You are of course familiar with how difficult it is to prove discriminatory purpose when you are dealing with a governmental act rather than an individual act, and especially when it may have taken place many years ago, and especially (as

Mr. Walbert pointed out) when Mobile says you cannot presume that the city or county intended the natural consequences of its acts. I would like to read to you from part of a letter that one of the lawyers in the Mobile retrial sent me not long ago, describing what went into that retrial. (The retrial was on the issue of discriminatory purpose; interestingly enough, it developed that Mobile's at-large system began not in 1911, as widely believed, but in 1869.)

The letter began with an estimate of lawyers' time of six thousand hours for all lawyers in the 18 months since the Supreme Court decision on remand issues, plus four thousand, four hundred hours for expert witnesses and research assistants, and an estimate of $120 thousand in out-of-pocket costs for all parties, not counting attorneys' fees. And for what?

> This amount of attorney and expert witness time resulted in a seven and one-half day trial as to the City and four days as to the School Board. In both cases it was necessary to focus on each discrete change in electoral systems for the City of School Board which occurred any time from 1819 to the present. While some of the events discussed occurred as recently as 1976 (School Board) and 1965 (City), most of the focus in both cases concerned the period from 1869 to 1876.
>
> Sun voluminous preparation did not narrow the issues. Rather, it became necessary es-

> sentially to recreate the period of time in which the subject legislation was enacted. Hundreds of newspaper articles from Mobile and around the state were submitted in evidence. Private correspondence files from public figures of that time located in [Mobile, Montgomery and Chapel Hill] were introduced. . . . .
>
> * * *
>
> This is only one example of numerous minute, discrete historical events which a court is asked to piece together to respond to the intent standard. I believe it is safe to say that virtually everyone in the courtroom felt we were trying history, groping for the gossamer and indulging in some sort of never-never land inquiry when attempting to fathom such discrete, particular and personal decisions that occurred more than one hundred years ago. Not only are such events seldom documented nor are there any survivors, but we simply do not even have a good feel for the ambience or tenor of the times.

Finally, turning to the question of evidence of recent times:

> However, there are clearly problems with the intent standard even in those situations. When there are live participants available to testify, there is a strong tendency to reinterpret history and present it in a self-serving manner. Few former officeholders are willing to candidly admit that there was any racial motivation in their actions.

Nonetheless, this ordeal might conceivably be justified if it were still possible to challenge those electoral systems in which voting discrimination is

severe. The track record since Mobile says otherwise, at least if there is no smoking gun. First, there is Mobile itself, both the City and the County School Board. Those cases may be won on remand, because there may be a smoking gun lurking in those 10,000 hours of work. But the evidence which went to the Supreme Court the first time was as strong as, or stronger than, the evidence in White v. Regester, yet the plurality described it as "most assuredly insufficient." Second, there are the two cases in Pensacola and Escambia County -- both are smoking gun cases. Finally, there is Lodge v. Buxton. That is a case of the greatest extremity in every respect, yet the Supreme Court has granted a stay pending appeal, and the Justice Department has backed away from earlier support and failed to file an amicus brief. I know that you, Mr. Chairman, have described this as a good case for showing how to prove intent, but I wonder whether Attorney General Smith and Assistant Attorney General Reynolds agree.

Aside from this handful of smoking gun cases, what do we have? Mr. McDonald has told you about Cross v. Baxter, Mr. Walbert has told you about Thomas County, Georgia, and I would like to tell you about Edgefield County, South Carolina. This is the perfect controlled

experiment case. The case is called McCain v. Lybrand, Civil Action No. 74-281 (District of South Carolina). The judge in the case was the Honorable Robert F. Chapman, who is known as a very conservative judge. He was appointed by President Nixon and has just recently been elevated to the Fourth Circuit Court of Appeals by President Reagan, to fill the seat of Senior Judge Clement Haynsworth. On April 17, 1980, Judge Chapman handed down his ruling declaring the at-large elections for Edgefield County Council to be discriminatory. Rather than try to go into detail about the findings and conclusions in the case, I would like permission to place the opinion in the record of this hearing. I will summarize it very briefly. First, the court analyzed a series of elections, and found as follows:

> The Court's overall finding is that blacks were virtually totally excluded up to 1970, and that since that time they have progressed to minimal tokenism.

The court noted the failure to appoint any significant number of blacks as election officials, and said of this:

> Evidence concerning the past few years' elections in Edgefield County showed exclusion of blacks (by officials exercising state action) in a critical part of the election process.

The court went on:

> Mr. Crouch, Secretary of the Edgefield County Democratic Party, testified that

> blacks do not participate as equals in the electoral process of Edgefield County, and that the present system is the legacy of a long history of racial segreation. He said that there has been some improvement but it must come slowly, and indicated that no greater speed would be possible voluntarily -- that it would take a court order.

Based on these findings and many others, the court concluded that the standards of White v. Regester and Zimmer v. McKeithen (485 F.2d 1297 (5th Cir. 1973)) had been met:

> . . . there is still a long history of racial discrimination in all areas of life. There is bloc voting by the whites on a scale this Court has never before observed and all advances made by the blacks have been under some type of court order.
>
> Participation in the election process does not mean simply the elimination of legal, formal or official barriers to black participation. The standard is whether the election system as it operates in Edgefield County tends to make it more difficult for blacks to participate with full effectiveness in the election process and to have their votes fully effective and equal to those of whites. Black voters have no right to elect any particular candidate or number of candidates, but the law requires that black voters and black candidates have a fair chance of being successful in elections, and the record in this case definitely supports the proposition and finding that they do not have this chance in Edgefield County.
>
> If black candidates lose in the normal give-and-take of the political arena then the courts may not interfere. And under no theory of the law can a court direct a white to vote for a black or a black to vote for a white. However, if there is proof, and there is ample proof in this case, that the black candidates

> tend to lose not on their merits but solely because of their race, then the courts can only find that the black voting strength has been diluted under the system and declare the same unconstitutional.

I said a minute ago that this is the perfect controlled experiment, and the reason is that five days after Judge Chapman's thorough examination of the totality of the circumstances, the Supreme Court decided Mobile v. Bolden. The State Attorney General's office (defending the County, as is common) promptly filed a motion to reconsider, and after additional briefs were filed, Judge Chapman withdrew his opinion. The facts were still the same -- if you will come to Edgefield with me I will guarantee to show you they are still the same -- but under the Mobile case there is no remedy.

In my belief, a standard that produces such a result is intolerable.

Are All Election Systems Threatened?

I would like briefly to address those who claim that amended section 2 is an all-out assault on election systems, especially at-large elections.

I hope it has become clear by now that amended section 2, like White v. Regester, applies only in that small category of places where there is no functioning

system of politics for minority voters, where there is already severe racial division, and where it is simply impossible for minority voters to have any significant opportunity under the election system as it is. As Professor Levin says, "The basic idea of democracy is that if people don't like what their rulers are doing, they can always throw the rascals out. In particular, as things stand now, if enough people get tired of a government that plays favorites toward certain groups, it can always dismiss that government." Obviously, in many or even most situations, that may be true. And in those situations, the principles that I have described simply do not apply. White v. Regester doesn't apply, and amended section 2 doesn't apply. If someone does wish to change those situations, the choice between at-large and district elections is a political choice, for the residents of the area to decide without the involvement of a court.

The cases we are talking about, though, are cases where Blacks or Hispanics have been simply shut out. To use Professor Levin's example, most of the "people" are perfectly satisfied with the way the government operates; it is only those who have been consistently left out for decades or a century who have complaints. And the proof

over that period of time shows that the system is not about to change by itself.

In these sistuations, the goal of a change is to create an opportunity -- nothing more than an opportunity -- to participate in the political system. Proportional representation is not the goal, and illusory fears about proportional representation should not be allowed to justify maintaining a system that shuts out an entire segment of the population. (And they are illusory: my experience with changes to districting systems is that they do not in fact result in proportional representation.)

A related point that several witnesses have made is the suggestion that to allow evidence of racial isolation or extreme polarization to constitute a factor in determining whether the electoral system is discriminatory would somehow constitute approval of polarization or would foster racial divisions. Section 2, of course, will apply only in those places where there is already an extraordinary amount of division, and to say that creating a remedy for exclusion would foster division is like saying that a thermometer causes a fever. As Everett Carll Ladd, the eminent political scientist, testified in a suit involving multi-member districts:

> Q Wouldn't it be the case that multiple member districts would avoid this polarization?
>
> A Certainly not. It [polarization] doesn't, of course, have any origination in electoral mechanics. It originates in historic positions of blacks and whites. It originates in different socio-economic status. It originates in patterns of socialization which produce prejudice, fear and so on in the groups. That the imposition of multiple member districts would eradicate racial antipathy, prejudice, so on, is nonsense.

What Consideration Did the House Give to Section 2?

It is not accurate to say that section 2 occupied the House Subcommittee only one afternoon, with three witnesses. First, those three witnesses were preceded by two eminent historians who gave an historical perspective on discriminatory voting practices, and who specifically addressed the problem of voting practices that could not be reached by section 5, generally because they were not post-1965 changes. Moreover, witness after witness on other days and from many different states discussed the same issue -- that is, the problem of dealing with pre-1965 forms of discrimination, especially after the Mobile decision. Thus, while it may be true that all the technicians' testimony about section 2 came in a single day, the issue was constantly on the

table.

I should add that those who complain about the "no quota" sentence in section 2, and appear to regard it as nefarious, ought to look at the transcript of the House hearings. It was Representative Hyde who suggested that some language be added, and of course there was no objection because the sentence simply restated the no quota position that was always intended to be in amended section 2. As to the particular language, I suggest you look at White v. Regester. I see no difference in the language, because I assume the language of the no quota sentence of section 2 was intended to track the language of White v. Regester.

So there are no hidden balls that I know of, and I believe the House of Representatives was aware of that. (Indeed, Representative Hyde himself had introduced a bill which amended section 2 to include a prospective effects test.) I suggest that the House members simply looked at a sound provision, satisfied themselves that it would not have the expansive meaning that some have suggested here, and passed it. I don't see anything more complex than that.

Bailout Under S. 1992

Although there have been some claims that the

bailout in S. 1992 is too strict, a detailed analysis of the bailout provisions shows otherwise. The bailout system is like a screen, requiring that a jurisdiction seeking to bail out must meet a number of tests; each of the tests is well tailored to meet the issue of a current and recent good record of nondiscrimination in voting.

The tests are in two parts. First are the ten-year eligibility tests. There are five of these, which the jurisdiction must not have done within the past ten years: (A) no literacy tests; (B) no court judgments of voting discrimination; (C) no federal examiners assigned; (D) no enforcement of nonsubmitted changes; and (E) no objections to submissions. These are the principal types of activities that would be a sign of continuing discrimination, and absence of these should be shown by any jurisdiction that would claim to have a good record.

The second part of the test is the requirement of positive actions to eliminate discrimination. This includes the elimination of discriminatory election systems, constructive efforts to eliminate voter intimidation and harassment, and other constructive efforts to improve registration and voting. These efforts do not

have any time requirement; that is, there is no waiting period after they are done. Thus, for example, if there is a discriminatory election system in a jurisdiction which has met all the ten-year tests, it can act to eliminate that discriminatory election system and be able to bail out immediately -- even by taking action while the bailout suit is pending.

The bailout procedure is available not only to states -- as is the current procedure -- but also to individual counties. Thus, a particular county with a good record in, say, Georgia, is not affected by other counties with poorer records in the state. The county must make the requisite showings for the jurisdictions within it, but this requirement maintains the principle that closely related areas would be treated together. (It would be impossible to go below the county level -- as well as unnecessary -- because going to county level already increases the number of potential bailout suits from several dozen to 900; breaking up the counties and allowing individual towns and cities to bail out separately would mean the number of potential suits would be about seven thousand.)

The bailout requirements of S. 1992 are far simpler tha, for example, those in the bailout proposed by

Representative Caldwell Butler in 1975. That bailout would have required a showing, among other things, that 60 percent of the minority population is registered, whereas the current bailout has no such inflexible requirement; it simply indicates that the participation levels are relevant evidence to help a court in determining whether the bailout requirements have been met.

The proof of the pudding is in the analysis of county records. Of approximately 800 counties in the major covered states, approximately one-fourth would be eligible to bail out by 1984, when the new provisions go into effect. (This means that that number would meet the ten-year tests; it does not take into account how many would be affected by the positive action requirements, because the "keys" to those provisions are in the immediate control of the jurisdiction.) The other three-fourths would become eligible over the remainder of the decade until 1992. If jurisdictions comply from this date, they would all be eligible by 1992.

The figures are based on actual examination of records of lawsuits, Justice Department objections, federal examiner assignments, and careful estimates of nonsubmissions, adjusted to take account of the possibility that noncompliance is much more serious than even we be-

lieve. For those who assert that that figure is over-optimistic, the answer is that it is fair unless the degree of violation far exceeds even the highest overestimates.

In any event, the ten-year period means that any jurisdiction that starts complying even today will be eligible for bailout by 1992, which was the target date for all jurisdictions to bail out in the original bill.

All in all, the bailout is extremely reasonable. It allows jurisdictions that really want it a chance to bail out before 1992, and keeps coverage to that date only for those which are currently violating the law or continuing to discriminate. Those jurisdictions that remain covered beyond 1992 will be under the Act only because they continue discriminating not only today, but on into the future as well.

With the Subcommittee's permission, I would like to introduce for the record a chart prepared by the Joint Center, showing how the different ten-year requirements affect bailout.

Thank you for your attention. I will be pleased to answer any questions.

EFFECT OF H.R. 3112 BAILOUT PROVISIONS ON COUNTIES IN MAJOR COVERED STATES

STATES	No. Counties	No. With Judgments	No. With Objections	No. With Examiners	No. With Nonsub-missions*	% of Counties With No Disqualifications (as of 1984)
ALABAMA	67	3	16	11	17	55%
GEORGIA	159	12	34	11	100	33%
LOUISIANA	64	3	5	7	11	67%
MISSISSIPPI	82	9	20	29	**	NOT YET COMPLETED
SOUTH CAROLINA	46	0	18	2	31	24%
TEXAS	254	3	4,	11	**	NOT YET COMPLETED
VIRGINIA	136	0	4	0	**	NOT YET COMPLETED
TOTAL	808	30	144	71	158	24%+

*Source of non-submission data: Southern Regional Council. Non-submission figures for Alabama, Georgia, Louisiana and South Carolina based on local acts of legislature. Submission of direct non-submissions of local governments lowers non-submission totals and raises eligibility percentage, especially in home rule states.

**Non non-submission projections available yet for Mississippi, Texas and Virginia.

* * *

Aggregate Projections

No. Counties	No. Projected Eligible 1984	No. Projected Eligible 1985-90	No. Projected Eligible 1992
808	210	220	378

Source: Joint Center for Political Studies

FINAL JUDGMENTS SINCE AUGUST 6, 1974, IN WHICH A FEDERAL COURT MADE A FINDING OF DISCRIMINATION IN VOTING

CASE	JURISDICTION	ROLE OF U.S.	DATE OF JUDGMENT
Calderon v. McGee, C.A. No. W-74-CA-21 (W.D. Tex. 1976)	Waco ISD (McClennon County), Texas	Amicus	3-29-76
Parnell v. Rapides Parish School Board, 425 F. Supp. 399 (W.D. La. 1976) affirmed in pertinent part, 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1977)	Rapides Parish School Board, Louisiana	Amicus	9-30-76
Stewart v. Waller, C.A. No. EC-73-42S (N.D. Miss. 1976)	City of West Point (Clay County), Mississippi	Intervenor	12-29-76
Kirksey v. Board of Supervisors of Hinds County, Mississippi, 554 F.2d 139 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 968 (1977)	Hinds County, Mississippi	Amicus (on appeal)	5-31-77
Paige v. Gray, 437 F. Supp. 137 (M.D. Ga. 1977)	City of Albany (Dougherty Co.), Georgia	Plaintiff	8-24-7
Broussard v. Perez, C.A. No. 76-158(B) (E.D. La. 1978)	Plaquemines Parish, Louisiana	Amicus	7-19-78
Ausberry v. City of Monroe, 456 F. Supp. 460 (W.D. La. 1978)	City of Monroe (Ouachita Parish), Louisiana	-- */	9-7-78
Lodge v. Buxton, C.A. No. 176-55 (S.D. Ga. 1978)	Burke County, Georgia	Amicus	10-26-78
Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978)	Montgomery County, Alabama	--	11-15-78
United States v. Clarke County Commission, C.A. No. 80-0547-H (S.D. Ala. 1981)	Clarke County, Alabama	Plaintiff	4-17-81

*/ A dash indicates that the United States did not participate. Our knowledge of private suits is limited. Consequently, this list may not include all federal suits in which a finding of discrimination was made, and where the United States did not participate.

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March 8, 1982

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Senate Committee on the Judiciary
Washington, DC 20510

Dear Senator Hatch:

Re: Voting Rights Act

On the last day of the voting rights hearings, Assistant Attorney General Reynolds made a number of statements about the new bailout provision in S.1992. In general he criticized that bailout as being too strict, and he claimed that there would be few if any jurisdictions that would be able to bail out for a considerable period of time. He specifically rejected the estimate that approximately 25% of the covered jurisdictions would be eligible for bailout at the first eligibility date in 1984.

I am writing to respond to these statements of Mr. Reynolds because the estimate he claimed to disagree with was one that the Joint Center has made, and nothing Mr. Reynolds said has in any way shaken the reliability of our original estimate. Indeed, the exhibits he brought, unlike his rhetoric, confirm our estimates.

Attached to this letter are two exhibits: (1) a memorandum outlining a number of issues pertaining to the substantive aspects of the new bailout procedures; and (2) a chart labeled "Comparison of Estimates of Effect of Bailout." I urge you to look particularly closely at the chart because it compares the figures in our estimate (which were attached to my prepared statement presented to this Subcommittee) with the figures listed in the attachments to Mr. Reynolds' testimony (Tables N-1 through N-5, pp.129-46). That comparison shows that our figures and the figures of the Assistant Attorney General are identical, or virtually identical, in almost every single instance. The only figures that differ by more than 1 or 2 are in the objection column--where Mr. Reynolds' figures are through the end of 1981 while our cut-off was earlier in the year--and in two entries in the judgment column--where we included consent decrees which were omitted by Mr. Reynolds.

(Neither our figures nor the Justice Department's figures take into account the number of eligible jurisdictions that will not bail out when they are eligible because they fail to eliminate a discriminatory voting or election method--but this factor obviously could not explain Mr. Reynolds' claim that "few, if any, jurisdictions" would be able to bail out, unless he means to imply--as no one else has--that virtually all the covered jurisdictions still have discriminatory voting procedures and that they would all insist on keeping them.)

In short, the Justice Department's own figures confirm the reliability of our figures, and show that our estimate of the effects of the bailout is sound. I realize that Mr. Reynolds said the opposite when he testified, but with all due respect I have to point out that his conclusory statements were not based on any specifics and in fact were contradicted by the facts that he himself collected for presentation to the Subcommittee.

Thank you for the opportunity to bring these facts to the Subcommittee's attention, and I request that this letter and its attachments be made part of the hearing record. I would be pleased to answer any questions that you or other Subcommittee members may have on this matter.

Sincerely,

Armand Derfner

Armand Derfner

COMPARISON OF ESTIMATES OF EFFECT OF BAILOUT

EFFECT OF H.R. 3112 BAILOUT PROVISIONS ON COUNTIES IN MAJOR COVERED STATES

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* * *

Aggregate Projections

No. Counties	No. Projected Eligible 1984	No. Projected Eligible 1985-90	No. Projected Eligible 1992
808	210	220	378

Source for large-type numbers: Joint Center for Political Studies
Source for corner-box numbers: United States Department of Justice

MEMORANDUM

BAILOUT PROVISIONS UNDER S. 1992

Issue: Is the new bail-out in S. 1992 too tough or extreme?

Response: No. Loosening bail-out standards necessarily means eliminating the protections of Section 5 for some jurisdictions. Since there is general agreement that Section 5 is necessary, any bail-out modifications must be based upon proof of compliance of Section 5, elimination of voting rights abuses and a record of non-discrimination. A precisely constructed bail-out formula is thus not just a technical matter; loosening the procedure too much could have the same effect as outright repeal, because too many places which continue to discriminate would escape coverage of Section 5.

Evidence presented during the course of the House hearings failed to show any covered jurisdiction which voluntarily made any efforts to eliminate voting discrimination.

The Attorney General has objected to more changes since 1975 than during the first ten years of the Voting Rights Act. Citizens from covered jurisdictions testified to numerous continuing efforts to deny minorities the right to participate fully in the political process.

As former Congresswoman Barbara Jordan testified on June 18:

> "Where are the incidents of jurisdictions changing their election laws to benefit minority voters? Where are the state legislatures which have enacted statutes mandating enforcement by local cities, counties, and school boards of 14th and 15th Amendment voting rights? Where are the state attorneys general who provide positive guidance to local governmental attorneys? Where are the minority citizens who testify to the good deeds of their elected officials? If they exist at all, they have not come before this Subcommittee."

The goal of the bail-out of S. 1992 is to give covered jurisdictions an incentive to eliminate discrimination denying or abridging opportunities for minorities to participate in the political process. Criteria are set forth in detail in the proposed statute. Each and every requirement of the bail-out is minimally necessary to measure a jurisdiction's record of non discrimination in voting. These standards provide uniform guidance to the courts and the jurisdictions.

The formula drafted by the House of Representatives is fair to both covered jurisdictions and their voters. Despite unsupported complaints that it is an impossible bail-out, it is estimated that one-fourth of covered counties — more than 200 — may be eligible to bail-out when the new procedure goes into effect in 1984. Additional counties will become eligible through the rest of the decade.

Issue: Who can bail-out under S. 1992?

Response: The new bail-out formula makes two major changes:

> The criteria for bail-out are tied closely to more recent events and conditions. A jurisdiction can bail-out upon a showing of a good record in specified areas for ten years, and the taking of positive steps to end voting discrimination and eliminate its vestiges, especially by eliminating voting procedures and methods of election that impede or dilute equal access;
>
> Individual counties (and their equivalents, such as parishes, or independent cities in Virginia) are eligible to bail-out separately if they can make the requisite showing.

Although there was no evidence presented at the hearings about any such counties that would be appropriate candidates for bail-out now, there were references to the usefulness of creating incentives for counties to improve their records, which is a principal purpose of the new bail-out formula.

There appear to be counties in every covered state that would be eligible for bail-out based on their past record (and assuming they are willing to take the necessary positive steps) as early as the new provisions take effect in 1984, and additional counties will become eligible after that. * A major theme has been concern over counties that have very minimal minority populations, and this concern is being met by H.R. 3112 because these counties should in general be able to bail-out without difficulty.

Issue: What happens after a jurisdiction bails out?

Response: Under current law, a jurisdiction that bails out is no longer subject to Section 5 and does not have to pre-clear its voting changes. The second paragraph of Section 4(a), though, provides that the bail-out court retains jurisdiction for five years so that if the jurisdiction engages in the type of conduct that would have kept it from bailing out to begin with, the bail-out judgment could be set aside and the jurisdiction brought back under Section 5. This has happened once, with the three counties of New York, which bailed out in the early 1970's but were brought back in two years later.

The House Bill, H.R. 3112/S. 1992 retains this type of provision. Under Section 4(a)(5), the bail-out court retains jurisdiction for ten years (the longer period is necessary because the new bail-out formula has additional criteria in it) during which a motion to reopen the case can be filed by the Attorney General or by an aggrieved citizen if it is alleged that the jurisdiction has engaged in conduct that would have prevented it from bailing out.

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* It is impossible to tell precisely which counties would be able to bail-out because some of the necessary information will not come out until the actual bail-out suit, but the best estimate is that approximately 25% of the covered counties will be eligible to seek bail-out in 198[illegible] (on the basis of their past records and assuming that they eliminate any discriminatory mechanisms).

Once the court reopens the case, of course, it is not bound to set aside the bail-out judgment unless that course is supported by the evidence. Some of the types of conduct that would prompt a motion to reopen the case could include the entry of a judgment of racial discrimination in voting against the jurisdiction or the jurisdiction's adoption of a method of election that had been previously objected to under Section 5 or otherwise dilutes minority citizen's votes.

Issue: Why should jurisdiction of bail-out suits be in the United States District Court for the District of Columbia rather than in local District Courts in the covered jurisdictions?

Response: Limiting bail-out jurisdiction to the District Court for the District of Columbia is necessary to ensure uniform application of the bail-out standards and impartial judicial decision-making free of local biases and local political pressures.

In enacting the Voting Rights Act of 1965, Congress vested exclusive jurisdiction of bail-out suits in the District Court for the District of Columbia to ensure uniform application of the bail-out standards and impartial judicial decision-making free of local biases and political pressures.1/ In South Carolina v. Katzenbach, 383 U.S. 301, 331-32 (1966), the Supreme Court upheld this limitation of jurisdiction as an appropriate exercise of the constitutional authority of Congress to "ordain and establish" inferior federal tribunals (U.S. Const., Art. III, Sec. 1).

The purposes of the bail-out provision would be seriously undermined if jurisdiction were vested in local District Courts and the interpretations of the legal standards governing bail-out applied in New York were different from those applied in Mississippi. Further, the 1965 legislative history of the Act shows that the extraordinary remedies provided by the Act (including administrative pre-clearance) were required because relief in voting rights cases filed in Southern District Courts was extremely difficult and sometimes impossible to obtain, and numerous appeals were required, even in cases presenting the most compelling facts. Testimony before the House Subcommittee on Civil and Constitutional Rights this year has demonstrated that, in significant instances, this is still the case. For example, the Mississippi legislative reapportionment case (Conner v. Johnson) went on for fourteen years -- including nine trips to the Supreme Court -- before effective relief for voting rights denials finally was obtained.

Because of its Section 5 pre-clearance jurisdiction, the D.C. District Court now has extensive experience in voting rights matters. Limiting judicial bail-out suits to the D.C. District Court will provide uniform application of the bail-out standards and an objective, dispassionate forum for the litigation of bail-out issues.

1/ Because the United States is the defendant in bail-out suits, considerable cost-savings to the Federal Government can be obtained permitting Justice Department attorneys to litigate such suits in Washington, rather than in local District Courts. The travel budget of the Civil Rights Division of the Justice Department has been curtailed in recent years, and the travel requirements of litigation bail-out suits in local District Courts alone could exhaust the Civil Rights Division's limited travel funds.

Issue: Why should States be the appropriate unit for bail-out, since some counties within covered states will now be eligible under S. 1992/H.R. 3112 to bail-out independently?

Response: The bail-out provisions in H.R. 3112 contemplate the same level of State responsibility and protection as was contemplated by the Framers of the 15th Amendment, and the drafters of the 1965 Act. The fact that some counties may now be able independently to obtain exemption does not alter the constitutional responsibilities or the plenary power of the covered States to meet the standards of the Act.

States have historically been treated as the responsible unit of government for protecting the franchise. The general rule is that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." Carrington v. Rash, 380 U.S. 89, 91 (1964). The power of the States is plenary and is only superseded by federally protected rights. Gomillion v. Lightfoot, 364 U.S. 339.

One such right, of course, has been, since the ratification of the 15th Amendment in 1870, the right to vote. Section 1 of the 15th Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (emphasis added). This constitutional declaration clearly recognizes the power of the States with regard to exercise of the franchise.

Section 2 of the 15th Amendment declares that "Congress shall have power to enforce this article by appropriate legislation." In enacting the Voting Rights Act of 1965, Congress exercised that constitutional authority.

In the 1965 Act Congress retained, in large measure, the State as the appropriate unit for determining coverage under the Act. Similarly, the 1965 Act provided for termination of coverage, where the entire State was covered, only by the State. This bail-out formula was upheld by the Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301 and again in City of Rome v. United States, 446 U.S. 156 (1980).

The original bail-out procedure of the 1965 Act, extended in 1970 and 1975, was only available to a covered State and was expressly unavailable to political units in the State. The House Committee Report in 1965 stated, "subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption." H.R. Rep. No. 439, 14.

By contrast, S. 1992/H.R. 3112 considerably expands the number of jurisdictions which are afforded the opportunity for separate bail-out. Counties within a covered State are now eligible to bail-out if they can demonstrate their record of nondiscrimination. This new opportunity for counties to be relieved from the requirements of Section 5 does not, however, undermine the fundamental responsibility of the covered States to protect the right to vote. S. 1992 simply effectuates, as did the original Act of 1965, the 15th Amendment declaration that the States may not deny or abridge the right to vote. The State is the unit of government which is constitutionally responsible and which has plenary power, even with home rule, to determine the "conditions under which the right of suffrage may be exercised."

In order to bail-out, therefore, a State must be responsible for showing that the State as well as all units of government within its territory meet the exemption criteria. The State owes that much to its minority voters. To allow the State to bail-out independently of its political subdivisions would permit the State to abdicate its universally recognized responsibilities over voting and would force minority voters in the remaining counties to look forever to the federal government to protect their right to vote.

Issue: Why should a consent decree, settlement, or agreement resulting in the abandonment of any voting practice challenged as discriminatory bar a covered jurisdiction from bailing out?

Response: Section 4(b)(4)(B) of S. 1992/H.R. 3112 prohibits the bail-out of a jurisdiction if, during the preceding 10 years, a consent decree, settlement or agreement was entered into resulting in the abandonment of a voting practice challenged as discriminatory. A consent decree, settlement, or agreement abandoning a voting practice challenged as discriminatory is generally considered to constitute an admission that the challenged practice was, in fact, unlawful and discriminatory. See e.g., United States v. Columbus Separate School District, 558 F. 2d 228, 230 n. 8 (5th Cir. 1977), cert. denied, 434 U.S. 101 (1978). Those jurisdictions which in good faith wish to abandon discriminatory voting practices are always free to do so.

Plaintiffs in a bail-out suit should not be allowed to go behind a consent decree to litigate within the bail-out suit whether they entered into such an agreement because of concerns for litigation expenses and the like and whether the alleged voting practice was discriminatory and unlawful. This provision rests upon considerations of economy of judicial time, public policy favoring the establishment of certainty in legal relations, and the desirability of avoiding the litigation of separate, complex lawsuits within the bail-out suit. This provision is not unique to settlements concerning voting rights, but is derived from the effect usually given to consent decrees by the principle of res judicata.

Many consent decrees involve constitutional challenges to major electoral practices. If the parties are allowed to go behind the consent decree, the litigation of this issue alone could cost each party $20,000-$50,000, involve usually five expert witnesses for defendants-intervenors or the Justice Department and a comparable number for bail-out plaintiffs, months of discovery, and generally at least one week for trial.

Issue: Why should a jurisdiction be barred from bailing out if a suit pending against it alleging denials or abridgments of the right to vote on account of race, color, or language minority status?

Response: The pendency of a lawsuit alleging voting rights violations establishes a substantial question that a jurisdiction is not in full compliance with Federal voting rights laws. When there is reasonable doubt, a jurisdiction should not be allowed to bail-out. If there is a concern with frivolous lawsuits being filed to bar bail-out, the answer is that there are many provisions in present law which safeguard against them.

Under Section (B) of the bail-out criteria, a covered jurisdiction is prevented from bailing out if, during the preceeding ten years, a final judgment has been entered determining that denials or abridgments of the right to vote on account of race or color, or language minority status have occurred anywhere within the jurisdiction's territory; a consent decree, settlement, or agreement has been entered resulting in the abandonment of any voting practice challenged as discriminatory; or an action is pending alleging such discriminatory denials of the right to vote.

One of the purposes of the bail-out criteria is to permit covered jurisdictions with a "clean slate" and a history of compliance with Federal voting rights guarantees to exempt themselves from coverage of the Voting Rights Act. The burden of proof is on the covered jurisdiction to prove that it meets these criteria.

Substantial question is raised that a jurisdiction is not in full compliance when there is a pending lawsuit alleging voting rights violations. If the lawsuit results in a final judgment finding voting rights violations, this would bar the bail-out; and therefore judicial economy requires that the bail-out should not be granted until the issues of alleged violations raised in pending lawsuits are resolved.

No jurisdiction should be allowed to exempt itself from the Act's coverage if there is any reasonable doubt that it is not in full compliance with Federal voting rights laws.

The concern that frivolous lawsuits might be filed to defeat bail-out is not realistic. Costs and attorneys fees may be assessed against those who file frivolous lawsuits, including the attorneys involved. Rule 56, Fed. R. Civ. P., Rule 38, Fed. R. App. P., 42 U.S.C. Sec. 1973l(e). In addition, summary dismissal, summary judgment, and expedited appeals procedures exist to give additional protection against the abuses of court procedures. Federal Rules of Civil Procedure, Rules 12, 56.

Issue: Why should covered jurisdictions be required affirmatively to eliminate voting procedures and methods of election which inhibit or dilute equal access to the electoral process as a condition of bailing out?

Response: Before a covered jurisdiction is exempted from the requirements of the Voting Rights Act, it should be required to eliminate all discriminatory voting procedures and methods of election to ensure that there is no longer any discrimination or potential for discrimination against minority voters.

The bail-out provisions of S. 1992/H.R. 3112 allow jurisdictions to completely exempt themselves from the coverage of the Voting Rights Act, including the pre-clearance requirement. Therefore, it is necessary to ensure that before a jurisdiction is exempted, it has eliminated any potential for continued discrimination and has secured for all its citizens an equal access to the electoral process. This does not mean that minorities must have been elected in proportion to their numbers, but only that they have an equal opportunity to participate in the electoral process on an equal basis with non-minority citizens.

The testimony before the House Subcommittee on Civil and Constitutional

Rights in hearings this year showed that in covered jurisdictions today, there still exist voting practices which are racially discriminatory or which have been used in a discriminatory manner to deny minority voters an equal opportunity to participate in the electoral process.

These include unduly restrictive voter registration procedures, multi-member legislative districts, at-large countywide and citywide voting which denies a substantial minority population an equal opportunity to participate, majority vote-runoff requirements, prohibitions on single-shot voting, and others. Although they are not necessarily unconstitutional under existing standards, these voting procedures and methods of election have been cited by the Supreme Court and lower Federal courts as having a "built-in bias" against minorities which do not permit minorities "to enter into the political process in a reliable and meaningful manner." White v. Regester, 412 U.S. 755, 766-67 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc). Therefore, if such procedures are found to be discriminatory in the particular total circumstances of the applicant, they must be removed.

The provision of the bail-out formula also provides an incentive to covered jurisdictions to open up their political processes to equal participation by minorities, and would obviate the need for extensive litigation by minority voters challenging discriminatory electoral mechanisms in those jurisdictions.

Issue: Why should the assignment of Federal examiners bar bail-out by a covered jurisdiction?

Response: The assignment of examiners is a good indication of voting rights abuses at the local level. The significance of Federal examiners was recognized by the Supreme Court in South Carolina v. Katzenbach. Provision of examiners was designed to reach official violations that could not be cured simply by outlawing misused voting rules. The hearing record shows that jurisdictions to which examiners have been sent are those where there has been continuing voting rights violations.

The bill reads:

> (C) no Federal examiners under this Act have been assigned to such State or political subdivision.

Section 6 of the Voting Rights Act governs the use of Federal examiners and provides for their appointment whenever (1) authorized by a court in a proceeding brought by the Attorney General to enforce the guarantees of the 15th Amendment, or (2) in a covered jurisdiction under Sec. 4(b) whenever the Attorney General certifies that he has received meritorious written complaints from 20 or more residents of a political subdivision alleging that they have been denied the right to vote because of their race or (3) when the Attorney General determines that the appointment of examiners is otherwise necessary to enforce the 15th Amendemnt.

In determining whether to assign examiners, the Attorney General is required to take into account (1) whether the ratio of nonwhite to white persons registered to vote appears to be related to voting rights violations, and (2) whether bona

fide efforts are being made by the jurisdiction to comply with the Act. Specifically, the Attorney General considers (1) how long and how consistently the voter registration office is open, (2) the location of the registration office in relation to areas where black registration is low, (3) whether there has been intimidation of or violence against registrants and (4) whether standards are applied differently to white and black applicants.

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Supreme Court dismissed as unwarranted the claim that the Attorney General is free to use his power to appoint federal examiners in an arbitrary fashion, without regard to the purposes of the Act. The Court said that Sec. 6(b) set adequate standards to guide the Attorney General and protected against arbitrary use of the appointment process.

Issue: Why does S. 1992/H.R. 3112 call for evidence of minority participation?

Response: Evidence of minority participation is perhaps the best indicator of whether Section 5 is still needed. A low minority participation was at the heart of the formula that initially invoked Section 5 coverage. Although it is intended that this evidence be regarded as significant by the court, there is no specific or arbitrary "passing" or "failing" level.

The formula for Section 5 coverage is based on the use of a literacy test and a below 50% voter registration and turnout. While this figure is an overall figure for all people, as a practical matter it reflected the existence of discrimination that resulted in low minority participation and wide disparities between the participation levels of minority voters and other voters.

Therefore, it is appropriate for a jurisdiction seeking to end Section 5 coverage to show that conditions have changed. This is an especially appropriate requirement since the covered jurisdictions have pointed continually to large increases in minority registration, voting, and office-holding as evidence that they no longer need Section 5 coverage. Indeed, state officials who have testified were saying as long ago as the 1975 renewal hearings that minority participation was an appropriate test for bail-out.

Although it is intended that the information presented about minority participation should be influential in the bail-out case, especially in helping the court to determine whether discriminatory mechanisms have really been eliminated and their legacy overcome, there is no hard and fast requirement of a specific level of minority participation. Rather, this evidence would be weighed by the court along with other evidence.

Continuing low levels of participation and continuing wide gaps between minority participation levels and other voters' levels would raise a serious question of whether the necessary positive steps had not yet been taken or that the jurisdiction was not yet ready to terminate Section 5 coverage.

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March 9, 1982

Honorable Orrin Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

On the last day of hearings on the Voting Rights Act, Assistant Attorney General Reynolds made a statement about the issue of reviewability of non-objections. I am writing this letter in response to Mr. Reynolds' statement, and I request that this letter be included in the Hearing Record.

Mr. Reynolds claimed that if non-objections were subject to judicial review as suggested by Professor Cochran and others, the burden on the Department of Justice would be intolerable.

There is no evidence to support that view and Mr. Reynolds' statement should not be allowed to obscure the great need for an amendment to S. 1992 which would provide for limited judicial review of non-objections.

Judicial review of objections is available to covered jurisdictions (actually they are even better off, because they get a trial de novo), yet under the law as interpreted in Morris v. Gressette, 432 U.S. 491 (1977), the corresponding right is not available to the voters who were the intended beneficiaries of the Voting Rights Act. I am confident that you would agree that in simple fairness the right of judicial review should be mutual. The right of review for voters is crucial for several principal reasons:

1. In passing on voting change submissions, the Attorney General is exercising a quasi-judicial function, as the surrogate for the district court. Yet, while a decision by the Attorney General which is adverse to the jurisdiction may be reviewed all the way up to the Supreme Court, a decision by the Attorney General which is adverse to the voter ends there and there is no way to get a definitive answer. I am not aware of any comparable function within our government so subject to ordered principles and yet is unreviewable. In this connection, many of the questions to be dealt with by the Attorney General in reviewing

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submissions involve not only findings of fact but complex questions of law. For example, in several cases, the Attorney General has had to decide whether under section 5 he is to defer to a court ruling on the constitutionality of a particular voting change. (See the submissions of the post-1970 reapportionments of the Mississippi Congressional districts and the South Carolina Senate.) If the Attorney General had held that he would not defer to the court ruling (because that ruling was based on a wholly different standard) and then objected to the change in question, the states could have taken the cases to court, including the Supreme Court, for review, and a definitive answer would have been forthcoming while preserving the rights of all concerned. Indeed, as we know now, that would have been the correct decision.

Unfortunately, the Attorney General at the time held the opposite way, i.e., that he was obliged to defer to such court rulings upholding the constitutionality of these reapportionment plans. This was error, but there was no way to seek review to find out, and the Supreme Court held that because the sixty-day submission period had passed, the legal question was beyond review by anyone. Morris v. Gressette, 432 U.S. 491 (1977). The specific consequence was that black voters in Mississippi and South Carolina have been deprived of their rights under the Act for a decade. That is a bizarre approach for a law that was designed to help minority voters, and I do not believe it is what Congress intends.

Another example is a question now involved in a number of submissions, i.e., whether a current submitted redistricting plan should be compared to a 1964 baseline or to the last plan as adopted or to the last plan as it now operates. This question is an important one, which may have to be finally settled by a court. But the ironic answer is that it will be settled by a court only if the Attorney General rules against the submitting jurisdiction; if the Attorney General rules for the submitting jurisdiction and against minority voters who oppose it, it will never come to a court for review. That is a strange way to make the law.

2. Under the law as now applied, a covered change is precleared if the Attorney General fails to object within sixty days--for whatever reason. If he forgets, or if he is corrupt, or if the submission is lost behind the radiator, none of those makes any difference: the voters cannot get the benefit of an objection. Several of these examples have come to pass. There have been submissions that were simply not answered within sixty days; there was an instance where a more-information request (the only thing that can toll the sixty days) sent within sixty days was mailed to an outdated address--and there is still litigation over that submission; and, sadly, there have been several instances where there are strong indications that a decision was based on politics rather than the merits.

Strong indications of politics affecting section 5 decisions have been involved in a number of submissions in earlier years. They have cropped up again in at least two instances last year: the withdrawal of the Jackson, Mississippi annexation objection, and the decision not to file a brief in McCain v. Lybrand, to enforce a prior section 5 objection. Newspaper articles contain strong suggestions of political

influence, which have gone unanswered by the Justice Department; indeed, in the McCain case, the Assistant Attorney General refused to identify the source of the "information" that led to his sudden withdrawal of the brief--other than to say the source was not in the Justice Department or the White House.

3. It is true that Congress did not address the question of judicial review in 1965, and the Supreme Court in Morris v. Gressette held the statute does not provide for such review. But the legislative history of the 1965 Act shows that the reason for Congress' failure to address the issue was not that Congress wanted to preclude judicial review of section 5 changes, but rather that Congress thought there would in fact be judicial review. When section 5 was first proposed, the sole route for preclearance was judicial--by an action for a declaratory judgment. The administrative preclearance by the Attorney General was a method added as a safety valve during the hearings, when questions were raised about how trivial changes would be precleared. At that point, the Attorney General method was adopted with the expectation that it would be solely for trivial changes, and that the significant changes would be dealt with through court action. In short, it was presumed that the typical change would be considered by a court, and only the atypical, trivial change would be dealt with administratively.

Since the administrative method was expected to apply to only a few changes, and those only the insignificant ones, there was no need to specify judicial review in those cases; it was expected that any significant changes would already be subjected to court consideration. As we know, of course, most changes--even the complex ones--have gone through the administrative process. The proposed amendment providing for judicial review is thus appropriate and necessary to carry out the overall goals of the Voting Rights Act. (And the goals of the 1970 and 1975 Congresses--neither of which had to address the question because the Morris case was not decided until 1977, before which it was generally believed that there was a right of review).

4. Any fears about the right of review being unmanageable are more imaginary than real. First, the provision for a review should limit such review to cases that involve arbitrary action or errors of law, thus preventing routine attempts to overturn non-objections based simply on a voter's disagreement with the way the Attorney General looked at the facts. Secondly, there should be a short statute of limitations--perhaps 180 days. Third, the filing of a review case would not automatically stop enforcement of the change; the court would use ordinary equity powers and thus enter an injunction only when the likelihood of success was strong.

These standards were generally followed in the years before Morris v. Gressette, and they caused no disruption. Indeed, during those years, even when there was a general assumption that non-objections were probably reviewable, there were only four cases that I know of: Harper v. Kleindienst, Perkins v. Kleindienst, Common Cause v. Mitchell, and--indirectly--Evers v. Williams.

Related to the issue of reviewability of non-objections, is the need for an amendment that would restrict the Attorney General's authority to withdraw objections. Right now the Attorney General claims the right to withdraw objections at any time and for any reason, and he has in fact, in Jackson, Mississippi, withdrawn an objection five years after its entry. There is simply no excuse for this, because it leads to uncertainty in the law, and it invites Attorneys General to create chaos by simply changing all the prior decisions that they happen to disagree with.

I should note that although the Attorney General currently maintains a practice of withdrawing objections when he deems it appropriate, there is nothing in the statute that gives him the authority to do so. If the Morris v. Gressette case is followed, the Attorney General presumably loses all his authority after sixty days--certainly he could not lose it only for one side and not for the other. I do not see any harm in a limited right to request reconsideration, as long as it is restricted in the ways outlined below, but I believe the current practice is too open-ended.

Obviously there ought to be room to correct mistakes, or respond to changed circumstances, but there must be limits if we are to have a coherent legal system. An amendment should provide that the Attorney General may withdraw an objection only upon application made within a short period after the entry of the objection--say, thirty or sixty days, and then only upon the offering of new information or a strong showing that the law or the facts have changed. If the thirty or sixty day period goes by, the jurisdiction ought either to be remitted to a declaratory judgment action in the district court or, in limited appropriate cases, might be permitted to readopt the change and resubmit it. In any event, of course, the voters should keep the right to review any withdrawal of an objection--in line with the right of review discussed above.

Our experience with section 5 tells us that these proposals for amendments would insure a greater measure of rationality to the Attorney General's decisions by affording minority voters a limited right of judicial review of non-objection decisions, and by regulating closely the Attorney General's practice of reconsidering objections.

Sincerely,

Armand Derfner

Senator HATCH. With that, let us recess until the next hearing.

[Whereupon, at 5:10 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

VOTING RIGHTS ACT

THURSDAY, FEBRUARY 4, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Grassley, and DeConcini.

Staff present: Vinton DeVane Lide, chief counsel, Committee on the Judiciary; Stephen Markman, chief counsel; William Lucius, counsel; Peter Ormsby, professional staff member; Claire Greif, clerk; and Prof. Laurens Walker.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the fifth day of hearings by the Subcommittee on the Constitution on the Voting Rights Act. Again, the major focus of the testimony today will be on the proposed change in section 2 of the act to substitute a results test for identifying discrimination in place of the present intent test.

I believe that I have made my own position clear on this issue during the first 4 days of these hearings. I must note for the record, however, that I am taken to task by one of our distinguished witnesses today for having remarked during the opening day of hearings that the proposed new language in section 2 "involves one of the most important constitutional issues ever to come before this body." According to this witness, I am guilty of "making a constitutional mountain out of a molehill."

I find this observation intriguing. I find it intriguing because the section 2 issue—the "constitutional molehill," as it were—has by itself stood in the way of expeditious extension of the Voting Rights Act. By itself it has stood in the way of extension of legislation that witness after witness has described as the most important civil rights legislation of our time, and I fully agree with this observation.

I might mention that I find it intriguing, then, that the counsel for the Leadership Conference on Civil Rights should take me to task for making a constitutional mountain out of nothing more than a simple molehill. If that is his view or if that is the view of his organization, I would hope that we can shortly come to agreement on the Voting Rights Act so that the more fundamental pro-

tections of the act are quickly extended, and especially those for which the act was originally intended.

It is not particularly surprising that I should be in disagreement on the merits of the section 2 issue with the distinguished counsel for the leadership conference. What is surprising is that there is such a fundamental disagreement on the importance of this issue.

I will ask the forbearance of my audience and summarize once more what the Attorney General and what a number of respected constitutional authorities and litigators see as the importance of this issue. I would leave others to characterize it as a "constitutional mountain" or a "constitutional molehill."

The issue is important because it speaks directly to the definition of civil rights and discrimination in this country: Does racial discrimination mean that an individual was treated wrongly because of or on account of his race, or does it mean that inadequate numbers of his race, for whatever reason and by whatever standard, have been successful in having been elected to office?

The issue is important because it speaks directly to the notion of representation in a democratic system of government: Are individuals elected to office to represent individual citizens or are they elected to office to represent ethnic and racial blocs of voters?

The issue is important because it speaks to principles of race relations that I find repugnant. The operative premises of the "results" test are that only blacks can represent blacks and only whites can represent whites, and that black political influence can be maximized by concentrating large numbers of black voters into single political ghettos.

The issue is important because it speaks to the most fundamental principles of the rule of law: Is this country going to operate under clear and certain standards for identifying racial discrimination, or are we going to institute a test in which discrimination is defined along the lines of "you know it when you see it"?

The issue is important because the most fundamental principles of self-government are involved. In *Mobile,* for example, let us not lose sight of the fact that a system of government freely chosen by the voters of that city and never found to have been motivated by racial prejudice was summarily overthrown by a single Federal judge because it did not produce the "color coordinated" results desired by some of our social engineers in Washington.

Finally, the issue is important because it places in jeopardy the system of self-government chosen by two-thirds of the municipalities of this country. The approximately 12,000 communities that have chosen at-large systems of voting are really in jeopardy. As in *Mobile,* the fact that at-large systems of voting were not motivated by any racial animus would be irrelevant.

I will not go further now. Whether or not this all represents a constitutional Mount Everest, I do not know. I believe it rather important, myself, but I am rather comfortable in the notion that we are debating something more than a constitutional anthill. If that is the case, however, as I have stated earlier, I would look forward to an early accommodation among parties on the section 2 debate.

Ladies and gentlemen, I believe that we have an outstanding series of witnesses this morning and I look forward to their state-

ments, all of which I have already read. We appreciate having the statements in on time.

I might mention that we will limit all witnesses to 10 minutes. The green light means you have 10 minutes; the yellow light means you have 1 minute left; the red light means you should stop so we can ask some questions and, of course, hopefully be able to receive even more enlightenment on what I consider to be one of the most important constitutional issues, certainly the most important constitutional issue of this particular Congress.

Senator DeConcini?

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Thank you, Mr. Chairman.

Permit me to express my gratitude to you for the manner in which the previous days' hearings have been conducted. The chairman has bent over backwards, in my opinion, to accommodate not only members of the subcommittee but also other members of the committee who have a deep interest in this subject matter.

I am told that the first few days of hearings resulted in outstanding testimony being received on all aspects of the Voting Rights Act from witnesses representing all points of view. This fairness has characterized all of the chairman's dealings on all matters before the subcommittee.

I would like to express my regrets at having been unavoidably absent during the initial days of hearings but hearings out in Phoenix, Ariz., for the Veterans Committee, of which I am a member, necessitated my absence. I am in the process of reviewing the previous testimony and look forward to participating in today's hearings and those that remain.

Time is of the essence in processing this bill. Again I applaud the chairman for his expeditious treatment of the issue, which I understand will conclude the hearings phase in late February on the date originally scheduled. I wish other subcommittees had such a good record as to time.

At the outset, let me make it clear that I strongly support extension of the Voting Rights Act; and I, together with another 62 of my colleagues, have cosponsored S. 1992. The Voting Rights Act stands at the heart of the great civil rights legislation of the sixties. Its results are tangible and momentous.

The Voting Rights Act has provided effective voting rights to all citizens of this country, whatever their race or color. This act has successfully implemented the guarantees of the 15th amendment against any abridgement of voting rights based on race or color. In all jurisdictions covered by the act, we have seen great increases in voter registration and participation on election day.

I am heartened that all of the other members of this subcommittee have expressed their support for the general principle embodied in the Voting Rights Act. It is my understanding that there is little disagreement about provisions in the act extending the preclearance provision of section 5 of the act, that the preclearance requirement ought to be limited to the covered jurisdictions, and that the various provisions dealing with abolition of the poll tax, the elimi-

nation of literacy tests and other discriminatory devices, the strictures on residency requirements, the provisions for Federal voting examiners and marshals, and the prohibition of coercion and fraud will all be maintained. These are significant steps and I endorse each and every one of them.

The problem with the bill before us seems to boil down to the proper interpretation of section 2 and its so-called results test, and the stringency of the bailout provision. The testimony we have received thus far has alleviated many of my concerns about section 2 and extreme interpretations that might be applied to it.

Nevertheless, I intend to carefully review the report and bill to be sure that proportionality based solely on race will not be a basis to overturn a freely held election. I believe all witnesses have concurred on this point.

I would also like to welcome the distinguished witnesses that are here today.

Thank you again, Mr. Chairman. I am looking forward to working with you on this important bill, as we have on other bills in this committee. Although we are going to have a lot of work before us, Mr. Chairman, I look forward to working with you. Thank you, sir.

Senator HATCH. Thank you, Senator DeConcini.

Senator Grassley?

Senator GRASSLEY. I have no statement, Mr. Chairman.

Senator HATCH. Then with that we will go to our first witness, who is the Honorable Senator from California, Senator Sam Hayakawa.

We are very happy to have you here, Sam, and we will look forward to hearing your testimony at this time.

STATEMENT OF HON. SAMUEL I. HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman. I am grateful for the opportunity to share my views on the Voting Rights Act.

Basically, I approve of the Voting Rights Act and I hope it will be reenacted. It was a very much needed piece of legislation in 1965 and most of its features I approve of thoroughly, but there is one feature of the act, as amended in 1975, which I cannot support. Namely, the 1975 amendments included requirements to provide bilingual election materials to certain minority language groups. It seems to me the decision to include bilingual requirements was made without taking into account Federal laws already in effect or the actual needs of certain ethnic groups.

Mr. Chairman, I have here a communication from the Senate of the State of California and their Resolution No. 13 on the subject, dated June 25, 1981, in which the Senate of the State of California expressed its views on the subject. I would like that put in the record, please.

Senator HATCH. Without objection, we will put that in the record at this point.

Senator HAYAKAWA. There is a statement to all California Representatives in Congress from Senator Jim Neilsen on the Federal Voting Rights Act language and minority provisions, a document

sent by the California Senate, by State Senator Jim Neilsen along with a number of his colleagues. I would like this included in the record.

Senator HATCH. Without objection, we will put it in the record.

Senator HAYAKAWA. On top of that there is a resolution of the National Federation of Republican Women from California, a resolution which was passed at the convention of September 19, 1981, which I would also like included in the record.

Senator HATCH. Without objection.

Senator HAYAKAWA. Then from my own correspondence, Mr. Chairman, I have excerpted letters from California public officials, from such people as Robert Mitchell, city manager, city of Loma Linda; Jesse Davis, mayor, city of Buena Park; Mrs. Evelyn Reynolds, city clerk, city of Salinas; Bob Neilson, mayor of the city of Fountain City; and so on—a large number of public officials who have expressed their opinions on the bilingual ballot. I would like to have all these included in the record.

Senator HATCH. Without objection, they will be included.

Senator HAYAKAWA. Several people have already testified before this committee that the cost is no longer an issue in debate over the bilingual ballot. I respectfully disagree. The State of California spent more than $1.2 million in 1980 on bilingual election materials. The expenditure of this money was mandated by the Federal Government. Local governments cannot weigh the need, for example, of rescue squad supplies against the demand for bilingual ballots.

In Scotts Bluff County, Nebr., only one person came forward to request a bilingual ballot. Nevertheless, the county spent more than $33,000 in 1980 to prepare the materials for primary and general elections.

During the House debate on this issue, the secretary of state of Kansas was quoted as saying, "It appears there is little or no use for these ballots, as evidenced in the 1980 report. The report stated that a total of $1,556 was spent on bilinguial materials in two counties and one ballot was requested."

In my discussions with the registrars in the State of California, it has been reported that many of those requesting Spanish language ballots admitted that they are perfectly capable of voting in English.

I am going to abbreviate my remarks to keep within the 10-minute rule, but I would like the full statement to be included in the record, Mr. Chairman.

Senator HATCH. Without objection.

Senator HAYAKAWA. GAO representatives have stated that election officials and minority group representatives reported that in some cases the formulas have not identified the minority population needing assistance. There is a peculiar story coming from Hawaii: Election officials in Hawaii claim that although bilingual ballots are made available for Chinese, Japanese, and Filipino populations of that State, these groups are perfectly proficient in English, and I would say because of the excellence of the public schools in Hawaii.

Among the Korean population, however, most do not yet speak English—they are a more recent set of arrivals—but bilingual bal-

lots are not required for them under Federal law because they make up less than 5 percent of the population.

The GAO officials went on to say, "The Bureau of Census statistics identify the minority population groups by surname." Now that does not necessarily mean that the individual with a Spanish surname or a Japanese surname cannot read, write, and speak English. Some have been rooted here for generations and know only English.

In other words, in any effort to determine if Japanese language ballots are required in my home county, it would be assumed that I would require a Japanese ballot because my name is Hayakawa but I cannot read or speak the language well enough to vote in that language. I am reminded of a professor of English that I had at Madison, Wis. whose name was Quintana. He had a Harvard Ph. D. and he did know Latin, he did know German, he did know French but to the best of my knowledge he did not know Spanish. However, he would have been included in the quota of those who are defined as Spanish speaking because of his Spanish name.

Nowhere in the triggering mechanisms is a person's ability to speak and read English addressed. Nowhere does the act require that a bilingual ballot be furnished only if the voter cannot use the English language, whatever his surname may be. The 50-percent participation requirement states that less than 50 percent voted, and that is one of the requirements under the Voting Rights Act, or that less than 50 percent were registered to vote, but there is no real attempt to determine the reason that less than 50 percent in a given election were registered. It was assumed that the cause was discrimination, but often the cause was simple indifference to a lackluster election in which the outcome was predicted.

During the Senate debate on the 1975 amendments, the Senator from New Mexico stated that two counties in his State met the criteria for low registration of voters. However, these counties contained large military installations with personnel claiming residency in States other than New Mexico and therefore registering and voting outside the targeted areas.

I have pointed out on other occasions that the bilingual requirements of the Voting Rights Act are in conflict with other Federal mandates. Our naturalization laws specifically require that a knowledge of spoken and written English be demonstrated to become an American citizen.

Indeed, I have spoken myself to recently naturalized American citizens who have complained bitterly that although they studied for a long time to be able to speak and read and write English, when they came for their naturalization test they were not tested for their knowledge of English, and they were quite, quite disappointed. They were so proud of their mastery of English. In other words, apparently INS does not always test them for this important requirement. The requirement for a bilingual ballot actually contradicts the pertinent provisions of the naturalization law and implies that the English language requirement is an unnecessary formality.

Those who disagree with my position as to bilingual ballots are quick to point out that many of the recipients of the ballots are third, fourth, and fifth generations of American families. I share

their dismay that these people are not fully participating in the rights of American citizens because of language barriers but I truly cannot see how allowing them to vote in a language other than English is going to make them full-fledged members of our American society.

There are five of us of Japanese descent in this Congress, three in the Senate and two in the House. We would not have got here had we not been able to speak English reasonably well, and if we had not decided to learn to speak English it would have meant what it ordinarily means for immigrants who do not learn to speak English, that we are content to remain outside the mainstream, to remain in our linguistic ghettos, and not open a branch grocery store in a downtown area where we had to know the English language. We would have opened sushi parlors or sukiyaki joints in Japan-town and been content to live in that way.

However, we did insist on participating fully in American life, which is why we are here, and I believe that voting is part of that full participation in American life which we expect all our immigrants ultimately to share.

Almost half my classmates in high school were children of European immigrants. In many families the parents spoke English poorly and Yiddish very, very well. It was considered part of the duty and education of these immigrant children—that is, my classmates—to explain to their parents, whenever necessary, measures at issue in elections. To many of us as children the tasks of interpretation were our introduction to citizenship long before we reached voting age.

In other words, the task placed upon us as immigrants and children of immigrants in learning the language and teaching our parents the language was part of that Americanization process which has made us a great and creative culture, a multiethnic culture which because of the cultural interaction, has made us perhaps unique in world history in its creativity and its greatness. I want to preserve that uniqueness and creativity in our society.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Hayakawa.

Senator DeConcini, do you have any questions?

Senator DECONCINI. I have no questions.

Thank you, Senator, for your statement.

Senator HATCH. Senator Grassley, do you have any questions?

Senator GRASSLEY. Senator Hayakawa, I know at least for my part I am not questioning the need for printing ballots in foreign languages where there is a clear indication that such a need exists but would you object to a program ascertaining what percentage of foreign language ballots have been requested and might be requested, and printing ballots only for the percentage required to meet a certain level, in other words, where there was a basic need demonstrated?

Senator HAYAKAWA. It seems a rather expensive process, considering the very, very small number involved. Why is it that they do not speak English, despite the fact that naturalization laws require them to speak English?

Senator GRASSLEY. That is the basis for your rationale for not printing bilingual ballots? Therefore, even where there is a re-

quested need as opposed to a presumed political determination here in Washington that there is a need where one might in fact not exist, then even under those circumstances you are opposed.

Senator HAYAKAWA. I am acquainted with Vietnamese families where they take it on as a first task. Having landed here, their first task is to learn English. I know that in my own family my father took the trouble to learn English in high school before he came here and then tried to teach my mother, with very little success. However, he took that on as a major responsibility.

In fact, in most immigrant families I know, including Swedish and German in Wisconsin, Polish and Russian Jewish in Chicago, the learning of English was the big, big project that you undertook as the first task once you got here. To think in any other terms is a fairly recent phenomenon.

Any law which reduces the incentive to learn English strengthens the language barrier and creates linguistic ghettos, linguistic islands. I was born and brought up in Canada, and during my childhood it was a happy thing that the French Canadians and the English-speaking Canadians got along perfectly well. We tried to learn each other's language and if it was not possible we did not make an effort to play with each other.

However, in the intervening years since I came to the United States, certain elements started to politicize that difference and to say, "We French are being mistreated by the English-speaking Canadians." Once you start politicizing language differences, then all hell breaks loose.

This is exactly what happened between the Flemish-speaking and the French-speaking in Belgium. It is happening right now between the speakers of Sinhalese and Tamil in Sri Lanka. There were 100 years of language riots in India until the laws were changed between 1957 and 1968 and English and Indian were made the official languages. Unless something can be done to prevent the politicizing of language differences, language differences can always be the source of internal division and split within a culture, and it is always dangerous.

Senator DECONCINI. Mr. Chairman?

Senator GRASSLEY. Do you have something you want to ask?

Senator DECONCINI. Yes. Would the Senator yield for a followup question?

Senator GRASSLEY. To him?

Senator DECONCINI. To him, on the bilingual question.

Senator GRASSLEY. Oh, yes.

Senator DECONCINI. From your statement, Senator Hayakawa, it seems that your objection is to any bilingual ballots. Is that correct? Do you think it is best not to have any bilingual provisions, or are there any circumstances in which you think they might be justified?

Senator HAYAKAWA. I am not thoroughly familiar with the laws of New Mexico but I think that New Mexico has some special legislation having to do with Spanish, does it not?

Senator DECONCINI. Yes, Arizona.

Senator HAYAKAWA. Arizona does too, or am I thinking of Arizona and not New Mexico?

Senator DECONCINI. Right. I think perhaps you are thinking of Arizona.

Senator HAYAKAWA. Perhaps. What are the laws as regards Arizona?

Senator DECONCINI. Well, I am just wondering if in the national Voting Rights Act—if there ought to be some provision, if not as detailed as in the S. 1992—if there ought to be some provisions for bilingual. I gather from reviewing your statement that you really are opposed to bilingual ballots. Is that a misinterpretation of your statement, Sam?

Senator HAYAKAWA. I would say that if in the legislation that made Arizona a State, the Spanish language was recognized along with English as a legitimate language of that State, an official language of that State, that fact should be grandfathered into the new legislation.

Senator DECONCINI. Barring that——

Senator HAYAKAWA. Barring that——

Senator DECONCINI. [continuing] If there are not some peculiar circumstances with admission of a State, do you think it is better for us not to have bilingual ballots?

Senator HAYAKAWA. I would agree with that, Senator.

Senator DECONCINI. Thank you, Sam. I have no further questions.

Senator GRASSLEY. Mr. Chairman, I have no further questions.

Senator HATCH. Thank you, Senator Hayakawa. We appreciate your statement here today.

Senator HAYAKAWA. Thank you, Mr. Chairman.

[The prepared statement of Senator Hayakawa and additional material follow:]

PREPARED STATEMENT OF SENATOR S. I. HAYAKAWA

Mr. Chairman,

Thank you for providing me the opportunity to share my views on the Voting Rights Act, and, more specifically, to discuss the bilingual requirements of that Act.

The Voting Rights Act of 1965 was a much needed piece of legislation. It has served our country well by removing discriminatory voting laws from the books. During several days of testimony, the members of this Committee have heard numerous people speak about the gains made as a result of the Act. I support the extension of most of the provisions of the Voting Rights Act.

However, the Act was amended in 1975 with language that I cannot support. The 1975 amendments included requirements to provide bilingual election materials to certain minority language groups. It seems to me that the decision to include bilingual requirements was made without taking into account federal laws already in effect or the actual needs of certain ethnic groups. In addition, the bilingual requirements have added to the financial burdens of local governments whose budgets are already stretched to the limit.

I have introduced legislation, S. 53, which will delete those portions of the Voting Rights Act which require bilingual election materials.

Several people have already testified before this Committee that cost is no longer an issue in the debate over bilingual ballots. I respectfully disagree. The State of California spent more than 1.2 million dollars in 1980 on bilingual election materials. The expenditure of this money has been mandated by the federal government. Local governments cannot weigh the need, for example, of rescue squad supplies against the demand for bilingual ballots. Some jurisdictions are required to make bilingual materials available, as in the case of Scotts Bluff County, Nebraska, only to have no one come forward to request a bilingual ballot. That county spent more than $33,000 in 1980 preparing the materials for the primary and general elections. Surely that money could have been spent in a way to benefit the county residents.

During the House debate on this issue last year, the Secretary of State of Kansas was quoted as saying, "It appears that there is little or no use

of these ballots as evidenced by the 1980 report." The report stated that a total of $1,556 was spent on bilingual materials in two counties, and one ballot was requested. Only one bilingual ballot was cast.

I have also heard from election officials in voting jurisdictions within counties that are covered by the bilingual requirements. In some cases, while the jurisdiction is required to make available a bilingual ballot, no bilingual ballots have ever been requested in that portion of the county.

In my discussions with registrars in the State of California, it has been reported that many of those requesting Spanish language ballots admit that they are capable of voting in English. They believe it is their right to vote in Spanish. However, the Constitution grants the right to vote - not the right to vote in the language of your choice.

Early in 1978 the House Subcommittee on Constitutional and Civil Rights met to hear representatives from the General Accounting Office present an evaluation of the Voting Rights Act. They stated that a proper evaluation could not be made because the Act contained no requirements for the collection of information about impact or cost that would be necessary to complete such a study.

The GAO representatives did state, however, that election officials and minority group representatives reported that "in some cases the formulas did not identify the minority population needing assistance." Election officials in Hawaii claimed that although bilingual ballots are made available for the Chinese, Japanese and Filipino populations in that state, these groups are proficient in English. Many among the Korean population, however, do not yet speak English, but bilingual ballots are not required for them under federal law because they make up less than five percent of the population.

The GAO officials went on to say, "The Bureau of Census statistics identify the minority population groups by surname. And that doesn't necessarily mean that the individual with a Spanish surname, or a Japanese surname, Chinese surname, cannot speak, write, read English. Some have been rooted here for generations and know only English." In other words, in any effort to determine if Japanese language ballots were required in my home county, it would be

assumed that I require a Japanese ballot because my name is Hayakawa. But I cannot speak or read the Japanese language well enough to vote in that language.

Under the amendments to the Voting Rights Act adopted by the 94th Congress, there are two sets of criteria used to determine whether the use of bilingual ballots will be required. The first set has three parts. The Act will be imposed (1) when more than five percent of the voting age citizens in a jurisdiction were members of a language minority group on November 1, 1972; (2) only English voting materials were provided on that date; and (3) less than fifty percent of the total voting age population in the jurisdiction voted in the 1972 Presidential election.

The second set of criteria triggers the Act when more than five percent of the citizens of voting age in a given jurisdiction are members of a language minority group, and the illiteracy rate for that group is higher than the national illiteracy rate.

These triggering mechanisms appear to be somewhat arbitrary. Whenever the criteria are met, it must be assumed that discrimination has taken place without considering other factors that may have an effect.

Most importantly, nowhere in the triggering mechanisms is a person's ability to speak or read English addressed. Nowhere does the Act require that a bilingual ballot be furnished only if the voter cannot use the English language.

The triggering mechanisms of the 1975 amendments were based on voting statistics from the 1972 general election. This Presidential race was not one of the most exciting contests of recent times. The incumbent was expected to win, and did win by a landslide. While I believe the privilege of voting is valuable and should be exercised, it is a fact that many do not share my view. In the non-Presidential election years of 1974 and 1978, less than fifty percent of our nation's eligible voters exercised their privilege to vote. Who here is of the opinion that the poor turnout in those years was due to discrimination rather than lack of interest? And yet, in 1972 we claim the problem was discrimination instead of lack of interest in a race that appeared to be a foregone conclusion.

The fifty percent participation requirement states that less than fifty percent voted, or that less than fifty percent were registered to vote. But

there was no real attempt to determine the reason that less than fifty percent were registered; it was assumed that the cause was discrimination. During the Senate debate on the 1975 amendments the Senator from New Mexico stated that two counties in his state met the criteria for low registration of voters. However, these counties contained large military installations with personnel claiming residency in states other than New Mexico, and, therefore, would be registering and voting outside the targeted counties. Those people, however, would be counted by the Census Bureau as residents of the voting jurisdiction. How many other jurisdictions covered by this Act have similar situations?

Another portion of this set of criteria states that bilingual ballots have not been provided in the past. In other words, the county that recognized that a second language did not have the same level of use as English, regardless of the heritage of large segments of the population, is presumed to be practicing discrimination. That makes as much sense as the assumption that I require a ballot printed in Japanese.

The triggering mechanism which says that the illiteracy rate of the minority language groups must be greater than the national illiteracy rate is also in need of scrutiny. The Voting Rights Act states that a person who fails to complete the fifth grade is illiterate. However, the Act makes no distinction between literacy in English or in another language. If the voter is thought to be illiterate in English, does that mean he is proficient in another language?

I am aware that some of the people who request bilingual ballots come from families that have lived in the United States for several generations. They may have lived in areas where their educational opportunities were improperly limited, and as a result their command of English is minimal. These same people, however, have not had formal education in Spanish, or any other language. Simply providing a bilingual ballot cannot make up for the years educational opportunities were withheld.

I have pointed out on other occasions that the bilingual requirements are in conflict with other federal mandates. Our naturalization laws specifically require that a knowledge of spoken and written English be demonstrated to become an American citizen. The requirement for a bilingual

ballot actually contradicts the pertinent provisions of the naturalization law and implies that the English language requirement is an unnecessary formality.

It is stated in our bilingual education program that English must be one of the languages used in bilingual schools. The bilingual education program provides an opportunity for minority language students to become proficient in the use of English.

Those who disagree with my position on bilingual ballots are quick to point out that many of the recipients of the ballots are third, fourth, and fifth generations of American families. I share their dismay that these people have not fully participated in the rights of American citizens because of language barriers. But I truly cannot see how allowing them to vote in a language other than English is going to make them full-fledged members of our American society.

Let us suppose, for instance, a Spanish speaking citizen wants to vote for a Presidential candidate or one of the various state propositions being offered. While he many have a ballot printed in Spanish, it will not help illuminate the differences between the candidates; it will not enlighten him on the effect the proposition will have on his life. Voter information pamphlets which are supposed to explain the issues in question are often so bureaucratically written that they are incomprehensible in any language!

Those who do not understand English are totally dependent on information received from foreign language television programs and newspapers. They are excluded from the broader perspective obtained from English newspapers. They cannot even listen to an English speaking candidate present his own views.

Almost half my classmates in high school were children of European immigrants. In many families the parents spoke English poorly. It was considered part of the duty and education of these immigrant children to explain to their parents, whenever necessary, measures at issue in elections. To many of us these tasks of interpretation were our introduction to citizenship long before we reached voting age.

These families understood the importance of sharing the language of the country they had adopted. However, with the use of bilingual ballots today, there is less need to understand the new language. Should we encourage

in this way the growth of minority language communities? Communities which will remain outside the mainstream of American life because of the language barrier?

Our country's greatness is directly related to our unique ability to merge a multitude of foreign cultures into one. The key to this ability is the acceptance of a common language that allows each new culture group to communicate and share ideas with those of us already here, while at the same time retaining pride in its original culture. We cannot as a nation afford to ignore the value of the American melting pot.

I firmly believe that all U.S. citizens, regardless of their heritage, need to learn to use English well enough to vote in this English speaking country. I ask my colleagues on this Committee to report to the Senate a bill which no longer contains a requirement for bilingual election materials. Any law which reduces the incentive to learn English strengthens the language barrier. It is time we worked to weaken that barrier.

National Federation of Republican Women 310 First Street, S.E., Washington, D.C. 20003 (202) 484-6670

MRS. BETTY RENDEL, PRESIDENT

RESOLUTION ON BI-LINGUAL BALLOTS

Whereas, The Voting Rights Act of 1965 was amended in 1975 to require bi-lingual voting materials, and was passed with little public knowledge;

Whereas, The Voting Rights Act provides for the printing of ballots and other election materials in a second language when certain conditions of the Act are met;

Whereas, Our naturalization laws require immigrants to be able to speak, read, write, and understand simple English with an exception only for those immigrants over a certain age;

Whereas, There is no provision for checking citizenship of non-English speaking persons registering to vote;

Whereas, Many of our forefathers were immigrants to the United States and as such, had to learn English in order to be naturalized;

Whereas, Bi-lingual ballots might be well-intentioned, failure to learn the English language retards full citizenship and opportunities for our minorities, and creates subcultures within America;

Whereas, The printing of bi-lingual ballots nationally for the 1978 elections cost some $3,000,000 and up to $957.00 per ballot request in one area alone, and affected over 500 governmental jurisdictions in 29 states (Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming); and

Whereas, We believe that the present bi-lingual provisions of the Voting Rights Act is in direct conflict with an older, more established Act and custom which was implemented to insure orderly assimilation of immigrants into our work force and culture;

Resolved, That the National Federation of Republican Women urges support of Senator Hayakawa's Senate Bill 53 and Congressman Bafalis' House Bill 1407 which would repeal the bi-lingual ballot provisions of the Voting Rights Act as amended in 1975.

Further resolved, That copies of this resolution be sent to all Congressmen, Senators and Governors of affected states.

Passed at NFRW convention, September 19, 1981

Remarks from California city and county officials regarding bilingual election materials:

I am also concerned with the large waste incurred in each election. Not only am I city manager but my duties include that of city clerk. I am responsible for overseeing local elections. I have seen a tremendous bulk of paper wasted to provide Spanish language ballots, voting instructions and other documents in that language. By providing this material in Spanish, are we not discriminating against those who speak neither English nor Spanish? Further, I have yet to see an election were more than a few individuals utilize the Spanish language ballot. Nowhere do I know where it has been utilized by more than one per cent of the voters. In Loma Linda the need for a Spanish ballot is a rarity. This requirement of these foreign language ballots is an additional burden on the taxpayers and is one that we need not continue.

Robert R. Mitchell
City Manager
City of Loma Linda

We believe that all ethnic groups should be encouraged to preserve and retain their customs and languages. However, since people must at least understand basic English in order to become an American citizen, it would seem reasonable that any government business should be conducted in only one language - English. The bilingual voting assistance requirements are extremely costly and completely wasteful. Our City has a sizable Spanish population and many of the Spanish people themselves have been affronted by the bilingual requirements which include registration and voting materials to be printed in both English and Spanish and a Spanish-speaking election worker at each polling place. In these days of trying to cut back government costs, it is both foolish and unwise to spend millions of dollars of tax money for the comparative few who have some difficulty with the English language.

Jesse M. Davis
Mayor
City of Buena Park

As a City Clerk in a County that has more than 5% non-English-speaking citizens, I am very familiar with the bilingual requirements of the 1975 Tunney Amendment to the Voting Rights Act. I am more fortunate than some Clerks since there is a certified Spanish translator in the office of the County Registrar of Voters and they charge us a mimimum rate for such services. I do, of course, have to pay extra for the printing of sample and official ballots in both English and Spanish and for publications in a Spanish-language newspaper, as well as in the designated English newspaper. Some of the election officials who work at the polling places tell me they have never been asked for a ballot printed in Spanish. At a time when Prop. 13 has cut the funds available to cities and counties, there certainly are areas where money could be better spent than on bilingual ballots.

Further, these bilingual requirements discriminate against other minorities who have not yet reached the 5% criteria.

Mrs. Evelyn Reynolds
City Clerk
City of Salinas

The City Council has long felt that the mandated translation of election materials, as one example, has been a needless expense borne by the taxpayers. I have been advised by the City Clerk that although all election materials have been translated into Spanish for the last four Municipal Elections, there has never been a request received for this literature. Additionally, the Clerk has advised me that when registering citizens to vote, that any comments made are generally negative when the citizens are asked, "do you prefer your election materials in English or Spanish."

Bob Nielsen
Mayor
City of Fountain Valley

Manhattan Beach is a City of some 19,000 registered voters with less than 2% requesting Spanish language materials or assistance. And, in actual fact, we have never had a single voter in our General Municipal elections request Spanish translations of election materials. During this time of severe budgetary constraints we have found meeting regulations concerning bilingual election materials increases our costs by 30%. As can be seen, relief from the bilingual requirement would enable us to use our dwindling resources to positively serve our citizens rather than to simply pour needed funds down the drain.

Russell F. Lesser
Mayor
City of Manhattan Beach

In view of the public demand to cut governmental expenses it seems inappropriate to me to require the extra expenditures necessitated by preparing election material in languages other than English, to say nothing of the educational requirements now imposed on our school systems. In our last municipal election, although we did have available translations of the ballot material in Spanish, as required by law, we did not receive a single request for the information. This increased our election costs only a small amount but multiplied over a period of years or between the hundreds of municipalities, this is a substantial amount of money.

Fred M. Hann
Mayor
City of Lancaster

I feel that it is demeaning to assume that our new citizens are unable to learn the language of our country, not to mention the cost of the additional printing and the possible misinter-

pretation involved with respect to ballots and election materials.

Eunice N. Sato
Mayor
City of Long Beach

All levels of government spend considerable amounts of money to produce election materials and publications in languages other than English. During our last municipal election we paid for certified translations of election materials that were available upon request. Despite the fact that 20% of our community is of Hispanic origin, not one request for this material was received.

Richard Acton
Mayor
City of Placentia

Having to print the various documents in more than one language is certainly a terrific expense on the taxpayers.

Harold T. Jones
Mayor
City of Rancho Mirage

The Voting Rights Act which required all jurisdictions with a 5% minority to print election materials in English and other languages has proven to be a costly requirement and one which the City has had no requests for despite its availability.

Louis W. Merritt
Mayor
City of Temple City

I agree that attempts to accommodate other languages on election ballots and other government materials is a waste of the taxpayers' dollars and, ultimately, a disservice to the non-English speaking public.

Charles E. Gilb
Mayor
City of Arcadia

For many years now, we have moved too far in accommodating the short range convenience of new immigrants to the detriment of the long range well being of those same new immigrants and the nation at large. The mandatory duplication of ballots, voting materials, contracts, notices and other materials is an unnecessary expense in these times of budgetary restraint. But even worse is the perpetuation of a language barrier for the new immigrant. Who would have thought

that this concession for language duplication would have proliferated to so many Asian and other languages.

James B. Sharp
Mayor
City of Tustin

Since United States citizenship is required in order to register to vote in all local and state elections and knowledge of the English language is necessary to take the examination for United States citizenship, it is inconsistent to require ballots and election materials to be printed in other languages.

Evar P. Peterson
Mayor Pro Tem
City of Westminster

The Council asked that I convey to you its enthusiastic support of the referenced legislation you have introduced to repeal the sections of the Voting Rights Act which require the use of bilingual election materials. The points of your argument for repeal are well taken and are shared by the members of this Council.

As a City which has expended a great deal of funds to comply with the provisions of this act with virtually no one availing themselves of the bilingual material offered, we certainly endorse and support the subject legislation you have introduced.

Alice M. Reimche
City Clerk
City of Lodi

The costs of printing ballots and other related material in more than one language are tremendous and create an undue hardship on local governments.

The demand for bilingual election material has been so insignificant that a repeal of the 1975 amendments to the 1965 Voting Rights Act is appropriate.

Bertha Moseley
Chairman, Board of Supervisors
Butte County

The costs of printing ballots and other related material in more than one language are tremendous and create an undue hardship on local governments.

George A. Edwards
Chairman, Board of Supervisors
Glenn County

Please reply to:

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State Senator
Jim Nielsen
Fourth District
Napa, Sacramento, Solano, Sonoma, and Yolo Counties

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Occupational Preparation
and Placement
State Allocation
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BCDC

August 10, 1981

TO: ALL CALIFORNIA REPRESENTATIVES IN CONGRESS

FROM: SENATOR JIM NIELSEN

RE: FEDERAL VOTING RIGHTS ACT LANGUAGE MINORITY PROVISIONS

Enclosed is a copy of my Senate Resolution 13. This measure asks President Reagan and Congress to repeal the federal mandate of multilingual ballots. The resolution passed the full Senate by a 17 to 9 vote.

Throughout California this incredibly costly mechanism has been counter to our intent to assimilate all citizens into our mainstream society. Our people do not want to be fragmented or labeled by ethnic, religious nor economic groups.

The problem is more than one of semantics. In one recent election only 1,200 ballots were requested, yet the total cost for such specialized ballots was nearly $2 million.

More than the cost factor, there are many non-English speaking citizens. By providing bilingual ballots we are telling them that they can fully participate in the political process without overcoming the language barrier.

Ballots may be printed in a different language, such as Spanish, but this will not help illuminate the differences between the candidates. The non-English speaking voter is excluded from the broader perspectives obtained from English-language newspapers, magazines, radio and television programs. While the bilingual ballot systems allows a non-English speaking citizen to more easily cast a vote, they remain limited in obtaining the wide range of information necessary to cast a totally informed vote.

This is an inappropriate expenditure at this time of fiscal restraint and limited monies. By outlawing mandatory bilingual ballots, voters will be encouraged to become more proficient in English, taxpayer monies will not be unnecessarily spent, and we will comply with the growing demand for a reduction of governmental interference in our everyday lives.

I am emphatic in my belief that my measure would actually help non-English speaking voters. Bilingual ballots have polarized our citizens and have caused a second-class group of voters.

Before a person can vote, one must be a citizen; and before becoming a citizen, one must learn English. Therefore, to say a person is a non-English speaking voter is a contradiction of terms.

I feel my resolution will add momentum to a movement already happening. Our country's greatness is directly related to our unique ability to merge a multitude of foreign cultures into one. The key to this success has been the commonalty of one language, English, and the bilingual ballot concept is counterproductive to this process.

I urge your support.

SENATE, CALIFORNIA LEGISLATURE 1981–82 REGULAR SESSION

Senate Resolution No. 13

Introduced by Senators Nielsen, Beverly, Craven, Davis, Marz Garcia, Johnson, Richardson, Russell, Schmitz, and Speraw

Relative to the Federal Voting Rights Act

WHEREAS, English is the official language of the United States; and

WHEREAS, The process of naturalization undergone by applicants for United States citizenship requires the ability to read, write, and speak English; and

WHEREAS, The Federal Voting Rights Act presumes a certain level of proficiency in the English language on the part of all voters; and

WHEREAS, The providing of non-English election materials to specified language minorities may hinder, rather than facilitate, the full integration of those minorities into the American mainstream; and

WHEREAS, The providing of non-English election materials to specified language minorities represents an unnecessary and wasteful taxpayer expense; and

WHEREAS, The providing of non-English election materials to specified language minorities may inflame prejudice against those minorities and promote a negative reaction to other, more valid minority programs; and

WHEREAS, The federal government has neither provided the guidance nor the funding necessary to carry out the language minority provisions of the Federal Voting Rights Act; now, therefore, be it

Resolved by the Senate of the State of California, That the Members respectfully memorialize the Congress of the United States to repeal the language minority provisions of the Federal Voting Rights Act; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States.

Senate Resolution No. 13 read and adopted by the Senate June 25, 1981.

Attest Darryl R. White
Secretary of the Senate

Senator HATCH. Our next witness will be the distinguished Governor of the State of Texas, Governor William Clements.

Governor Clements, we are really delighted to have you here. You are an old friend and we appreciate your taking the time from what we know is a very busy schedule there to come up and testify today.

While you are taking your seat, perhaps I could read into the record a letter from the U.S. Department of Justice, Civil Rights Division, the Office of the Assistant Attorney General of the United States, William Bradford Reynolds, dated February 3, 1982:

Dear Senator Hatch:

This is responsive to the telephonic request of Mr. Steve Markman of your staff inviting me to respond to allegations made by Mr. Joaquin Avila, associate counsel of MALDEF, that I have refused to meet with that organization to discuss pending submissions under section 5 of the Voting Rights Act. According to press accounts, Mr. Avila testified generally that the administration is insensitive to Hispanics and specifically that I had declined to meet with him last week to discuss a pending decision.

In my opinion he is wrong on both counts. The Civil Rights Division reviews about 6,000 changes under section 5 of the Voting Rights Act annually. Because of the 1980 census, the past few months have brought the largest volume of redistrictings ever processed in the Division. Although our resources are literally stretched to the breaking point, I believe the procedures which have been developed over the last several years, and which I have not changed at all, assure that this important responsibility is carried out fairly and with full opportunity for the views of all affected citizens and organizations to receive consideration.

Interested groups such as MALDEF receive a weekly notice of every submission and frequently forward written and oral comments to the officials conducting our reviews. Upon request, staff members routinely meet with such groups to discuss their concerns. Mr. Avila himself is a regular participant at such meetings.

The analysis done by our Voting Section invariably includes a summary of such views, and in making my decision I carefully review the analysis. On occasion, when my review indicates it would be helpful, I schedule meetings with one or more interested parties. Obviously, given the volume of submissions and my other responsibilities, it is impossible for me to meet with every organizational representative that wishes to make a special case. Instead, I have continued a system that guarantees a full opportunity to comment.

For example, in the last week, the very period in which Mr. Avila apparently felt slighted, I reviewed and entered objections to the legislative redistricting in the Texas House and Senate, and a congressional redistricting in that State. In each instance, comments provided by MALDEF were among the considerations that led to the objection.

Indeed, of all the organizations participating in our section 5 review program, MALDEF is by far the most active. Mr. Avila and his associates are in regular, virtually daily contact, with us. Under these circumstances, if the press accounts are accurate, I am astonished that Mr. Avila would advise the Judiciary Committee that we have been unresponsive to his group's interests, based on my unavoidable inability to meet with him on a particular pending matter.

With regard to the general charge that this administration is insensitive to Hispanics, much of the foregoing discussion is also relevant and instructive. We carefully review each submitted voting change to determine if it has a proscribed discriminatory purpose or effect, applying the legal standards enunciated by the courts regardless of the nature of the minority group involved.

As for our general interest in MALDEF's views, in point of fact I have met with representatives of MALDEF on two separate occasions during our consideration of possible extension of the Voting Rights Act. In view of Mr. Avila's concerns and because he represents a major civil rights organization, I will attempt to schedule a meeting with him at a mutually agreeable time. On that occasion I will outline the above principles and reassure him of our continuing interest in his organization's views.

I thought that was an appropriate letter to read into the record at this point. I might mention that I personally called the Attorney General of the United States, who himself felt that they have been

responsive on this issue but said that he would certainly inquire further into the matter. Of course, I think that is part of the reason for this response.

With regard to Mr. Avila and any other civil rights groups, I would be happy to follow up as chairman of this committee to make sure that you are given the consideration that you are due by the Civil Rights Division or anybody else in this administration. I know that there is no intent to deter you from doing your job or to fail to do their jobs as members of the Civil Rights Division.

Therefore, with that, Governor Clements, welcome again to this committee. We are delighted to have you here and we will look forward to taking your testimony at this time.

STATEMENT OF GOV. WILLIAM CLEMENTS OF THE STATE OF TEXAS

Governor CLEMENTS. Thank you, Mr. Chairman.

Chairman Hatch and members of the Subcommittee on the Constitution: It is a privilege to be here today, as extension of the Voting Rights Act is undoubtedly the most significant civil rights issue facing Congress.

During my first bid for Governor of the State of Texas in 1978, on numerous occasions I publicly endorsed and supported the Voting Rights Act. I am here today to tell you that as Governor, my support of the act has not waivered. The Voting Rights Act has been good for Texas.

TEXAS' COVERAGE UNDER THE VOTING RIGHTS ACT

There is no doubt that Texas came under the provisions of the Voting Rights Act in 1975 because of a record of past, often-systematic discrimination against minority voting. There is equally no doubt that such practices, to a great extent, have been abandoned. Although Texas' coverage under section 5, the preclearance provision of the act, remains in full force and effect until 1985, nonetheless isolated instances of discrimination remain and I believe that extension of the Voting Rights Act in Texas will help to eradicate them.

The requirements of the Voting Rights Act do not for the most part touch nor do they inconvenience nonminority voters in Texas. To minority citizens, though, the act is a very real guarantee that their right to vote will be protected. I feel that this precious protection and its essential result, the confidence of minority voters in the election process, must be continued. Under no circumstances will I support changes resulting in a weakening of the act.

TEXAS' RECORD UNDER THE VOTING RIGHTS ACT

Texas' record under the Voting Rights Act has been exceptionally good. Since 1975 on a nationwide basis Texas has submitted almost half of all election changes the Justice Department has considered for preclearance, and we have drawn only one-seventh of the objections made. Furthermore, only eight-tenths of 1 percent of our submissions under the Voting Rights Act have drawn objections, as compared to a 3.7 percent rate of objection for all other States.

This record, coupled with changes in State law such as the required use of bilingual election materials, and the fact that leaders of minority organizations have stated that minority voter registration in Texas has increased significantly since 1975, clearly demonstrate the progress Texas has made in insuring that all minority citizens are offered the unqualified right to vote.

EFFECT OF THE VOTING RIGHTS ACT IN TEXAS

Let me cite some examples which clearly indicate the positive effect of the Voting Rights Act in Texas: The Mexican-American Legal Defense and Educational Fund, a major Hispanic interest group, has referred to the Voting Rights Act as, and I quote, "The cornerstone of Hispanic efforts to secure meaningful political access through the Southwest."

A recent study by the Southwest Voter Registration Education project showed a 29.5 percent increase in Hispanic voter registration nationwide between 1976 and 1980. In the Southwest, Hispanic registration rose 44 percent.

The April 4, 1981, election of Henry G. Cisneros as mayor of San Antonio made him the first Mexican-American mayor of any major U.S. city.

A 1980 study by the Texas Advisory Committee to the U.S. Civil Rights Commission suggested the Voting Rights Act has had a positive effect in increasing Mexican-American and black representational proportions. In instances where the Voting Rights Act has not applied there has been little or no change.

SUPPORT OF MINORITY GROUPS IN TEXAS OF THE VOTING RIGHTS ACT

Finally, on January 22, 1982, I was joined not only by David A. Dean, Secretary of State—who incidentally is here this morning with me, and in Texas our secretary of state is the chief elections officer so he has accompanied me here this morning, and I would like the record so to state--but also by an unprecedented coalition consisting of the Texas State directors of the League of United Latin American Citizens, American G.I. Forum, IMAGE, the NAACP, and the League of Women Voters, for the purpose of collectively and unequivocally endorsing extension of the Voting Rights Act as it is currently constituted and applied to Texas.

The union of these organizations is unprecedented, and for the purpose of endorsing an extension of the Voting Rights Act sends a very clear message to the Congress and to your subcommittee: The Voting Rights Act has been good for Texas and the act should be extended as presently constituted. In fact, Oscar Moran, the Texas State director of the League of United Latin American citizens, recently stated, and I quote, "The Voting Rights Act has been good for Texas and LULAC supports a 10-year extension of the act as presently constituted. When the machine is working, let's not fine-tune it."

BAILOUT PROVISION

I applaud President Reagan's endorsement of a 10-year extension of the Voting Rights Act. As Governor of Texas, I also applaud his

position in favor of "reasonable" bailout provisions for States and other political subdivisions.

However, to qualify my last statement, should there be a reasonable bailout provision acceptable to the Texas minority organizations mentioned previously that does not in any way jeopardize the integrity and intent of the Voting Rights Act; then and only then will I support the provision. To my knowledge no reasonable bailout provision has been offered that is acceptable to all the Texas parties.

The bailout provisions set forth in H.R. 3112 are so stringent and cumbersome, it is doubtful that any covered jurisdiction could become exempt. For example, the proposed House legislation provides that every jurisdiction in a covered State must be granted bailout before the State can achieve bailout. It could, therefore, take only one of Texas' 254 counties to prevent the State from becoming exempt or only one out of 1,102 school districts in the State of Texas to prevent the State from bailing out. Therefore, I cannot support the bailout provision in H.R. 3112.

BILINGUAL BALLOT PROVISION

I also support President Reagan's endorsement that the bilingual ballot provision of the current Voting Rights Act be extended so that it is concurrent with other special provisions of the act. The use of Spanish in addition to English for registration and voting on the Texas ballot has afforded full minority participation in Texas' electoral process, and it must be continued. The bilingual ballot provision insures full participation by Texas' Hispanic population in the State's election process.

SECTION 2 OF THE VOTING RIGHTS ACT

With respect to section 2, I am in favor of extending the act as is. I would again like to quote Mr. Moran of LULAC: "Let's not mess up a machine which has worked well in the past." The U.S. Supreme Court has ruled that section 2 is no more than a restatement of the 15th amendment of the U.S. Constitution and that tests to prove that laws are unconstitutional are the same as challenging the validity of the act under this section. One must satisfy the same standard as challenging it under the 14th or 15th amendment of the U.S. Constitution.

EXTENSION OF THE VOTING RIGHTS ACT

Extension of the Voting Rights Act as it is presently constituted for 10 years should be the correct decision for this subcommittee to reach. If in fact a reasonable bailout provision is offered which meets the satisfaction of all of the Texas parties and does not dilute the intent of the act, then I will support such a provision. Finally, the intent standard for determining discrimination must be retained.

I will continue full cooperation with Federal authorities. Our goal over the course of the act's extension period is to reach a point where all Texans have full confidence that their right to vote is fully protected without need for indefinite Federal oversight.

There is no doubt that if each of us could sit down and draft a Voting Rights Act, that there would be as many variations as there are drafts. The message I bring to you from Texas today is that the current Voting Rights Act has been good for Texas. The groups I mentioned and myself strongly urge your expedited action to extend the act as is.

Election year is upon us, and minority groups need to be assured of their continued protection. Let's not procrastinate further and spend endless time deciding whether the current Voting Rights Act will be made more liberal or more conservative, more restrictive or less restrictive. Let the political demagoguery end, and extend the Voting Rights Act immediately, as is.

I will be pleased to respond to any questions.

Senator HATCH. Thank you, Governor.

Can you explain to me why the predominant part of the civil rights community in the State of Texas—unlike the civil rights leadership here in the District of Columbia—is supportive of a straight extension of the Voting Rights Act rather than the House bill?

Governor CLEMENTS. Without being facetious, Chairman Hatch, I would have to say that there are many differences between us in Texas and the community here in Washington, D.C.

Senator HATCH. I have noticed that through the years, yes.

Governor CLEMENTS. Therefore, exactly why our minority groups in Texas would be satisfied and pleased and want continuance of the act as is, versus what your group up here is saying, I really cannot answer that because I would not pretend to have a feel for any of these kinds of matters outside of Texas. I can speak for Texas with some authority but I cannot speak for Washington, D.C. I tried that and it did not work.

Senator HATCH. Well, I think very few of us can, as a matter of fact. However, I have found that to be an intriguing disparity.

There have been a few civil rights leaders from Texas who disagree with you, but my understanding is that the majority of them would prefer a simple extension of the act.

Governor CLEMENTS. I do not think there is any question that the majority feel as I have expressed it. It is unprecedented for these five organizations to come together and to have a unified front and unanimously agree with the statement that I have just made.

Senator HATCH. Thank you.

Senator DeConcini?

Senator DECONCINI. Mr. Chairman, Governor Clements, thank you for your testimony and your out-front support of the extension.

I am advised that the heads of LULAC and MALDEF will be testifying here and that their statements will wholeheartedly support the amendments to section 2, as they did in the House, which is a little bit contrary to the impression that you have left here. The president and the head of LULAC, I believe, is from Texas. Do you have any comment?

Governor CLEMENTS. Well, I do.

I think that you have to take into account that in those organizations they have a national leader who represents, shall I say, perhaps a national view. The president of the Texas LULAC organization is included in my statement, and he joined with these other

leaders of those organizations representing Texas in his statement. It is not unusual in Texas, Senator, for those organizations that represent Texas to differ with their national organizations.

Senator DECONCINI. Then, Governor, the support by the head of the Texas LULAC organization is for a straight extension of the act——

Governor CLEMENTS. Exactly, exactly.

Senator DECONCINI [continuing]. And making no distinction between section 5 or section 2.

Governor CLEMENTS. That is exactly right, and the same thing with the NAACP, and the same way with the G.I. Forum.

Senator DECONCINI. Therefore, all of those Texas——

Governor CLEMENTS. You could call them Texas branches of the national organizations.

Senator DECONCINI [continuing]. Texas branches or organizations differ from what the testimony has been or will be as to their national——

Governor CLEMENTS. That is right. It reminds me somewhat of various Congressmen who differ with their own administration at times, or various Senators who differ with their own administrations.

Senator DECONCINI. Oh, I know all about that. However, what you are saying is that Texas branches differ from the national ones——

Governor CLEMENTS. Yes, sir.

Senator DECONCINI [continuing]. Assuming that what I am telling you is correct about the national leaders.

Governor CLEMENTS. I do not know anything about the national position and they have not transmitted their position to me but I can tell you that I am authorized to speak for the Texas branches of these organizations.

Senator DECONCINI. That includes section 2, the amendments to section 2?

Governor CLEMENTS. Yes, sir.

Senator DECONCINI. Thank you, Governor.

Senator GRASSLEY. Governor, I want to thank you for your testimony as well, and I want to publicly acknowledge that this is the second time that I have had an opportunity to discuss legislation pending before the Congress with you. I want to thank you for the hosting of the Immigration Subcommittee in your capital earlier this year to discuss that overwhelming national problem as well.

Governor CLEMENTS. Senator Grassley, we were delighted to have you in Texas and you are welcome any time.

Senator GRASSLEY. I do have one question with regard to the bailout provisions: There is a debate, at least there was on the floor of the House of Representatives and I assume there might be in the Senate, on the question of whether or not States should be allowed to bail out before all of their political subdivisions have. Do you have any information or points of view on that specific question that you would like to give to the committee?

Governor CLEMENTS. Yes, sir. I touched upon that in my statement. We have 254 counties in Texas and, as I stated, some slight number over 1,100 independent school districts. It would seem unreasonable to me that all of those political subdivisions, whatever

they might be, would be required to be in compliance before the State itself in any part could be excluded.

I feel that as those subdivisions in Texas, whatever they might be—counties, municipalities, school districts, et cetera—that as those have demonstrated, historically demonstrated compliance, that they should be allowed to move out from under the regulations.

Now, I do not have a piece of legislation to submit as a draft to you that this is my idea on that, but that is what I mean by a bailout. In discussing this with these minority organizations, in principle, in concept they too are in basic agreement with that kind of an approach. However, all of us agree that we would have to look very carefully at any bailout provision. Certainly one that included all subdivisions, all political subdivisions of a State being in compliance before any one could be excluded, I would be opposed to that. I think that is unreasonable.

Senator GRASSLEY. Thank you.

That is the only question I have, Mr. Chairman.

Senator HATCH. All right.

Governor, as you know, we have had many witnesses who are authorities in this field come in and testify that should section 2 pass in its present form as enacted by the House with the results test in it, that it would ultimately lead over a prolonged period of time to proportionate representation by race, and that it would affect some 12,000 communities across the country. Do you agree or disagree with that statement?

Governor CLEMENTS. I would have to give more thought to that specific but I would prefer really generally to say that I agree with the act as it is. I am in support——

Senator HATCH. You are saying that you support the present law, not the House bill.

Governor CLEMENTS. That is right. I am in support of the intent. I am a little bit familiar with Attorney General Smith's recent testimony with respect to the intent provision, and I generally agree with his position.

Senator HATCH. Thank you, Governor. We are happy to have had you here, and thank you for taking time out from what we know to be a very busy schedule. You Governors have a lot on your minds these days.

Governor CLEMENTS. It is my pleasure. Glad to be here with you.

Senator HATCH. Thank you so much.

[Additional material submitted by Governor Clements follows:]

93-758 O - 83 -- 56

OFFICE OF GOVERNOR WILLIAM P. CLEMENTS, JR.
JANUARY 22, 1982

FOR IMMEDIATE RELEASE:

Governor William P. Clements, Jr., was joined today by Secretary of State David A. Dean; Oscar Moran, Texas State Director, LULAC; Ed Bernaldez, Texas State Chairman, American G. I. Forum; Jose Garcia, Texas State President, IMAGE; A. C. Sutton, President, Texas Chapter, NAACP; and Diana Clark, President, League of Women Voters of Texas, for the purpose of collectively and unequivocally endorsing extension of the Voting Rights Act.

Governor Clements in noting that both he and each of the organizations support extension of the Voting Rights Act as it is presently constituted, stated that, "should there be offered a reasonable "bail-out" provision acceptable to all the Texas parties, then I will support the provision. I would not support any change or modification which jeopardizes the integrity and intent of the Voting Rights Act."

Governor Clements stated, "I am extremely pleased and encouraged by Texas' widespread support for extension of the Act. It has been good for Texas! Clearly, Texas' coverage by the Act has resulted in necessary changes in state laws to promote minority voter registration and participation in the electoral process along with excellent rates of minority voter registration. These facts demonstrate the progress Texas has made in ensuring all minority citizens are afforded the unqualified right to vote."

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Governor Clements noted that, both he and Secretary Dean intend to continue full cooperation with federal authorities with the goal of reaching a point where all Texans have full confidence that their right to vote is fully protected without need for indefinite federal oversight. Governor Clements concluded by noting that he will be in Washington, D.C., on February 4, 1982, to testify before the U.S. Senate Judiciary Subcommittee on the Constitution in support of extension of the Voting Rights Act.

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Senator HATCH. Our next witness will be the Honorable James Sensenbrenner from Wisconsin, a Member of the House of Representatives.

Jim, we are happy to welcome you to our committee and we will take your testimony at this time.

Mr. SENSENBRENNER. Thank you.

Senator HATCH. Jim, we have been trying to limit our witnesses to 10 minutes so we can have more time for questions, if it is all right with you. The green light means you have 10 minutes; the yellow light, 1 minute left; and the red light means we would like to ask some questions. Please go ahead.

STATEMENT OF HON. F. JAMES SENSENBRENNER, JR., A MEMBER OF CONGRESS FROM THE STATE OF WISCONSIN

Mr. SENSENBRENNER. Thank you, Mr. Chairman, for allowing me to testify on the extension of the Voting Rights Act of 1965. I have prepared written testimony which I would like included in the permanent record of these hearings and I will summarize the points made therein verbally.

Senator HATCH. Without objection, your full testimony will be included.

Mr. SENSENBRENNER. During consideration of this legislation in the House Judiciary Committee, I, along with Congressmen Don Edwards of California and Hamilton Fish of New York, cosponsored the amendment which eventually passed the House.

The Voting Rights Act of 1965 has been the most successful piece of civil rights legislation ever passed by the Congress. It must remain on the books beyond next August 6 in a form which effectively prevents voting discrimination from recurring.

During House debate on the extension, two major issues of contention arose: First, whether the bailout procedures allowing jurisdictions covered under the section 5 preclearance provisions are fair; and, second, whether the inclusion of a results test in section 2 of the House-passed bill plowed new legislative fields in the law. In both cases, what the House passed was fair and necessary to maintain the Voting Rights Act as an effective tool to prevent voting discrimination.

The bailout procedures contained in the House-passed bill are tough. They ought to be tough. The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights heard over 100 witnesses in 17 days of hearings. The testimony amply demonstrated that the ingenuity of the human mind is limitless when it comes to devising ways to rig election systems to favor certain candidates or points of view. Gerrymandering, moving polling places, re-registration and re-identification devices, limited hours for registration, frequently at inconvenient sites, show that a need remains in many jurisdictions for the Justice Department to continue preclearing election laws under section 5. Fortunately, there appears to be little opposition to that part of the bill.

However, in order for a jurisdiction to bail out from section 5 preclearance, there should be a tough but fair standard to show that the officials there have purged themselves of all of the notions about returning to the bad old days. The bailout must be tight

enough to prevent State and local officials from pointing the finger at each other for who is at fault for discriminatory laws and procedures, and the court should retain jurisdiction for an extended period of time to prevent a relapse into the old attitudes. The House-passed bill meets all of these tests.

I would like to focus my testimony today, however, on why section 2 of the House-passed bill—that part which adds a results test—is essential to maintaining a strong voting rights law.

Section 5 of the law, unlike section 2, applies only to proposed election law changes in covered jurisdictions after 1965. In other words, section 2 must be used to strike down discriminatory election laws passed in the covered jurisdictions before 1965 as well as those passed elsewhere up to the present.

If section 2 is gutted, Congress will have given absolution to all of the sins committed in the covered jurisdictions prior to 1965. In good conscience, I cannot give such a blank check to each and every election law passed in those parts of the Nation before Congress enacted the Voting Rights Act. To do so would completely negate the intent of this most successful law and allow the most blatantly discriminatory laws to stand as long as they were passed before 1965 and as long as no changes in them have been attempted since.

The key to keeping an effective section 2 is the amendment contained in the House-passed bill which explicitly states that any practice which results in discrimination is prohibited. Some will ask why this change is necessary. Simply put, the decision of the Supreme Court in the case of *Mobile* v. *Bolden*, in requiring that only the intent of the practice be considered, makes a section 2 lawsuit very difficult to prove.

In many instances, particularly when one is considering a law or practice originally employed prior to 1965 in a jurisdiction now covered by section 5 preclearance, one would have to subpena the officials who approved that law from the grave in order to determine their intent. *Mobile* challenged a 1911 law in the election of certain local officials. No one who voted on that law is presently alive to testify. To use the intent standard and that standard alone would mean any attempt to strike down that law as discriminatory would fail before it began. Absolution would be given to that practice. The intent of the act in protecting the right to vote and to have that vote mean something would be lost.

Contrary to the allegations of some, section 2 of the House-passed bill does not accomplish something Congress never intended to do when the Voting Rights Act was first passed in 1965 and renewed in 1970. During the 1965 hearings, Attorney General Katzenbach stated that the scope of section 2 was to prohibit discriminatory procedures if their purpose or effect was to deny or abridge the right to vote on the basis of race or color.

In 1970, Attorney General Mitchell proposed repealing section 5 preclearance in exchange for language allowing the Attorney General to bring section 2 suits if the practice had the effect of denying or abridging the right to vote on account of race or color. That offer was rejected by the Senate Judiciary Committee and 10 members wrote report views that the Attorney General already had such power.

Hence, it is clear that a results or effects test was intended by Congress both in 1965 and in 1970.

Second, the opponents of the section 2 language passed by the House claim that no legal standard requiring results applied before the Supreme Court decision in *Mobile* v. *Bolden.* That is not true either, for the Court used a results test in both *Whitcomb* v. *Chavis,* decided in 1971, and *White* v. *Regester,* decided in 1973.

Particularly relevant to this issue is the Court's language in *White* that the right protected was not a right to proportional representation but the right of equal access to the electoral process.

The House was quite clear in emphatically stating in statutory language that no right of proportional representation was conferred by the amendment to section 2 which this subcommittee is presently considering. To claim otherwise misreads the plain language of the bill. Equally unfounded are allegations that at-large election systems used in approximately two-thirds of the local jurisdictions throughout the Nation are illegal.

In order to sustain the proof required in a section 2 suit, if the House-passed bill becomes law plaintiffs must show that the totality of the system deprived minorities of access to that system. This is a far different standard than if minorities lose an election fair and square. Even the House-passed bill's strongest supporters will state that it is not its intent to decide who will win the election but just to make sure that the rules apply fairly to all the participants.

Mr. Chairman, this subcommittee has a golden opportunity to reject the scare tactics of those opposed to an effective Voting Rights Act by approving section 2 as passed by the House.

Thank you.

Senator HATCH. Thank you, Congressman Sensenbrenner.

Let me ask you this question: According to the 1980 Almanac of American Politics, the ninth district of Wisconsin, which you represent, is the State's only predominantly suburban congressional district. Is that correct?

Mr. SENSENBRENNER. That is as it stands now. We House Members have to worry about reapportionment.

Senator HATCH. I see, but it is true as of today.

Mr. SENSENBRENNER. As of today, yes.

Senator HATCH. The Almanac continues by observing that the district was created by Democratic State legislators to remove Republican voters from two neighboring districts and concentrate them in a single district. I think that is correct also, is it not?

Mr. SENSENBRENNER. No, sir, it is not. The present congressional reapportionment plan that has existed since 1971 was coauthored by this witness as a member of the Wisconsin Assembly during the 1971 session.

Senator HATCH. Then the Almanac is incorrect on that issue?

Mr. SENSENBRENNER. I believe so.

Senator HATCH. OK. They go on to conclude by noting that this effort has been so successful that the district has always elected Republican Congressmen and always, except in 1964, delivered solid Republican margins in Presidential elections. That is true, is it not?

Mr. SENSENBRENNER. Since the ninth district was created originally, the Republican candidate for Congress has been successful,

although there were close elections in both 1970 and in 1974. In 1970 I believe the margin was 6,000 and in 1974 the margin was 11,000.

Senator HATCH. Let me ask you a fairly straightforward question: Does the ninth district of Wisconsin serve to maximize the influence of Republicans in the Wisconsin congressional delegation?

Mr. SENSENBRENNER. I assume that any district that elects a Republican Congressman maximizes the influence of Republicans.

Senator HATCH. You currently have 80 percent Republicans in your district. Do you think that there might be any possibility that the Republicans might be better off if your district had somewhat fewer Republican voters?

Mr. SENSENBRENNER. I certainly would be in favor of fewer Republican voters in the ninth district if we could elect another Republican Congressman but since the Wisconsin Legislature has a majority of Democrats in both houses, I do not think they are willing to put a member of their own party out of business.

Senator HATCH. I see.

Mr. SENSENBRENNER. I think the same would apply in States like Utah where both houses have a majority of Republicans, if I may be so bold as to say, Mr. Chairman.

Senator HATCH. I am not sure I see the analogy between Congressional districts which have been subject to the apportionment process, and States.

On page 4 of your statement you say, "It is clear that a results or effects test was intended by Congress both in 1965 and 1970." Now are you saying that this results test as articulated in the House bill is the same as that effects test which you describe in your statement here today?

Mr. SENSENBRENNER. I think that we are splitting hairs in attempting to see a significant difference in a results test or an effects test. The results test was used to make it crystal clear that discriminatory practices which result in the exclusion of minorities from the totality of the electoral process would be illegal under section 2 of the House-passed bill.

Senator HATCH. Therefore—if we do not split hairs—they should basically mean one and the same thing, is that what you are saying?

Mr. SENSENBRENNER. Well, I would concede that point.

Senator HATCH. You would concede that?

Does the section 2 effects test, then, represent the same standard as the effects test in section 5?

Mr. SENSENBRENNER. No, it does not.

Senator HATCH. You do not think so? Well, then, let me ask you this: How can the statute then use the same word in two places and yet mean two entirely different things?

Mr. SENSENBRENNER. Not being a judge and not desiring to ascend to the bench, I really cannot state specifically how the word would mean two different things either in section 5 or in section 2.

Senator HATCH. However, you are stating that they do indeed have the different meanings.

Mr. SENSENBRENNER. Section 5, I would point out, Mr. Chairman, basically sets up an administrative standard which the Justice Department is to employ in reviewing those electoral law changes

that are required to be submitted under the preclearance procedure. There is no administrative standard established in section 2. The courts have to interpret a lawsuit based upon the facts.

Most section 2 lawsuits—and there have been very few of them—have been extremely complicated and the plaintiff's burden of proof is very difficult, even if an effects or a results test were included in the law. I think that one again would have to look at the totality of the statute or procedure that was under challenge in a section 2 lawsuit.

Senator HATCH. Assuming then that the procedure is different between section 5 and section 2, the substantive standard would be the same. Am I correct in that?

Mr. SENSENBRENNER. Not necessarily. An administrative procedure——

Senator HATCH. I thought that was what you just said.

Mr. SENSENBRENNER. An administrative procedure I think has a different standard of proof than the standard of proof that is employed in the courts.

Senator HATCH. Well, the only difference would be really that one is administered by the Justice Department and the other administered otherwise. Is that correct?

Mr. SENSENBRENNER. That is correct.

Senator HATCH. However, the actual substantive method of proof would be the same in the effects test both under section 5 and under section 2, getting rid of the procedural problems, and there certainly is a difference in procedure, I suppose.

Mr. SENSENBRENNER. Well, I do not have the statistics at hand on the Justice Department's decision being challenged in the District Court for the District of Columbia but I assume that a judicial standard would be applied. My recollection is that the vast majority of those decisions which have been challenged in the United States District Court, the Justice Department has prevailed on.

Senator HATCH. Do you think that the courts in applying the section 2 test will look to the principles developed in the section 5 application to determine how to use section 2?

Mr. SENSENBRENNER. I could not answer that question, not being a judge.

Senator HATCH. But you are considered an architect of the new section 2 test. OK. If you are correct in saying that, in your opinion, it would be splitting hairs to say that there is a difference between the effects test in section 5 and the results test in section 2, then I think that your answer indicating that both the results and effects tests are the same—other than the differences procedurally—serves to suggest the confusion over the interpretation of this. An eminent civil rights lawyer who testified the other day claims the tests are basically different tests. It would seem to me that everybody who talks about the effects test lends more evidence to the existence of a great deal of confusion over what the test really means.

In your written testimony you state "this *Mobile* decision was a radical deviation from previous Supreme Court interpretations of section 2." Would you give us a citation to any section 2 or voting rights case where the Supreme Court ever held that intent is not required under section 2?

Mr. SENSENBRENNER. The courts have held that section 2 has run along the same lines as the 14th and 15th amendments to the United States Constitution.

Senator HATCH. The 15th amendment, in any event.

Mr. SENSENBRENNER. In *White* v. *Regester,* the Court did look to the totality of the circumstances to determine whether the challenge system effectively shut out racial minorities from the process. I would submit that the amendment to section 2 that is proposed in the House-passed bill simply applies the standard of *White* v. *Regester* to section 2 lawsuits that can be brought anywhere in the Nation, as well as in the covered jurisdictions, for pre-1965 activities.

Senator HATCH. Well, you are familiar with the fact that Mr. Justice Stewart said that the *White* v. *Regester* case imposed an intent test.

Mr. SENSENBRENNER. Also, I disagree with Justice Stewart's opinion. I think that there is a results factor in there, Mr. Chairman.

Senator HATCH. Let me ask you this: Even assuming you were right, which of course I do not think you are if you read the Supreme Court opinion both in *White* v. *Regester* and in the *Mobile* v. *Bolden* case, can *White* actually be considered a section 2 case?

Mr. SENSENBRENNER. No. Neither is *Bolden.*

Senator HATCH. I would disagree. Well, then, *White* is not a 15th amendment case either. Isn't that correct?

Mr. SENSENBRENNER. I am not familiar with exactly what the nexus of the *White* case was; I am familiar with what the result is.

Senator HATCH. Yet you are confident that the new section 2 faithfully reflects *White.* You claim that to prove intent there must be a "smoking gun." I would like to know what the legal basis is for that claim, and where is that language in *Mobile?* Frankly, where is the "smoking gun" in *Lodge* v. *Buxton,* which is a case that has been decided through the use of the intent standard since the *Mobile* case?

Mr. SENSENBRENNER. I do not see how one can determine the intent of those officials that approved a law or ordinance or practice which is being challenged as discriminatory, if all of those officials are dead and one cannot subpena them from the grave to determine precisely what the intent was. In my written testimony I pointed out that the *Mobile* law that was under challenge in the *Bolden* case was originally passed in 1911. The only way one can determine intent, I would submit, is to look at exactly what the officials were doing at the time they did it. It is obvious that there are no witnesses who would be able to testify to a 1911 practice or procedure.

Under section 5 preclearance, if there was a change contemplated since 1965 in the State of Alabama, the Justice Department would have had a chance to review it. However, since there was no change, section 5 could not have been utilized and section 2 of the law would have had to have been the sole way of striking that down. How do you get at people who are dead to prove intent?

One other point: One of the things that your committee and our committee in the House are struggling over in the revision of the criminal code, which is an entirely unrelated issue——

Senator HATCH. Right.

Mr. SENSENBRENNER [continuing]. Is the codification of the various different forms of intent that are utilized to convict people of Federal crimes. There is a consensus, I believe, that has developed both on this side and the other side of the Capitol, that intent is far too difficult to prove under the present law and there should be some simplification. This is one of the major arguments in favor of the criminal code recodification bill.

Senator HATCH. I am not sure that I agree. The issue in the Code is conforming scienter requirements in the Federal criminal law, not relaxing them.

My time is up on this first round but let me just mention that the *Arlington Heights* case says the following:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available.

Among the specific considerations that it mentions are:

> The historical background of inaction, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, the impact of a decision upon minority groups, et cetera.

As a former practicing attorney I must disagree that intent is too difficult to prove. It is proven every day in almost every court in this land. I agree that we could surely convict more criminals if we lessened the burden of proving intent from "beyond a reasonable doubt" but that would hardly be appropriate under the burden of centuries of case law which states otherwise; especially if we are convicting individuals who did not have any intent to commit the crime or who in fact did not commit the crime but were merely convicted because of a standard that makes it too easy to convict.

Mr. SENSENBRENNER. I recall that the *Arlington Heights* case did not involve alleged zoning for alleged voting discrimination but did involve alleged zoning discrimination.

Senator HATCH. Even so, it is still the law. What is the difference?

Mr. SENSENBRENNER. Yes. It was still the law but the action that brought rise to that lawsuit I believe was considerably more recent than 1911.

Senator HATCH. Of course, as you will recall, reference to the contrary was made in the *Mobile* case, in approval of the actual standard that *Mobile* was adopting. I personally think it is difficult to argue that *Mobile* is creating an unprovable intent standard, when in fact you can use circumstantial evidence to prove intent.

Be that as it may, we will go to Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Congressman Sensenbrenner, I have read your statement and your brief overview here and just want to compliment you for it. I think it lays out quite well, at least for this member of the committee, the deliberation that the House committee and the full membership on the floor gave to your amendment, I believe it was, amending section 2.

Indeed, I am very impressed with your logic and your reasoning that brought you to the conclusions that you have. It will certainly have some influence on this Senator. I think it is done in a manner of real concern regarding the intent question, and because people

continuously say that this act works, this machine works so why do anything, I think what you have done here is only fine-tune it and make it more compatible with some of the cases that have been decided. Therefore, I wholeheartedly thank you for your very detailed explanation that is very helpful to me, and your background in coming to the conclusions to which you have come.

Mr. SENSENBRENNER. Senator, I would not like to accept the credit for the language of the amendment to section 2. With all due respect, the original suggestion of that amendment was made by Congressman Hyde during subcommittee consideration on the House side. Congressman Hyde on June 23 wrote a letter to Chairman Edwards of the Subcommittee on Civil and Constitutional Rights which I would like to submit for inclusion in the record.

Senator HATCH. Without objection, we will put that in the record.

[Letters from Congressman Hyde follow:]

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June 23, 1981

Honorable Don Edwards, Chairman
Subcommittee on Civil and
Constitutional Rights
2307 Rayburn Office Building
Washington, D. C. 20515

Dear Don:

I am informed that you wish to have my views on section 2 of the Voting Rights Act in hand so that witnesses before the Subcommittee this Wednesday might better be able to address the language in Chairman Rodino's bill. I trust the following is informative.

First, the Chairman's bill would add new language to section 2 of the Act, recently interpreted by the Supreme Court in Mobile v. Bolden, ___U.S. ___(decided April 22, 1980). His bill would strike "to deny or abridge" from the Act and substitute in its place the phrase "in a manner which results in a denial or abridgment of" (emphasis mine). Claims to the contrary notwithstanding, I am very concerned that this proposed language, never before interpreted by the Court, could cause proportional representation to be ordered when a showing of block voting and under-representation can be made. I prefer to retain the Mobile criteria, which I happen to believe are broader than advertised, rather than risk the unknown through such open-ended language. At-large voting systems exist all over this country and, in the words of Justice Stevens in his concurring opinion in Mobile, their selective condemnation for political purposes "would entangle the judiciary in a voracious political thicket."

My most recent bill, H.R. 3948, adopts the same section 2 language contained in its predecessor, H.R. 3473. In it I retain the language now in the law, as interpreted in Mobile, and add a prospective "effects" test tracking the language now contained in section 5. Since it is my understanding that submissions to the Justice Department, while they are judged according to their effect, are nevertheless viewed in their totality and that annexations, for example, which are rationally proposed are not automatically rejected because they might also have a dilutive effect, I have embraced the section 5 "effects" test for use nationwide through section 2.

Second, I believe Mobile has been maligned somewhat and that the "intent" test it uses is broader than some have asserted. Six justices of the

Supreme Court upheld Mobile's at-large system of voting for the three positions of City Commissioner. Five of them, including Justices Burger, Powell, and Rehnquist, also supported the Court's ruling in White v. Register, 412 U.S. 755 (1973), a decision the dissenters embrace. Contrary to the claims of Justice Marshall, the plurality never rejects White's conclusion that

> "To sustain such claims, (that multimember districts are being used invidiously) it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." (emphasis mine).

It is on the underscored language that the Justices, and I suspect your witnesses this Wednesday, disagree.

Very simply, I agree with the White v. Register standard and I do not believe that the Court in Mobile decided otherwise. In fact, the plurality cites White, saying that it is consistent with the Fourteenth Amendment principle that an invidiously discriminatory electoral practice must be traced to its source. In White, the Court went on to say, the Court noted that "in each (Texas) county" additional factors, beyond the multimember districts in question, restricted access to the electoral system by blacks. In Mobile, the plurality took pains to point out that racially polarized voting is not the same as a "racially exclusionary primary" as had been used years ago in Terry v. Adams, 345 U.S. 461, and that the right of blacks to vote in Mobile, Alabama, "has not been denied or abridged by anyone" and that the Mobile system was constitutional. The dissenters parted company here; they claimed that the results were invidious because as Justice Marshall put it,

> "The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors."

In sum, I agree with the standard of proof articulated in White v. Register and upheld, in my opinion, in Mobile. I am concerned, though, about the breadth of interpretation to which the Rodino language might be susceptible. I could, however, agree with the Rodino language, provided an amendment could be adopted which specifically states that proportional representation is not necessarily required as a result of statistical imbalance and polarized voting.

Sincerely,

HENRY J. HYDE
Member of Congress

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March 1, 1982

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
Washington, D.C. 20510

Dear Orrin:

I understand that in his testimony before your Judiciary Subcommittee on the Constitution on Thursday, February 5, 1982, my colleague, Congressman F. James Sensenbrenner, Jr., credited me with the creation of the "disclaimer" which was added to the House amendment to Section 2 of H.R. 3112. I wish the record to clearly reflect that I have consistently stated my misgivings over the "results" test in the original version of H.R. 3112 and, ever since I first saw it, have indicated that the "disclaimer" added in full Committee only heightened my fears.

As proof of this claim, I understand that Mr. Sensenbrenner introduced a letter solicited from me by House Subcommittee Chairman Don Edwards, dated June 23, 1981, in which I discussed in general my views on Mobile v. Bolden, and its relation to White v. Register, both Supreme Court cases which lie at the core of the "intent v. effects" controversy now before your Subcommittee.

In the letter, I argued, as I did before your Subcommittee on the 28th of January, 1982, that I believe Mobile to be completely consistent with White v. Register. Indeed, contrary to testimony on February 2, given before you by Mr. Armand Derfner, Justice White, the author of the majority opinion in White v. Register, concluded in Mobile that the:

> plurality . . . agrees with the courts below that maintenance of Mobile's at-large system for election of city commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by racially discriminatory purpose. (Emphasis mine.)

Justice White's dissent is based not on his disagreement with the test applied by the plurality in Mobile, but on his disagreement with the inference which the plurality took from the facts; he concluded that the lower courts "properly" inferred invidious discrimination from the "totality of [the] facts". According to Justice White (who should know if anyone does), the test was "intent" in both Mobile and White v. Register.

After discussing my on-going apprehension about the use of proportional representation as a remedy for violations of the amended Section 2, I indicated in the June 23

letter that I could live with the Rodino language so long as I was convinced by an amendment that proportional representation was not necessarily required "as a result of statistical imbalance and polarized voting." The language ultimately incorporated in Section 2 in the form of the "disclaimer" did not, and does not, adequately respond to my expressions of concern. Rather, it served to increase them.

The "disclaimer" was never presented to me in draft form for examination, never received my approval, either directly or indirectly, and, indeed, attracted my criticism from the moment I saw it in full committee. As I indicated in my June 23rd letter, and again in my testimony, I have always asked for assurance that proportional representation would not result from violations of Section 2 in the House bill. The "disclaimer", however well intentioned, does not adequately respond to my fears. Indeed, it addresses only what might be necessary to constitute a violation; the distinction is very important. My concern, though, was directed at what remedy might be employed by the reviewing court. The "disclaimer" does not address that question at all, and it is the use of proportional representation as a remedy which has caused concern among some of the scholars which have testified, either in person or by correspondence, before your Subcommittee. It is worth noting that in Mobile Justice Blackmun agreed with Justice White's conclusion that the plurality should have inferred intent from the facts. He differed, though, and concurred in the result of the case, because the District Court had chosen proportional representation as the remedy to redress the discriminatory practice then in place.

Moreover, the use of the "in and of itself" language leads one to the conclusion that disproportional representation, with a mere scintilla more, will be all that is necessary to demonstrate a violation of the section as well. Logically, this "scintilla" of additional evidence could be an inferior school system which has a disproportionate impact on minorities, a phenomenon often found in the areas of the country not covered under Section 5 of the Act, or a history of past racial discrimination, as is most notably demonstrated in portions of the South. In short, by pretending to nullify the significance of proportional representation, it actually emphasizes and invites its use as a remedy. The better solution, as I suggested in my testimony, is to codify Washington v. Davis by permitting intent to be established by the use of both direct and indirect evidence; thereby clearly eliminating any need for a "smoking gun".

I have discussed this matter with Mr. Sensenbrenner on several occasions; to suggest, as he does now, that I am responsible for the "disclaimer" language is simply to distort the facts.

I would appreciate it very much if this letter could be made a part of the Subcommittee's record following Mr. Sensenbrenner's testimony.

Sincerely,

HENRY J. HYDE
Ranking Minority Member
Subcommittee on Civil and
Constitutional Rights

HJH:mjh

Mr. SENSENBRENNER. The last paragraph of Mr. Hyde's letter says, "In sum, I agree with the standard of proof articulated in *White* v. *Regester* and upheld, in my opinion, in *Mobile*. I am concerned, though, about the breadth of interpretation to which the Rodino language in the original bill might be susceptible. I could, however, agree with the Rodino language provided an amendment could be adopted which specifically states that proportional representation is not necessarily required as the result of statistical imbalance and polarized voting."

Therefore, the amendment to H.R. 3112 that I ended up being the author of was a suggestion that was made by Congressman Hyde in his letter to Chairman Edwards on June 23, 1981, and I believe that Mr. Hyde rather than I should get the credit for that.

Senator DECONCINI. Thank you, Congressman, but I understand Mr. Hyde now has had a change of heart. I was not here when he testified. I believe he perhaps will still take credit for the wording and the suggestion of it but I understand he does not support it.

Senator HATCH. I do not know that he will, Senator. I will just say this, that Congressman Hyde was, after only 1 day of hearings on this very important issue in the House, always concerned about whether section 2 would be construed to lead to proportional representation. I think he has become convinced since that time that there is no way that it can be interpreted to lead to anything but proportional representation.

Mr. SENSENBRENNER. Mr. Chairman, there was more than 1 day of hearings on the section 2 amendments——

Senator HATCH. How many days were devoted to the section 2 issue?

Mr. SENSENBRENNER [continuing]. In the House because the section 2 amendments, there was testimony that was interlaced all throughout our 17 days of hearings and over 100 witnesses.

I do have a transcript of one of the hearings that was held on Wednesday, June 24, 1981 where Mr. Hyde asked one of the witnesses: "Under any effect test we crank in, I would hope the Court and the Justice Department could review the totality of the circumstances in evaluating whether this is in fact a voting rights abuse. I think we understand each other. Do we agree?" Professor Walbert said, "One hundred percent," in response to Mr. Hyde's statement.

Senator HATCH. Of course, I do not know what significance that statement has, because the totality of the circumstances are going to be examined in any intent test, and a determination will be made concerning the circumstantial evidence involved in order to lead to an inference of intent that will go to the jury. That is all——

Mr. SENSENBRENNER. Mr. Hyde's testimony specifically talked to effect or results tests as well, in respect to——

Senator HATCH. I understand that but since then he has come to the conclusion that it will lead to proportional representation.

Let me ask you this question: Let's assume for the purpose of discussion that the section 2 language is enacted, and that it does lead to proportional representation, and that at-large voting districts are outlawed. Would you agree with that result?

Mr. SENSENBRENNER. No, I do not agree with that at all. If the totality of the circumstances do show that minorities are shut out of the electoral process and they do not have a chance to win fair and square, then it would be outlawed.

Now my reading of the case in *Mobile* v. *Bolden* indicates to me that the result of that case would not necesarily be reversed if section 2 of the House-passed bill does become the law. There were indications within that Supreme Court decision that in one election the black candidates did not even carry the voting districts where there was an overwhelming black majority, and some allegations that the candidates were young and inexperienced in another election.

Section 2 as passed by the House does not intend to stuff the ballot box to predetermine a result. It merely opens up the door so that people can participate and either win or lose fair or square.

Senator HATCH. Senator Grassley?

Senator DECONCINI. Mr. Chairman, I have——

Senator HATCH. Oh, I am sorry. I thought you were through.

Senator DECONCINI. No. I yielded to the chairman on one matter.

Senator HATCH. Excuse me. I apologize, Senator.

Senator DECONCINI. I just want to ask, getting back to Congressman Hyde who has testified—as I understand, at least, I have been told by my staff—not in support of section 2, whether he introduced some legislation originally that had an effects test? Are you aware of that?

Mr. SENSENBRENNER. Mr. Hyde introduced three or four bills during House consideration of the Voting Rights Act. Frankly speaking, they went off in so many different directions that I am confused and do not know whether he did or he did not.

Senator DECONCINI. However, with reference to your letter that you read giving him credit, I thank you for reading that. I did not realize that he was originally the suggester of this language. He certainly has made it clear now that he has had a change of heart. I am only delighted, Congressman, that you have stood fast in this because I think you are one of the most knowledgeable people in the area that I have heard testify or had an opportunity to read testimony.

Thank you.

Mr. SENSENBRENNER. Thank you, Senator.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator HATCH. Senator Grassley?

Senator GRASSLEY. Please look at the last sentence on page 5 of your testimony, and then I want to read from page 30 of the House report, the last sentence on page 30. I guess my point is, I consider that the two sentences do not square. If they are intended to, I would like to have you explain it or if there is an inconsistency, then explain that as well.

You say, "Even the House-passed bill's strongest supporters will state it is not its intent to decide who will win elections but just to make sure that the rules apply fairly to all the participants." Then on page 30, from the House report, I quote, "It would be illegal for an at-large election scheme for a particular State or local body to permit a bloc-voting majority over a substantial period of time con-

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sistently to defeat minority candidates or candidates identified with the interests of a racial or language minority."

Mr. SENSENBRENNER. I would draw your attention to the two paragraphs which precede the paragraph from which you read in the House committee report.

Senator GRASSLEY. I have also read those, too.

Mr. SENSENBRENNER. I think that the sentence that you have read has to be read in the total context of the discussion that the House Judiciary Committee made relevant to amendments to section 2 of the act.

A paragraph and a half above it says, "The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not in itself constitute a violation of the section, although such proof along with other objective factors would be highly relevant, nor does it create a right of proportional representation as a remedy."

Then it goes on by saying this is not a new standard, and talks about various other factors such as single-shot voting, a polarity of voting groups where people cast their votes along racial lines, and the like.

Senator GRASSLEY. If the determination from the House committee statement that I read—the last sentence on page 30—is a determinant, then the remedy could be proportional representation.

Mr. SENSENBRENNER. It does not create a right of proportional representation. I do not think that reading the plain language in the statute would lead one to the conclusion, or would lead a court to the conclusion that a proportional representation remedy was envisioned by the Congress at all.

One of the reasons why the House Judiciary Committee and eventually the House as a whole felt that the language had to be in the statute is a lack of confidence on the part of at least some of us that Federal judges and their law clerks do not read committee reports and debate in the Congressional Record to properly ascertain what congressional intent is.

Because we were so concerned about this particular issue and this particular result, the House put it in the statute itself, so anybody would have to be blind in order to miss the fact that a right of proportional representation was not evisioned by the Congress in passing the amendment to section 2, should that be enacted.

Senator GRASSLEY. OK. My last point would deal with just a general expression of your thinking on the subject, maybe over the last 2 years, and I ask the question because a couple of weeks ago I read your statement on the House floor debate. I guess—as I recall serving with you in the House, from the philosophical slot that I would have put you in—I guess I would have expected a different point of view on the bailout and on section 2. Have you had a change of view in the last year or so on the subject?

Mr. SENSENBRENNER. The Senator is absolutely correct that I am not the most civil-righteous individual in the House of Representatives. [Laughter.]

I came into the subcommittee hearings on the Voting Rights Act extension as a skeptic of either extending section 5 preclearance or

extending bilingual preclearance and the bilingual ballot provisions.

However, after sitting through the extensive hearings and seeing the abuses that were attempted to be perpetrated up to the present time in many of the covered jurisdictions, I, like Congressman Hyde, reached the conclusion that section 5 has been a successful law and the bilingual preclearance and ballot provisions also have been very successful.

The reason that I feel as strongly as I do about section 2 is because section 5 only applies in certain limited parts of the country, as we all know, and it only applies to changes that have been proposed since 1965. Without an effective section 2, there would be no way of catching the abuses that were enacted prior to 1965 in covered jurisdictions, as well as the abuses that might have happened in noncovered jurisdictions up until the present time.

The section 2 issue is probably the thorniest issue philosophically that one can look at because of various interpretations, and my efforts in the subcommittee and the full committee and on the floor were to try to make the section 2 issue as crystal clear as possible, so that the courts could not misconstrue what Congress actually intended.

Senator GRASSLEY. Is it your view on section 2 that it should be rewritten because the Supreme Court misinterpreted the intent of the 1965 act, and that that ought to be straightened out now, or that they interpreted it right but you disagree with the opinion, and that the effects test ought to be put in now because that is the only way to make it workable?

Mr. SENSENBRENNER. I believe that they did misinterpret what the Congress did in 1965 and in 1970. The statement that I have made from Attorney General Katzenbach when the law was originally passed, and Attorney General Mitchell's offer that was rejected by the Senate Judiciary Committee at the time of the 1965 extension, I think very clearly indicate that section 2 intended to embody an effects or results test. Somehow that point was not caught by the court when the *Mobile* v. *Bolden* case was decided. Incidentally, that was a plurality decision with all kinds of opinions going off in all different directions, so the Court was not clear where it was going either.

Senator GRASSLEY. Getting back to a comparison of section 5 and section 2, section 5 is an extraordinary remedy for covered jurisdictions. We all agree to that. Why, in your judgment, should an extraordinary remedy be applied nationwide as it is going to be according to the House bill in section 2?

Mr. SENSENBRENNER. I believe that the extraordinary remedy is the fact that an administrative agency of the Federal Government, in this case the Justice Department, is able to strike down State laws, local ordinances, and State and local practices on an administrative basis without having to go to court. It is up to the officials of the covered jurisdiction to attempt to get those laws or practices revalidated, and the burden of proof is changed to those people in doing so.

Section 2, however, is different. The burden of proof there is on the people who would like to strike down the law as being discriminatory, and there is a tremendously different standard that is im-

plied between a law that fails under section 5 and a law that is challenged under section 2.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator HATCH. Jim, what in your opinion is the results test? Specifically; what does it mean?

Mr. SENSENBRENNER. The results test is if the result of the procedure that is under challenge so completely shuts out minority groups from the election process that they do not have a prayer of being elected or taking their case to the voters of that particular area or State and having a chance of winning. I think you have to look at the totality of the circumstances in order to sustain a section 2 lawsuit.

Senator HATCH. How would you make that determination? Give me some illustrations of how you might make such a determination.

Mr. SENSENBRENNER. I would say in the case of *Mobile,* if there is no way that a minority person who might be the most qualified person could be elected to the commission in Mobile, based upon the way the situation was set up, that would be a case. Second, if there was a——

Senator HATCH. Let me see if I understand that; you are saying that if the most qualified person running——

Mr. SENSENBRENNER. Yes, could not be elected merely because of the color of his skin.

Second, in the case of a district election where the district boundaries were so gerrymandered that a minority person could not be elected, and we did see some maps from some communities in Texas during the House subcommittee hearings on that——

Senator HATCH. The *Gomillion* case is a perfect illustration.

Mr. SENSENBRENNER. Yes. I would say that would be a case where the action deprived a minority member from being elected.

Senator HATCH. You should not have trouble proving intent there. In the kind of a case, such as *Gomillion,* you were certainly able to prove intent.

Mr. SENSENBRENNER. That depends on when the district boundaries were established. If it was done very recently you would not have any problem proving intent. If it was an old law you would, simply because people's memories fade, as we know, and because of the fact that the officials who are responsible for the law, ordinance, or practice may very well be dead.

Senator HATCH. Well, just to help us here, what precisely is the question the court would ask itself in evaluating the evidence to arrive at a results test?

Mr. SENSENBRENNER. Is the totality of the system such that a minority candidate could not be elected?

Senator HATCH. That is precisely one of the questions that is asked in the intent test. In other words, every time I try to determine what the specific standard is to identify discrimination under the so-called results test, I get the same response, that the court must consider the totality of all the circumstances or that it has to weigh all the factors. Now that is nice but that is hardly a relevant response to the question.

Mr. SENSENBRENNER. I do not think so, Mr. Chairman. The court when it tries a case is the trier of the facts.

Senator HATCH. Everybody concedes that to be the courts' role and responsibility. My question involves a lot more than simply that. It is not some generic, general principle of law that nobody disagrees with. My question is: How does the court evaluate this evidence? What is the judicial standard? I do not want, "Well, they look at the totality of the evidence." I want to know what the precise judicial standard is.

In intent, under that test the court has to evaluate all the evidence, the totality of the evidence, weigh all the factors before it on the grounds of whether or not it actually raises an inference of intent. If it does, it goes to the jury.

Now what is the standard under the effects test? Please, tell me that, Mr. Sensenbrenner.

Mr. SENSENBRENNER. In Justice Stewart's opinion in *Mobile* v. *Bolden*, he said that a showing of the factors in the *Zimmer* case which looked at the totality of the circumstances was a starting point but was not sufficient to show intent. The Stewart decision practically required a "smoking gun" to be discovered. It is hard to find any smoke when the gun was fired in 1911. [Laughter.]

Senator HATCH. All that seems to show is that the *Zimmer* evidence, in and of itself, was not enough. Still, what is the standard the judge is going to use? Tell me exactly what it is, not just "Let's look at all the evidence." That is every case. What does the court ask itself? Just tell me that. Nobody seems to be able to say that. They say the effects test is a wonderful test, it will work so well, it will end discrimination, and it will do all these wonderful things but nobody can tell me, what the court will ask itself in making a determination using the effects test.

Mr. SENSENBRENNER. Senator, you and I have a very fundamental disagreement on the amendment to section 2.

Senator HATCH. I must agree that we do.

Mr. SENSENBRENNER. I feel that *White* v. *Regester* was one that was on point as to what the court looks at; that *Mobile* v. *Bolden* ended up diluting the standards that *White* did establish; and that is what has brought this issue before us and why we are debating over this point today.

Senator HATCH. You and I do not disagree on what the court looks at; we do not have any disagreement there. The question is, what is the standard by which a court arrives at a conclusion that the results are discriminatory?

Mr. SENSENBRENNER. Again, you have to look at the results of the election and the totality of the system.

Senator HATCH. All right.

We thank you for coming in. We appreciate your testimony and have enjoyed the give and take on this matter. I still do not think anybody has ever answered that question of what the court asks itself?

Mr. SENSENBRENNER. Mr. Chairman, I look forward to our conference on this subject. [Laughter.]

Senator HATCH. Well, I do, too. It may not be as difficult as you think. You never know.

Thank you, Jim. It is nice to have you in our committee.

[The prepared statement of Congressman Sensenbrenner follows:]

PREPARED STATEMENT OF CONGRESSMAN F. JAMES SENSENBRENNER, JR.

As a member of the House Judiciary Subcommittee on Civil and Constitutional Rights, I am familiar with the issues surrounding the Voting Rights Act. When H.R. 3112 was before the House Judiciary Committee and the House of Representatives, it received my strong support. In fact, I was the co-author, along with Chairman Don Edwards and Congressman Hamilton Fish, of the compromise bail-out provision which ultimately passed the House of Representatives.

My testimony before your Subcommittee will focus primarily on Section 2. Specifically addressed will be the provisions of H.R 3112 and S. 1995 which attempt to clarify the current law.

Section 2 currently reads as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention the guarantees set forth in Section 4(f)(2), (minority language provision).

Section 2 has nationwide application and contains no activation provision comparable to Section 4's requirement of a history of discrimination.

Recently there has been much controversy surrounding whether Section 2 should have an "intent" or "results" [redacted] requirement. This debate boiled over in 1980, when the Supreme Court, in the case of Mobile v. Bolden, held that Section 2 should be considered coextensive with the 15th Amendment. The Supreme Court went on to hold that "intent" was required to show discrimination.

While this decision was a radical deviation from previous Supreme Court interpretations of Section 2, it also ignored the legislative history surrounding the adoption of Section 2.

Admittedly, the legislative history does contain statements that Section 2 was patterned after the 15th Amendment. However, there is no reason to believe that intent was required to prove voting discrimination. In fact, Attorney General Katzenbach, in response to a question from Senator Fong on the scope of Section 2 replied, "I had thought of the word 'procedure' as including any kind of practice. . . if its purpose or effect was to deny or abridge the right to vote on account of race or color."

The Supreme Court ackowledged the importance of the Attorney General in drafting the Voting Rights Act when it stated, "In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretation of it." (U.S. v. Sheffield 435 U.S. 110 (1977)).

Further evidence that the intent test was not meant to be applied to voting rights cases was exhibited in 1970, when Attorney General John Mitchell proposed repealing Section 5 and offered in exchange language authorizing the Attorney General to challenge any practice, "which has the purpose or effect of denying or abridging the right to vote on account of race or color...." The Joint Views of Ten Members of the

Judiciary Committee rejected this proposal by stating, "The Attorney General already has the authority to bring such suits (under Section 2)."

Pre Bolden Cases

The above interpretation of the Voting Rights Act i.e., that an intent requirement was not needed to establish a violation of Section 2, was recognized by the Supreme Court until the late nineteen-seventies.

The Court, in making a determination of whether voting discrimination existed, looked at the "totality of the circumstances." In White v. Regester 412 U.S. 755 (1973), the U.S. Supreme Court held that,

> To sustain such claims (that multi-member districts are unconstitutional) it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of its choice.

Thus, the right being protected was a right of equal access to the election process.

In arriving at its finding, the Supreme Court relied on the earlier case of Whitcomb v. Chavis 403 U.S. 124 (1970), where the Supreme Court had earlier looked into the "totality of the circumstances" when it upheld at-large elections in Indianapolis even though dilution of black voting strength prevented blacks from electing candidates in proportion to its share of the electorates. The court took note of discriminatory purpose, but its analysis focused on whether blacks had less opportunity than others, ". . . to participate in the political process and to elect legislators of their choice."

Following the White case, the Fifth Circuit Court of Appeals en banc decided the case of Zimmer v. McKeithen 485 F.2nd 1297 (1975). In arriving at the decision that multi-member elections in a Louisiana parish were discriminatory. The court held,

> ... when a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy... or that the existence of past discrimination in general precludes participation... a strong case is made... The fact of dilution is established upon proof of the existence of an aggregate of these factors...however all these factors need not be proved in order to obtain relief.

Mobile v. Bolden

The above three cases remained controlling until the Supreme Court decided the case of Mobile v. Bolden 446 U.S. 55 (1980). In Mobile, the Court inferred Section 2 must be considered coextensively with the 15th Amendment. The court went on to say, "That (the 15th) Amendment prohibits

only purposefully discriminatory denial or abridgement by government of freedom to vote on account of race, color, or previous condition of servitude."

The plurality then focused its attention on the Equal Protection Clause of the 14th Amendment. The plurality in citing White and Whitcomb held that lack of proportional representation is not enough to show discrimination. A plaintiff is also required to prove this plan was, "conceived or operated as a purposeful device to further discrimination."

The adoption of the intent requirement is a clear departure from the earlier "totality of the circumstances" test. This is born out by Justice Stewart when in Mobile v. Bolden he stated:

> Zimmer v. McKeithen ... was quite evidently decided on the misunderstanding that it was not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause -- that proof of discriminatory intent is sufficient.

Provisions of H.R 3112 and S. 1995

To clarify Section 2 and the decisions interpreting it, H.R. 3112 and S. 1995 struck the words, "to deny or abridge" and inserted in lieu thereof, "in a manner which results in a denial or abridgement of." Also added is the sentence, "The fact that members of a minority group have not been elected in numbers equal to the group proportions of the population shall not, in and of itself, constitute a violation of that section."

This additional language is a return to Congress' intent and the pre-Bolden understanding which focuses on the results and consequences of discriminatory voting or electoral practices. Without this language, discriminatory voting practices would be virtually impossible to prove. Only the most flagrant violations of Section 2 would be able to be proven, as a "smoking gun" would be required as evidence.

Apart from not requiring intent, the additional provisions make it clear that proportionate representation will not result. The legislative language along with the legislative history established in the House Judiciary Committe and House of Representatives are quite explicit on the subject.

Conclusion

Finally, I would like to point out that this amendment to Section 2 is a constitutional excercise of Congressional power. Both the 14th and 15th Amendments allow Congress to pass legislation to enforce the Voting Rights Act.

The Supreme Court reaffirmed the principle in South Carolina v. Katzenbach and Rome, GA v. United States, which was decided the same day as Mobile v. Bolden. The amended Section 2 is "appropriate legislation" pursuant to Congress' power to enforce the 15th Amendment.

In conclusion, Mr. Chairman, I would again re-emphasize the importance of quick action on the Voting Rights Act. It has been the most successful piece of civil rights legislation ever enacted by the Congress of the United States. Its passage ended over one hundred years of Congressional and judicial attempts aimed at protecting the constitutional right to vote. To let it expire would be a discredit to the principles upon which our republic was founded.

Senator HATCH. Our next witness will be Mr. Freeman Leverett, a partner in the Georgia law firm of Heard, Leverett & Adams. Mr. Leverett has served as the assistant attorney general of the State of Georgia, in which capacity he represented the State in a number of apportionment and civil rights cases including *South Carolina* v. *Katzenbach*.

I have to admit I am extremely impressed by the thoroughness of your statement and your testimony. I personally believe it is truly outstanding piece of testimony.

Let's have order in the chamber.

Mr. Leverett?

STATEMENT OF E. FREEMAN LEVERETT, PARTNER, HEARD, LEVERETT & ADAMS, ELBERTON, GA.

Mr. LEVERETT. Thank you, Mr. Chairman and gentlemen of the committee. I appreciate the opportunity to appear. I have prepared a summary of my remarks and I would like to file a copy of that, since I will not cover that in as full detail as it is set forth there.

I would like to direct my remarks mainly to section 2, I should say the proposed amendment to section 2. Before I deal with some of what I consider to be the consequences of this amendment, I think there are certain basic principles that need to be understood concerning section 2.

The first is that section 5 imposes a discriminatory impact or result standard as an initial, threshold matter applicable only at the beginning of the preclearance by the Attorney General. I am talking about section 5. Under present law, once this initial burden or hurdle is overcome, then the validity of the State law is governed by the traditional 14th amendment discriminatory intent standard.

Under section 2, however, as it is proposed to be amended, this would impose a permanent standard which would apply for all time to come, both laws before and after 1964.

Senator HATCH. Mr. Leverett, I have to leave and Senator Thurmond is going to continue the hearing. If you will permit me just to ask you one question. You have heard the question and answer with Mr. Sensenbrenner?

Mr. LEVERETT. Yes, sir.

Senator HATCH. I asked: What is the standard? What does the court ask itself under the effects test? Can you define that?

Mr. LEVERETT. No, sir. I would think, though, from reading the committee report, that the intention is to impose a discriminatory impact or effect standard that is no less than the standard in section 5, and in fact I think it will be even more stringent because of the Supreme Court decisions that limited the literal language of section 5 in the *Beer* case based upon the peculiar purpose of section 5, which background is not applicable to section 2.

Senator HATCH. Maybe that is one of the reasons why I never get an answer to that question from anybody, and we have the top legal experts in this particular field on the other side of this issue. Nobody yet has answered that question very satisfactorily, and I think one of the reasons they are afraid to answer it is because they know section 2 must lead inevitably to proportional representation. Do you agree with that assesment?

Mr. LEVERETT. Yes, sir; there is no doubt about it.

Senator HATCH. Do you see any other result the section 2 change could have, under the implications of term "result"?

Mr. LEVERETT. No, sir; I think the word "result" is just as strong as "effect" or "impact" and perhaps even more so.

Senator HATCH. OK. Thank you.

Mr. LEVERETT. The second point I wish to make concerning the amendment to section 2 is that in my opinion it will go even further than the effect language of section 5. In *Beer* v. *United States,* which is the New Orleans case, the Supreme Court held that the literal language of section 5 was limited, that it would not be given complete effect according to its terms because it had to be read in its context, and its context was to prevent changes in laws that would result in retrogression in the position of minorities in covered States.

Consequently, in the *Beer* case the Supreme Court rejected the contention of the Attorney General and the District Court of the District of Columbia, which had said that under section 5 the reapportionment laws were required to maximize the political power of minorities. There is no similar basis, however, in section 2 for imposing such a limiting construction. Consequently, there is a real probability in my opinion that section 2 as amended will be construed as requiring the maximization of the political power of minorities in connection with any reapportionment law.

Second, the standard of section 2 as it is proposed to be amended will constantly change. An intent or purpose standard such as you have under the 14th amendment substantially remains the same at any period of time but because you have a result standard or an effect standard, this changes with the changing facts.

In other words, suppose that a State were to adopt an election code, say, in 1985 at a time when it had no or very few minority population. That code would very likely be valid but assume that by 1995 it had acquired a 35 percent minority population. It is very likely that that law, although valid when passed, has by the mere change in time and the change in circumstances become invalid because of the effect or the result that it produces.

The same type of observation I think should be pointed out with respect to the present, and that is that a law passed in a given State may very well be enforceable in parts of the State but unenforceable in other parts of the State because of the variable appli-

cability of a standard that looks to how it affects someone or what result it produces.

Another basic point I think that needs to be pointed out here is that while we have used in this debate terms of discriminatory effect or discriminatory impact, this term really in civil rights jurisprudence means disparate impact. It does not have necessarily the connotation of something evil or something malicious or mean. It simply means that in its actual operation it produces an effect on one group that is different than it produces on another. This has been borne out in the similar language in title 7 of the 1964 Civil Rights Act.

Now coming to the consequences of the amended section 2, the first area that I think this will dramatically affect is with respect to congressional reapportionment and legislative and local districting. As a result of the release of the 1980 census, many States are now in the process of revising their congressional district lines, their legislative seats, their legislative districts in State legislatures, and political subdivision elections.

At present these laws are governed by the traditional constitutional standard of discriminatory intent or purpose. That was so held in *Wright* v. *Rockefeller* in 1964 involving New York. Section 2, however, would now apply the new race-conscious impact or result test to State legislative districting and congressional districting, and in consequence it would mean that all of these laws would have to be judged by how they affected a particular minority, if it was a protected minority under section 2.

The likelihood is that these laws will have to maximize the political strength of protected minorities. Redistricting consequently is going to become much more race-conscious and much more difficult as a result.

The second area that will be affected by the amendment to section 2 is in connection with municipal annexations and governmental consolidations. When new areas are annexed and are subject to section 5 preclearance, and the effect is to reduce the overall minority percentage in the political subdivision, the Supreme Court has held that the city or the political subdivision must convert to single-member district elections with districts gerrymandered so as to insure that the minorities would have proportionate representation in the enlarged community.

In fact, it was only with great difficulty that the Supreme Court rejected—and even then with three judges dissenting—the contention that there could not be any annexations anyway unless the minorities had the same political strength in the new community that they had in the old. The Supreme Court rejected that but not without great difficulty, and even then three judges dissented.

However, keep in mind that in connection with section 5, the literal consequences of that section have been limited by the Supreme Court's decision in *Beer,* which says that this section was designed only to prevent a retrogression and therefore it was not required to maximize the power of minorities, but no similar provision or policy consideration would be applicable to section 2. Therefore, the fact of the matter is that section 2 is likely to be applied so as to prevent annexations or consolidations in their tracks in all situations.

The other area that will be affected, of course, is with respect to at-large voting. The only area where a discriminatory impact standard was ever applied as a constitutional standard was with respect to at-large elections, and even here it was a modified one as defined by the fifth circuit's opinion in the *Zimmer* case. That principle of course was discredited by the Supreme Court in the *Mobile* case.

In my opinion, the consequence of H.R. 3112 will be to outlaw at-large elections in any State containing any appreciable number of protected minorities. At-large elections are in widespread use all over the United States. They constitute a rational method of election and they make it very simple to satisfy the one man-one vote requirement in many areas.

Most cities of over 25,000 population use at-large elections. In fact, approximately two-thirds of all cities in the United States use at-large elections. Forty percent of all counties elect at large, and another 20 percent of counties elect the presiding officer at large. The Supreme Court pointed out in the *Whitcomb* case that as of 1970, 46 percent of the upper houses and 62 percent of the lower houses of State legislatures contained some at-large seats.

Now the invalidation of at-large elections has not been attended just by the requirement that the political subdivision or State go to district elections. In every case there has been a concerted effort by the plaintiffs, and they have been successful in most instances; both the Attorney General and the district court for the District of Columbia have required that these single-member districts be gerrymandered so as to accord some degree of proportional representation to the minorities. This principle is not usually spelled out but it is simply accomplished by the district court and the Attorney General refusing to approve anything that does not in fact achieve a desired result.

The disclaimer that is set forth in the proposed amendment to section 2 in my opinion will not accomplish anything. The reason is that this disclaimer does not add anything new. It has already been enunciated in the very cases that established the dilution doctrine. These cases have required the abolition of at-large districts, notwithstanding that they have expressly articulated this disclaimer.

However, more important, as has been pointed out here earlier today, this disclaimer will be construed in the light of the language at page 30 of the report of the House which says that all you have to do is to show that over a period of time candidates offered by the minorities have been consistently defeated. This goes further than any court decision has ever gone, and in fact this was expressly rejected, this argument was expressly rejected in *Lodge* v. *Buxton* at pages 1362–1363.

The fourth area where the impact standard will have an effect is in candidate and voter qualifications. In the *Dougherty County, Georgia* case the Supreme Court held that candidate qualifications also affect the right to vote. Consequently, just as in title 7 when the courts pass upon the validity performance of tests and qualifications to determine whether they are related to employment, the courts will now pass upon the validity of candidate qualifications to determine whether they legitimately relate to the particular office in question.

Mr. Chairman, I believe that my time has expired so I will submit to any questions.

Senator THURMOND [acting chairman]. Thank you.

Mr. Leverett, if the proposed amendment to section 2 becomes law, could jurisdictions that are found to have violated it become subject to section 5 preclearance?

Mr. LEVERETT. Yes, Senator, that is quite possible because as I recall it, section 3 contains a clause authorizing the judicial imposition of a preclearance requirement based upon a violation of the Constitution or any laws guaranteeing the right to vote. Section 2 is a law guaranteeing the right to vote. If it is violated, then there is a basis under section 3 for a court imposing a preclearance requirement on jurisdictions that are not now subject to section 5.

Senator THURMOND. If this is so, is it true that these newly covered jurisdictions would be covered under section 5 for at least 10 years—that is, under the House bill—before they would become eligible to apply for a bailout?

Mr. LEVERETT. My recollection of the language of the House bill is that they would, Senator.

Senator THURMOND. Has the Justice Department, in construing its powers under section 5 preclearance, followed the Supreme Court's ruling in the *Beer* case?

Mr. LEVERETT. Senator, I have not had too much experience with them other than in the *Wilkes County, Georgia* case, but the implication has been, and it was spelled out in the *Beer* case itself, that the Attorney General has generally demanded that districts be set up that contain not less than 60 to 65 percent of the minority so as to insure proportionate representation. In all of the situations that I know anything about, there has been a continuation of the insistence that the political power of minorities be maximized rather than that simply the districts be drawn neutrally.

Senator THURMOND. Mr. Leverett, in your opinion have the goals of the 1965 Voting Rights Act evolved into something more than they were originally intended to be?

Mr. LEVERETT. Senator, I do not think there is any question that that is true. In fact, in a dissenting opinion the late Justice Harlan pointed that out, that section 5 was designed mainly to prevent changes in laws relating to either registering, voting, or casting a ballot.

Section 14 defined the terms "vote" or "voting" as used in section 5 in that fashion, but as a result of a number of Supreme Court decisions—namely *Allen, Perkins,* and the *Dougherty County* cases, section 5 has been construed to extend to areas which I do not think the Congress in 1965 intended it to extend to. It is now being used to insure proportional representation and to deny the effectiveness of any law that does not favor a minority.

As Justice Harlan pointed out, this is a problem that exists nationwide and not just in some States. Consequently, if you accept the premise, there is no reason for limiting section 5 to just 9 States and parts of some 13 others.

Senator THURMOND. Mr. Leverett, do the exceptional conditions found to exist by the Supreme Court in *South Carolina* v. *Katzenbach* in 1966 also exist today?

Mr. LEVERETT. No, sir, Mr. Chairman, and I think that something else needs to be pointed out. The Voting Rights Act was aimed mainly at the brutal, frontal assault on voting rights that had been found in several States in the South. I might point out that your State, Senator, and my State as well as Virginia, were three States that had not had the range of violations and the extent of violations that had existed in three other States.

The justification for section 5 to begin with was not that there were some laws that were unconstitutional because the existing remedies were capable of dealing with that. The rationale and the only justification for section 5 as pointed out in the committee report accompanying it, as well as by the Supreme Court in the *Katzenbach* case, was not just that these laws existed but that as fast as they were being stricken down by the courts, the States were going back and passing new laws to take their place, merely to circumvent them. That was never true in South Carolina; it was never true in Georgia or Virginia. It had been true, I think, in Alabama, Louisiana, and Mississippi.

I do not think that situation exists. Moreover, I think that the circumstances that has been brought about where 67 percent of the eligible blacks in Mississippi are now registered, and the statistics are comparable in most other States, I do not think that the emergency conditions that justified section 5 exist any longer.

Senator THURMOND. Mr. Leverett, we have had several witnesses to intimate and even state that unless Congress acts on August 6, 1982, or by then, section 5 preclearance will cease. Now, it is the feeling of many people that the Voting Rights Act has accomplished its purpose. Those States are under probation 5 more years anyway, and they feel that that is adequate.

I am willing to go along with the President's recommendations, though, to renew the act with a reasonable bailout. I was just wondering how you felt about the situation.

Mr. LEVERETT. Senator, my own feeling is that section 5 should be replaced with a rigorous section authorizing the judicial imposition of preclearance. Section 3 contains that now but only in a suit brought by the Attorney General. I personally do not feel that States should be subjected to what even the supporters of the Voting Rights Act in the Supreme Court have referred to as a "revolutionary inroad upon our system of federalism," or "stringent new remedies," or "remedies that are unique even in this unique law."

I do not think that section 5 should be retained as it is. I do not think that it so much accomplished the result as did other provisions of the Voting Rights Act which are permanent, such as the one that outlaws literacy tests. That will remain intact, as I understand it. You have the amendment to the Federal Constitution that outlaws the poll tax, and that of course will remain in the law. There are five or six other provisions dating back to the Civil Rights Act of 1957 that are quite adequate, in my opinion, to deal with any type of discrimination that is likely to arise.

Senator THURMOND. A great many people have made the statement: "Unless you renew the Voting Rights Act, the Voting Rights Act is dead." Isn't it a fact that the Voting Rights Act is on the

lawbooks as a permanent law of the United States? The only question that came up was the preclearance matter.

Mr. LEVERETT. That is exactly right. Section 4, of course, contained the suspension of literacy tests but Congress later came back in either 1970 or 1975 and passed a permanent prohibition of literacy tests, so that will not be affected in the least. The poll tax situation will not be affected. The durational residency requirement prohibitions will not be affected. The civil remedies provisions, such as examiners, that will not be affected. These provisions will not expire under any circumstances unless Congress repeals them, which I do not think is realistically likely. Therefore, the only thing of any consequence that will expire is section 5 unless it is renewed, and it does not really expire, but the States will simply meet the requirements that it imposes, and becomes entitled to release.

Senator THURMOND. In other words, if Congress did nothing the Voting Rights Act is on the lawbooks to stay. It is a permanent law.

Mr. LEVERETT. Very much so.

Senator THURMOND. Now is the extension of section 5 in perpetuity constitutionally sound?

Mr. LEVERETT. That raises some serious questions, Senator. You know that since the Voting Rights Act was upheld in *South Carolina* v. *Katzenbach,* seven Justices of the U.S. Supreme Court, in one context or another, have expressed either an outright opinion or raised serious questions as to the constitutionality of the act.

Making it permanent, as H.R. 3112 purports to do, subject only to a bailout procedure that is so stringent that I do not think hardly any political subdivision could ever satisfy it, does raise serious questions because the act was justified on the basis of the emergency that existed and the fact that there was such a great disparity in the number of minorities that were registered. Well, the predicate of that no longer exists. Minority registration has become quite substantial since that time.

Senator THURMOND. I believe counsel has some questions.

Mr. MARKMAN. I would not have any additional questions for the present witness, Mr. Chairman.

Senator THURMOND. Mr. Leverett, we want to thank you for your presence here and the magnificent manner in which you have presented your testimony, which has been very enlightening and helpful.

Mr. LEVERETT. Mr. Chairman, thank you very much.

[The prepared statement of Mr. Leverett follows:]

PREPARED STATEMENT OF E. FREEMAN LEVERETT

Mr. Chairman and Members Of The Committee:

I am E. Freeman Leverett. I am a practicing lawyer in Elberton, Georgia, and a partner in the firm of Heard, Leverett & Adams. I have practiced law for 30 years. From 1952 until about 1965, I served as an attorney, Assistant Attorney General, and Deputy Assistant Attorney General of the State of Georgia. In that capacity, I participated in most of the Civil Rights and Reapportionment Cases in which the State of Georgia was involved during this period, including the Georgia County Unit Case, Gray v. Sanders, 372 U.S. 368 (1963), and one of the Georgia Reapportionment Cases, Fortson v. Toombs, 397 U.S. 621 (1965). I also presented argument before the Supreme Court on behalf of Georgia in the case challenging the 1965 Voting Rights Act, South Carolina v. Katzenbach, 383 U.S. 301 (1966), in which I was assigned by the attorneys aligned with South Carolina to present argument for the group on the validity of Section 5 of the Act dealing with the same point which was the subject of Mr. Justice Black's dissent (383 U.S. at 355). I have also presented oral argument before the Court representing a black citizen of my county in an attack on the constitutionality of certain provisions of the Serviceman's Life Insurance Act as being discriminatory against black persons. Willis v. Prudential Ins. Co., 405 U.S. 318 (1972).

I am general counsel for the Georgia School Boards Association, a fellow of the American College of Trial Lawyers, and a fellow of the American Bar Foundation. I am Chairman of the State Campaign and Financial Disclosure Commission of the State of Georgia, and am serving a second term on the State Disciplinary Board of the State Bar of Georgia. During the early 1960's, I served as counsel for the Georgia Assembly Commission on Schools (Sibley Commission) which held hearings and sought a resolution to the school crisis facing Georgia at that time. I was co-author of a book on Georgia practice which served as a standard text in Georgia law schools for a number of years.

I appear before the Committee today as a private citizen, in opposition to some of the provisions of HR 3112, the proposed extension and amendment of the Voting Rights Act of 1965.

There are several provisions of HR 3112 which I will discuss, but the principal part of my presentation will be directed toward the proposed amendment to Section 2 of the Act (42 USCA 1973).

THE IMPACT OF THE SECTION 2 AMENDMENT

I am particularly concerned with the amendment to Section 2, because I feel that its implications are not understood. Unlike most parts of HR 3112 which operate only to extend the existing act, the amendment to Section 2 changes and substantially alters that section. It is no overstatement to say that the effect of the amendment is revolutionary, and will place in doubt the validity of political bodies and the election codes of many states in all parts of the Union. If enacted, Section 2 will in a very short time, produce a new horde of voting rights suits all over the Nation having repercussions with portents no less than the flood of reapportionment cases which followed Baker v. Carr, 369 U.S. 186 (1962). It is simply impossible at this time to anticipate the numerous voting practices, laws and governmental structures which will fall victim to the broad sweep of the amended section. As expressed by Representative Butler in the House Debates, in changing to an "effects" test, one is limited "only by his imagination." Cong. Rec. H 6984. This is necessarily so because in substituting an "effect" or "impact" test for the traditional, intentional discrimination rule of Fourteenth and Fifteenth Amendment jurisprudence, the validity of a law is made to depend upon how it operates in a given context. The same law, although neutral on its face and enacted with the purest of motives and purposes, may well be invalid in some states while valid in others, because of differences only in such circumstances as whether a racial or language minority is present in one state or subdivision, or whether the minority enjoys substantially the same socio-economic status in one jurisdiction as the majority. In other words, the validity of a law under the "effect" test depends not on its inherent qualifies or the legislative context in which it was enacted, but upon the evidence in the particular case, as to how it affects certain persons in that state. This evidence will vary from state to state and period to period. It is quite possible for example, that a law may be constitutional in some jurisdictions within a state, and void as to others.

As I will attempt to show in more detail, the amendment to Section 2 will likely have these consequences:

(1) It will preclude any meaningful annexation by municipalities, government consolidations, county consolidations, or other similar governmental reorganizations, in areas having a minority population, at a time when our urban areas, suffering from deteriorating inner cities, need to expand their tax bases more than ever before to effectuate economies and support the economically depressed expanding inner cities.

(2) It will outlaw at-large voting in any area where any racial, color or language minority is found. According to studies several years ago, 32 of the 50 largest school boards in the Nation elect at-large, as do most municipalities having over 25,000 population, and 40% of all county governing bodies, to say nothing of numerous multi-member districts in many state legislatures.

(3) It will place in doubt state laws governing qualifications and educational requirements for public office and vest federal courts with carte blanche authority to pass on these laws under standards so subjective and result-oriented as to constitute a virtual veto power.

(4) It will dramatically affect state laws establishing congressional districts, state legislative districts and local governing body apportionment or districting schemes. Empowered with the sweeping, impact standard of the new Section 2, federal courts, borrowing from the precedents of the Justice Department and district court in the District of Columbia in applying a similar standard under Section 5 preclearance cases, will likely mandate districting schemes which maximize the power of minorities.

(5) It will place in doubt provisions of many election codes throughout the United States. The very sweeping, undefined, sliding scope of the §2 amendment makes it impossible to foresee and anticipate its full application at this time.

Additionally, these far-reaching consequences will not be confined to the South, even where dependent to some degree upon a showing of prior discrimination. This is so because of many recent decisions

uncovering subtle instances of de jure discrimination against minorities in education, housing, zoning and other areas, and in Oregon v. Mitchell, 400 U.S. 112, 152, 256 (1970), Supreme Court justices pointed out that many states outside the South denied black suffrage for some years after 1865.

Of equal significance to the general doubt and confusion which the Section 2 amendment will produce, is the nature of the change it will inflict. While the immediate issue is stated in terms of "effect" vs. "intent", the bottom line is proportional racial representation, and reverse discrimination. As a lawyer who has been of counsel in a number of voting rights cases, I have personally observed the emergence of new doctrine which says that a minority, is entitled to representatives proportionate to their numbers, and that any law which in practice disadvantages that group in any way, regardless of its otherwise valid concerns, is by the former fact alone rendered invalid. An "effect" or "impact" test is nothing short of a formula for special privilege and reverse discrimination, and necessarily tends to exacerbate and aggravate, rather than to alleviate, racial differences and antagonisms.

I will address these concerns in more detail later in these remarks.

ANALYSIS OF THE SECTION 2 AMENDMENT

Existing §2 declares in substance that no voting qualification, standard or practice shall be imposed or applied ". . . so as to deny or abridge the right of any citizen of the United States to vote on account of race or color (or because he is a member of a language minority) . . . " 42 USCA 1973, as amended, 1975.

The amendment, simply stated, would strike the words "to deny or abridge" and substitute therefor, the words "in a manner which results in a denial or abridgement of . . . "

The House Committee Report declares that,

> "Section 2 of the HR 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision" (Report, p. 29).

At page 30, the Committee notes that as so revised, §2 would include "not only voter registration requirements and procedures, but also methods of election and electoral structures, practices and procedures which discriminate." While disavowing any effort to mandate proportional representation in all cases, the report makes it clear that this is the objective in most cases:

> "It would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interest of a racial or language minority" (Id.).

THE DISCLAIMER IN SECTION 2 ADDS NOTHING

The House Committee Report asserts that the amended Section 2 will not be construed as mandating proportional representation, because the amendment includes this language:

> "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

This disclaimer is not valid. The principle contained in the additional section just quoted is already the law, for the Supreme Court and the lower courts have expressly so held in a number of cases. Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); White v. Regester, 412 U.S. 755, 765-6 (1973); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980); Zimmer v. McKeithen, 485 F2d 1297, 1308 (C.A. 5th 1973); affd. sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976); Kirksey v. Board of Supervisors of Hinds County, 554 F2d 139 (C.A. 5th 1977), cert. den. 434 U.S. 968; David v. Garrison, 553 F2d 923 (C.A. 5th 1977); Nevett v. Sides, 571 F2d 209, 216 (C.A. 5th 1978); Lodge v. Buxton, 639 F2d 1358, 1362 (C.A. 5th 1981), stay granted sub nom Rogers v. Lodge, 439 U.S. 948 (1978), probable jurisdiction noted October 5, 1981, ___U.S.___, 70 L.Ed.2d 80 .

In White v. Regester, supra, the only decision of the Court to uphold invalidation of a multi-member district on constitutional grounds, the Court declared:

"To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential" (412 U.S. at 765-6).

Yet, it is this same case, White v. Regester, which gave rise to the "disparate impact" test which a later Court just disapproved in City of Mobile v. Bolden, supra, and which has been used in many cases to strike down at-large voting arrangements, and to require deliberate gerrymandering of election district lines in order to achieve varying degrees of racial balance in representation.

Consequently, since the disclaimer is already a principle firmly established in the very cases which have given rise to the "disparate impact" test in election cases, its restatement in the amendment to §2 in HR 3112 does nothing to alleviate the force of the disparate impact language which precedes it, and in fact, it is obvious from the Committee Report that the sponsors of HR 3112 intend for it to impose an even more rigorous disparate impact standard than the one disapproved in City of Mobile v. Bolden, supra.

IF ANYTHING, THE DISCLAIMER WEAKENS THE RULE THAT THE FAILURE OF MINORITIES TO ELECT REPRESENTATIVES IN PROPORTION TO THEIR NUMBERS DOES NOT ESTABLISH DISCRIMINATION

The disclaimer added to §2 necessarily will be construed in the light of the House Committee Report quoted above (p. 4) to the effect that it would be illegal for an at-large scheme . . . to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates. . . " (Report, p. 29).

So being, it is clear that the statement of the Committee Report goes further than any existing court decision in mandating proportionate racial discrimination. No case yet decided has held that the mere fact that minority candidates are consistently defeated operates to invalidate an election plan. Indeed, the cases previously cited all hold to the contrary. They require some additional factors, such as a history of past discrimination, unresponsiveness of legislators to minority needs, and the like. Yet, the sponsors of HR 3112 announced in the Committee Report that such is their intent.

The very fact that Congress has changed the standard of §2 is indicative of an obvious intent to change the law: Changes in language in a statute are "persuasive . . . that a change in sense . . . was intended." Commissioners of Creek County v. Seber, 318 U.S. 705, 714 (1943) (emphasis supplied). Notwithstanding statements by members of Congress during legislative debates disavowing any legislative intention to give an overly broad scope to a law, the history of Supreme Court interpretation of civil rights legislation has been that the Court consistently imputes to Congress an intention to go further than Congress actually intended. That was borne out in the Weber case, United Steelworkers of America v. Weber, 443 U.S. 193 (1979), where five members of the Court disregarded statements by sponsors of Title VII of the 1964 Civil Rights Act and held that the Act did not outlaw racial quotas in hiring.[1] It has also been true in the Court's interpretation of §5. See p. 60 et seq.

Given the Committee Report language, it is obvious that the amendment to §2 of the Voting Rights Act will be construed as a virtual mandate for proportional representation in any case where minorities have not been able after several elections to elect representatives of their color or race.

THE PROPOSED AMENDMENT TO SECTION 2 WOULD IMPOSE THE SWEEPING DISCRIMINATION STANDARDS OF SECTION 5 OF THE ACT NATIONWIDE, FOR ALL TIME TO COME

Up to this point in constitutional law, the Fourteenth Amendment itself has been held to require a modified discriminatory impact test only in the area of at-large voting, a proposition now discredited by City of Mobile v. Bolden, supra.

Section 5 of the Voting Rights Act represents the first time that Congress imposed such a test in voting cases as a matter of statutory

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1. Senator Humphrey, referred to as the moving force behind Title VII in the Senate, declared on the floor, "Nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." 110 Cong. Rec. 5423, quoted in 443 U.S. at 237. The majority opinion glossed over these and other equally definitive statements, and held in effect that despite Congress' intent to outlaw all forms of discrimination, the Court could nevertheless uphold reverse discrimination since the Court (not Congress) deemed this necessary "to accomplish the goal that Congress designed Title VII to achieve" (443 U.S. at 204).

law,[2] but it is limited to the covered jurisdictions only, and also limited by the special legislative purpose behind Section 5.

The amendment to Section 2 would now apply essentially the same test nationwide to all states, whether covered or not. There are very impo tant and significant differences, however, as follows:

(1) Section 2 applies to all 50 states. United States v. Uvalde Consolidated School District, 625 F2d 547 (C.A. 5th 1980), cert. den. 68 L.Ed.2d 858 (1981). Section 5, however, applies only to 9 covered states and a number of subordinate jurisdictions in other states.

(2) Section 5 applies only to changes in voting laws since 1964. Any laws enacted prior thereto are not affected. Beer v. United States, 425 U.S. 130, 138 (1976). On the other hand, §2 applies to all laws, regardless of when enacted, whether many years in the past or many years in the future. It imposes a permanent standard to govern for all time to come, and is not limited to changes.

(3) Section 5 applies only an initial, threshold test. Once the obstacle of preclearance by the Attorney General or the district court in the District of Columbia is passed, the validity of the law thereafter is governed by the discriminatory intent test of Washington v. Davis, 426 U.S. 229 (1976) and City of Mobile v. Bolden, supra. Section 2, however, would apply the same §5 test on a permanent basis, as against all laws previously enacted and those hereafter enacted.

If the amendment to Section 2 becomes law, the preclearance requirements of Section 5 become almost meaningless, for the same drastic test which that section applies initially to (a) changes in (b) a few states, has now been made permanent for all states and for all laws, regardless of when enacted. About the only difference

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2. Section 5, requiring preclearance of voting changes subsequent to November 1, 1964, in covered jurisdictions, used the language,

". . . does not have the purpose and will not have the effect. . ." 42 USCA 1973 c.

The traditional, constitutional standard, requires both discriminatory purpose and effect. McMillan v. Escambia County, 638 F2d 1239, 1243, f.n. 9 (C.A. 5th 1981). See also concurring opinion of Justice Stevens in City of Mobile v. Bolden, supra.

that will exist because of §5 after the amendment of §2, is that in covered states, changes do not even go into effect, and are not even "laws" until precleared, Corder v. Kirksey, 585 F2d 708 (C.A. 5th 1978); United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977); Wise v. Lipscomb, 437 U.S. 535, 542 (1978); Connor v. Waller, 421 U.S. 656 (1975).

Section 2, however, will apply the strict standard to laws in all states, regardless of when enacted, and for all time to come, not just upon initial preclearance, so that a law valid when enacted becomes invalid many years later simply because circumstances affecting minority voters have changed in the meantime. This is the necessary consequence of an "impact" test, because by its very nature, it applies differently at different times, depending on the facts or circumstances upon which it operates. If those facts change, the application of the law changes, and hence what was constitutional when enacted may become unconstitutional with the passage of time.

Consider these examples:

(1) Under the existing Voting Rights Act, municipal annexations in the covered jurisdictions enacted after 1964 will not be precleared if they reduce black voting strength. Under the §2 amendment, however, annexations enacted anytime -- 1890, 1920, etc. -- would be subject to challenge if they reduced black voting strength, whether enacted in Georgia, California, Illinois or anywhere else. Section 2, as amended, would retroactively invalidate annexations all over the United States.

(2) The Georgia Election Code contains provisions requiring majority vote with a run-off in primaries and elections, and that in multi-member body elections, each candidate must specify the "place or post" he is seeking. These provisions were precleared by the Attorney General when reenacted in 1970. Similar laws are in effect in many other states. They are designed to prohibit the pernicious practice of splinter candidates, sometimes deliberately entered into an election for the purpose of splitting the vote. If the amendment to §2 becomes law, however, these laws and others in other states, may well be declared invalid, because the courts have recognized that in areas where minorities are found, they may have an adverse impact, and of course, preclearance by the Attorney General does not insulate a law from court challenge under

a new standard contained in a law of general applicability such as the proposed Section 2.

(3) Assume that in 1935, Billings, Montana adopted a new election code. At that time, assume further that Billings had no minority population, and that the law was not motivated by any discriminatory purpose whatever, but by 1995, Billings had acquired a 35% minority population. If the 1935 law had a disparate impact on the new minority population, it would then be void under §2, although valid when adopted in 1935.

These are just a few of the examples. It is not possible to anticipate all of those that may arise; for the "impact" test which §2 purports to adopt introduces a sliding scale which will produce different results from time to time based on changed conditions having nothing to do with discrimination.

"DISCRIMINATORY IMPACT OR EFFECT" IS A MISNOMER

Throughout the discussion of this subject, reference is often made to "discriminatory impact" or discriminatory "effect". It is important to understand that these terms are misleading in a derogatory sense, and hence calculated to cause confusion.

"Discrimination" is a term that generally connotes something evil or wicked. See 12A Words & Phrases 362 et seq.

As used in the term "discriminatory impact" or "effect", however, it means something entirely different, for here, it means disparate impact, i.e., that the law in practice produces different results on one group than on another, regardless of how neutral on its face the law may be, how many other valid governmental purposes it serves, or how sincere and benevolent it may have been inspired. For example, in City of Rome v. United States, 446 U.S. 156 (1980), the City of Rome had adopted a number of annexations which the Court found had not been made for any discriminatory purpose. It might also be observed that municipal annexations generally are not considered as being evil or unfair as a general proposition. Most of the time, they are prompted by real estate development and the desire of the new urban areas to obtain municipal services. Yet, in the Rome case, the annexations were struck down under the "effect" test of Section 5 simply because they reduced the percentage of blacks in the enlarged community.

Dotson v. City of Indianola, 521 F. Supp. 934 (D.C. Miss. 1981), illustrates the distinction even more. In that case, Indianola, Mississipp had adopted several annexations over a number of years, some of which resulted in a net increase in the black percentage, and others which resulted in a net decrease. All of the annexation measures were submitted at one time under an understanding with the Attorney General that they were being submitted as a group. Despite this, the Attorney General double-crossed the City, and considered them separately, and approved only those which increased the black percentage, and objected to those which reduced it. The Court upheld the double-cross on the basis of the rule that the action of the Attorney General in acting under a §5 submission is not subject to judicial review, relying on Morris v. Gressette, 432 U.S. 491 (1977). Here was the spectacle of identical laws receiving an exactly contrary fate simply because some adversely affected blacks, while others which adversely affected the white population were approved.

The point is also illustrated by Title VII employment cases. There, the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), held that Title VII's ban on employment discrimination invalidated the use of employment tests which admittedly were not adopted with a discriminatory intent, simply because in practice a greater percentage of blacks then whites were seen to fail them.

The point of all of this is to recognize that an effect test proposed by the amendment to §2 is going to invalidate needed laws which are not harmful or evil in the least, but which are otherwise valid and useful.

THE DISCRIMINATORY INTENT TEST IS SUSTAINED BY PRECEDENT

The rule of constitutional adjudication requiring a showing of discriminatory intent under the Fourteenth Amendment is of long standing. In one of the earliest and most famous cases, the Chinese laundry exclusion case, Yick Wo v. Hopkins, 118 U.S. 356 (1886), an ordinance requiring licensing of all laundries in San Francisco had been administered so as to deny licenses to all 240 Chinese laundries, while at the same time granting licenses to all but one white-owned laundry. In striking down the ordinance as applied, the Court declared: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar

circumstances. . . the denial of equal justice is still within the prohibition of the Constitution" (118 U.S. at 373).

In Snowden v. Hughes, 321 U.S. 1, 8 (1944), plaintiff contended that state officials had denied him equal protection of the laws in certifying his opponent as the winner of a primary election when in fact he had received the highest number of votes. The Court rejected the equal protection challenge, declaring:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." (321 U.S. at 8).

The leading case, of course, is Washington v. Davis, 426 U.S. 229, 240 (1976), where the Court rejected a challenge to a personnel test used in the District of Columbia for selecting candidates for the police training program, despite the fact that the test was seen in practice to disqualify a larger percentage of black than white candidates. Noting that a showing of intentional discrimination had been held necessary in school desegregation cases, the Court alluded to the "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a discriminatory purpose. . . The differentiating factor . . . is purpose or intent to segregate." (426 U.S. at 240). The Court disapproved lower court decisions which had applied a discriminatory impact test in such subject areas as public employment, urban renewal, zoning, public housing and the providing of municipal services (426 U.S. at 244-245).

The Court noted that a discriminatory purpose rule had also been applied in Wright v. Rockefeller, 376 U.S. 52 (1964), involving Congressional Reapportionment.

In City of Mobile v. Bolden, 446 U.S. 55, 66 (1980), the Court extended the discriminatory purpose rule to the subject of at-large voting, and disapproved Zimmer v. McKeithen, 485 F2d 1297 (C.A. 5th 1973) aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) "but without approval of the constitutional views expressed by the Court of Appeals" (424 U.S. at 638).[3]

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3. The basis of the affirmance was the rule requiring single-member districts in court-devised reapportionment plans "absent unusual circumstances" (424 U.S. at 639).

It is this firmly-established rule that the amendment to Section 2 now seeks to change. The reasons upholding the contrary purposeful discrimination rule are compelling, however. In Washington v. Davis, supra, the Court stated the basic reasons thusly:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." (426 U.S. at 248).

In footnote 14, the Court cited Goodman, De Facto School Desegregation: A Constitutional And Empirical Analysis, 60 Calif. L.R. 275, 300 (1972). In this well thought-out article, the author points out the practical ramnifications of the discriminatory impact formula:

> "State action that is neutral on its face and serves legitimate non-racial ends does not violate the equal protection clause merely because those it burdens often happen to be black. The same effects result from many laws, such as neutral tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities. Sales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges are more burdensome to the poor than to the rich, and hence more so to the average black than to the average white. These and countless other de facto discriminations would be disallowed by a rule condemning, or requiring special justification for, all state action disproportionally harmful to members of minority groups. The objection to such a rule is not solely one of practicality, but also one of principle. It is the individual, not the group, to whom the equal protection of the laws is guaranteed. A man's blackness does not exempt him from neutral laws applicable to the majority of citizens.

Why then should he be exempt solely because others disadvantaged by the law happen disproportionately to be black?"

It is also significant to note that under a disparate impact test, the Veteran's Preference upheld in Personnel Administrator v. Feeney, 442 U.S. 256 (1970) would have been invalidated.

Government simply could not exist under an Equal Protection rule utilizing discriminatory impact as the test, yet that is precisely what is being urged in all quarters, not only in election cases. As one example, in Silverman, "Equal Protection, Economic Legislation and Racial Discrimination", 25 Vand. L. R. 1183 (1973), the author proposes just such a rule to determine the validity of all laws affecting black persons, and devotes many pages to demonstrating that such a rule would result in striking down, as they presently exist, the federal minimum wage law, usury laws, and medical licensure laws. He also maintains that employment tests, urban renewal, zoning, public housing, and municipal services should be governed by this strict standard.

The end effect, of course, would be to place in jeopardy a great part of all the laws presently on the books, and compel government to assume a posture of insuring equality of status rather than equality of treatment, and thereby place the courts in the business of "political decision-making." Note, Proof of Racially Discriminatory Purpose , 12 Harv. Civ. Rights L.R. 725 (1977). Such a test compels the legislature to give effect to race in situations not directly tied past de jure discrimination, Ely, Legislative and Administrative Motivation In Constitutional Law , 79 Yale L.J. 1207, 1260 (1970). It also posits a test based on whether legislation favors or disfavors blacks, Harlan, dissenting in Allen v. State Board of Elections, 393 U.S. 544 (1969), and hence, in practice, mandates reverse discrimination. The doctrine of discriminatory or disparate impact can not be contained, for arguably, all disproportionate impacts can be attributed to past discrimination in part. Note, Washington v. Davis, 25 Emory L.J. 737, 756. It has also been observed that the Court rejected this very argument in Washington v. Davis, Note, Racial Vote Dilution In Multi-Member Districts: The Constitutional Standard After Washington v. Davis, 76 Mich. L.R. 694, 710 (1978).

The significance of all the foregoing is that a discriminatory impact test generally is impractical in the everyday affairs of life. It

would place government in a strait-jacket, and confer on the courts the responsibility of political decision-making. It is, in essence, the elevation of the socialist state to a constitutional imperative, and a mandate for reverse discrimination in favor of minorities. It is equally undesirable in election cases, as will now be shown.

DISCRIMINATORY IMPACT IS EQUALLY UNSOUND FOR ELECTION CASES

A discriminatory impact test will play havoc with election codes and governing body structures throughout the United States, in any area where there exists any discrete racial minority. The two most obvious areas - obvious because of experience with them in covered jurisdictions under the preclearance provisions of Section 5 of the Act - is with respect to annexations, consolidations and at-large or multi-member districts.

Indeed, the only instance in which a discriminatory impact test has been applied as a constitutional as distinguished from a statutory standard in the area of elections is in connection with at-large elections. The principle developed in this manner:

In Fortson v. Dorsey, 379 U.S. 433 (1965), the Supreme Court upheld a challenge to multi-member districts per se, but added this caveat:

> "It might well be that, designedly or otherwise, a multi-member constituency scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population" (379 U.S. at 439). (emphasis supplied)

Later, the Court rejected an attack on such an arrangement after evidence had been introduced dealing specifically with the plan in operation, in Whitcomb v. Chavis, 403 U.S. 124 (1971), involving Marion County (Indianapolis), Indiana, but in White v. Regester, 412 U.S. 755 (1973), the Court upheld a challenge to at-large voting for members of the Texas House of Representatives in Dallas and Bexar Counties. The Supreme Court's opinion was not clear in indicating whether it was relying on a discriminatory impact or discriminatory intent approach. Language in the opinion in places would seem to support both.

Following White v. Regester, the United States Court of Appeals for the Fifth Circuit decided the much-cited case of Zimmer v. McKeithen, 485 F2d 1297 (C.A. 5th 1973), affd. sub. nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals" (424 U.S. at 638).[4] In Zimmer, the Court of Appeals, drawing on discussion in White v. Regester, articulated an "aggregate of factors" and "enhancing factors" test to determine the validity of at-large voting, in these terms:

> "The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis, supra, would require a holding of no dilution. Whitcomb would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting pro-

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4. See Footnote 3, supra.

visions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors." (485 F2d at 1297)

The Court of Appeals recognized that it was prescribing a modified discriminatory impact test, for at page 1304, the Court alluded to a plan that,

"[D]esignedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[5]

and, in footnote 16, the Court referred to the fact that in its opinion, prior cases,

" . . . [F]ocused on the actual effect of the legislation being challenged, and not on the reason why the legislation was enacted". (485 F2d at 1304).

In Nevett v. Sides, 571 F2d 209 (C.A. 5th 1978), the Court again recognized that Zimmer had been based on a discriminatory impact rationale, see 571 F2d at 225, but held that even so, a finding on the Zimmer criteria would suffice to prove discriminatory intent in the retention of the at-large system (571 F2d at 222-223). It was this very holding which was rejected by the majority opinions in City of Mobile v. Bolden, 446 U.S. 55, 73 (Stewart); Id, p. 90 (Stevens) (1980).

It was the Zimmer case which gave rise to the so-called "Zimmer dilution analysis," which is responsible for having ushered in a virtual reconstruction of a staggering number of city councils, county commissioners and boards of education in the southeastern United States. All of this has been accomplished without any showing of discriminatory intent. In many instances, at-large election laws in existence for over 60 years, adopted during a period when it is certain they were not designed as engines of discrimination, were struck down under the Zimmer approach. In a number of other cases, at-large laws enacted subsequent to 1964 were denied preclearance under Section 5.

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5. As previously shown, the effect or impact language "or otherwise" originated in Fortson v. Dorsey, supra, and was declared to be obiter dictum in City of Mobile v. Bolden, supra (446 U.S. at 68, f.n. 13).

I personally am familiar with a number of jurisdictions in Georgia which sought to use at-large election simply as a convenient, ready means of complying with the one-man-one-vote principle following the court's 1968 decision in Avery v. Midland County, 390 U.S. 474 (1968), and its 1970 decision in Hadley v. Junior College District, 397 U.S. 50 (1970), holding the reapportionment principle to local governing bodies such as boards of education and cities.

The invalidation of at-large elections has been conjoined with a requirement that election districts be gerrymandered so as to achieve varying degrees of proportionate racial representation. In remedying dilution, the courts in the Fifth Circuit have been quite direct in holding that race must be considered, Zimmer v. McKeithen, supra (485 F2d at 1308); Kirksey v. Board of Supervisors of Hinds County, supra (554 F2d at 151); United States v. Board of Supervisors of Forrest County, supra (571 F2d at 955), and in Kirksey, the Court in effect mandated racial gerrymanders in order to insure some degree of proportionate representation. (See particularly, 554 F2d at 151, and Judge Gee's concurring opinion, at p. 153). The real pervasiveness of this reverse discrimination requirement is not usually spelled out in words in most of the cases for obvious reasons. It simply is effectuated by the Court's refusing, without explanation, to approve any plan except one which does maximize minority voting power.

It is the Zimmer disparate impact dilution principle, of course, that City of Mobile v. Bolden disapproved, and which the amendment to Section 2 seeks to restore in an even more rigorous form. That the standard under a revised Section 2 will be even more sweeping can hardly be denied.

First, heretofore, the rule was one solely of judge-made law, designed to "fill in the gap" in the common-law tradition. When, however, Congress enacts it into law, this represents a policy-decision by the proper policy-making body, and the Courts generally apply the statute more forcefully than the judge-made rule. It is not even certain, for example, as to whether the courts would continue to require the Fifth Circuit's showing of the traditional "aggregate of factors" to invalidate at-large voting, or simply adopt a per se rule.

Secondly, Section 2 comes armed with a House Committee report specifically declaring that Congress intends that in any community where blacks have been unable over a period of time to elect representatives commensurate to their numbers, at-large elections stand condemned by Section 2. The report laments the fact that blacks have not registered or been elected in the same proportion as whites (Report, pp. 7, 9), making apparent that Section 2 is aimed at achieving proportional representation.

Even assuming, however, that the Courts continue after the amendment of Section 2, to require a showing of something in addition to the inability of minority persons to win elections in order to invalidate at-large elections, the Zimmer formula will continue to provide that "something else". Essentially, as applied, the Courts have given controlling significance to that part of the Zimmer analysis which is concerned with a history of prior discrimination. The high point of this development came in Kirksey v. Supervisors of Hinds County, 554 F2d 139 (C.A. 5th 1977), cert. den. 434 U.S. 968, where the Court held that it was necessary only to show a past history of discrimination in areas unrelated to voting, and that the at-large scheme perpetuated "an existent denial of access by the racial minority to the political process."

THE DISPARATE IMPACT TEST WILL INVALIDATE AT-LARGE ELECTION DISTRICTS ALL OVER THE UNITED STATES

Election districts all over the United States, and not just those in the South, should be concerned with the application of such a test. Just as it took school desegregation and bussing about 15 years to move North and Westward, it is only a matter of time before the election district battlefield will also move away from the South. From the statement of governing principles contained in Zimmer, it should be apparent that a dominant consideration is a history of past discrimination.

Recent court decisions unearthing subtle forms of de jure discrimination in education and other fields in Ohio, Michigan, Massachusetts, Missouri, Oklahoma, California and other states, should make clear that no part of the United States is immune from the broad, pervasive sweep of a disparate impact test. In Gaston County, North Carolina v. United States, 395 U.S. 285 (1969), the Court, in applying the discriminatory impact test of the bailout provision of Section 4 of the Voting Rights Act, 42 USCA 1973b, relied on evidence of discrimination in education going back as long as 61 years (395 U.S. at 294), in denying relief. And, in his dissenting opinion in Oregon v. Mitchell, 400 U.S. 112, 152 (1970), Mr. Justice Harlan pointed out these salient facts:

In 1865, only 6 states in the Union permitted Negroes to vote, and in that same year, enfranchising proposals were defeated in Connecticut, Wisconsin, Minnesota, Colorado and the District of Columbia (400 U.S. at 156-7).

In the opinion of Mr. Justice Brennan in the same case, joined in by Justices White and Marshall, historical materials were referred to showing that black suffrage was rejected in 17 of 19 states between 1865 and 1868 (400 U.S. at 256).

The implication of this historical background is unmistakeable:

Discrimination against blacks (and perhaps other minorities) has been prevalent throughout the United States, and the existence of such discrimination, although going back many generations before, will nevertheless be used as the predicate for broad, far-reaching relief under any law using disparate or discriminatory impact as a test.

MULTI-MEMBER OR AT-LARGE ELECTION DISTRICTS ARE RATIONAL ELECTION METHODS IN WIDE USE OVER THE UNITED STATES

In the plurality opinion in City of Mobile v. Bolden, 446 U.S. 55 (1980), it was said of the at-large system under attack there:

"This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation."

And, in footnote 7:

"According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. Id. at 98-99. It is reasonable to suppose that an even larger majority of other municipalities did so." (446 U.S. at 60).

In footnote 15:

"It is noteworthy that a sytem of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago

> as a praiseworthy and progresive reform of corrupt municipal government. See, e.g., E. Banfield & J. Wilson, City Politics 151 (1963). Cf. M. Seasongood, Local Government in the United States (1933); L. Steffens, The Shame of the Cities (1904)." (446 U.S. at p. 70).

Of the 50 largest school boards in the United States, 32 use at-large voting. Black Voters v. McDonough, 565 F2d 1, 2 (C.A. 1st 1977).

In a 1968 law review article, it was pointed out that almost two-thirds of all cities elect their councilmen at large; one-fifth elect by wards; and the remainder, by a combination of the two. As to counties, two-fifths elect at-large, another one-fifth elect the presiding officer at large, and two-fifths elect by districts. The trend in recent decades is toward at-large elections, for the proportion of cities electing at-large grew from 53% to 62% since 1940. Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. R. 790 (1968).

At-large voting appears to be in widespread use in many states. For example, this is particularly so in Massachusetts. Massachusetts law provides that each county shall have three county commissioners, except Nantucket and Suffolk Counties. MGLA 34-4. These commissioners are elected at-large, subject to the requirement that no more than one should be elected from the same city or town. The law also provides for staggered terms, another voting device which a disparate impact test places in doubt. See MGLA §54-158. Massachusetts law also authorizes at-large election of members of town meetings. MGLA 43A-4. The Massachusetts Code also provides a number of alternative plans of city government. Plan A involves the election of 9 councilmen, all at-large. MGLA 43-50. Plan B provides for a combination of district and at-large councilmen. MGLA 43-59. Plan C, the commissioner form of government, provides for a 5-man council with a mayor and four other commissioners, all elected at large. MGLA 43-67. Plan D provides for a mayor, city council and city manager with 7 or 9 members of council, all elected at-large.

It is no over-statement to conclude that at-large voting will be outlawed in a large part of the United States if the proposed amendment to §2 is adopted. This should not be. At-large elections

are a valid, rational method of election. As stated by Mr. Justice Stevens in City of Mobile v. Bolden, supra,"at large election is supported by valid and articulate justifications." (446 U.S. at 92). It should also be pointed out in this context that at-large elections stand on a different footing altogether when used with respect to the governing body of a political subdivision than when they are used in connection with apportionment of state legislatures. In the latter instance, most of the legislative seats generally are single member districts, and when a few multi-member districts are presented, the very fact of selective use connotes some type of differential treatment and makes these districts suspect. See concurring opinion of Mr. Justice Stevens in City of Mobile v. Bolden, supra, (446 U.S. at 92), f.n. 14, and note, 87 Harv. . R. 1851 (1974). There is also a substantial difference in that in many of the cases involving political subdivision at-large arrangements, the district is small both geographically and population-wise, and the opportunties for confusion and the difficulty in candidates meeting all of the voters are not present. Lastly, there is an inherent justification for at-large voting in political subdivision elections which was recognized in a note in 87 Harv. L.R. 1851, which critically commented on the Zimmer case shortly after it was decided. The author of this article points out:

> "Further, the purposes served by multi-member districts are less apparent in Rogester than in Zimmer. The district-wide perspective in allegiance which result from representatives being elected at large, and which enhance their ability to deal with district-wide problems, would seem more useful in a public body with responsibility for the district than in a statewide legislature." (87 Harv. L.R. at 1857).

THE END RESULT OF INVALIDATION OF AT-LARGE VOTING UNDER §2 IS RACIALLY PROPORTIONAL REPRESENTATION

As previously stated, in every case where at-large elections have been successfully invalidated by court decision, there have been efforts by the plaintiff's counsel, which usually have been successful, to mandate a remedy which not only converts to single-member districts, but also to racially gerrymander single-member districts which insure varying degrees of racial proportionality. As a lawyer who has been of counsel in several of these cases, it has confronted me in every

one. Invariably, the effort is made to gerrymander election districts that will have a minimum of 65% to 70% minority citizens, since it is felt by civil rights groups that because of the tendency of many minorities not to register or vote, a substantially greater percentage than a bare majority is necessary to insure election. This has also invariably been the experience in connection with preclearance in covered jurisdictions under §5 of the Voting Rights Act. In one case which I handled involving Wilkes County, Georgia, I was advised by a representative of the Justice Department that they would agree to preclear a single-member district plan if one district would be devised so as to provide for a 70% black majority.

This apparently has been the experience with Justice Department officials in the Voting Rights division in a number of other cases, for in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), there is a reference to an anonymous telephone call from a representative of the Justice Department to this effect:

> "A staff member of the Legislative Reapportionment Committee testified that in the course of meetings and telephone conversations with Justice Department officials, he got the feeling that 65% would be probably an approved figure for the non-white population in the assembly district in which the Hasidic Community was located, a district approximately 61% non-white under the 1972 plan." (430 U.S. at 152).

What is being sought here is governmental action which forces governments and public officials to think and act along racial lines. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1207, 1260 (1970). It is, in effect, an insistence upon segregated election districts, which reinforces the bloc-voting syndrome. David v. Garrison, 553 F2d 923 (C.A. 5th 1977). Such reverse discrimination exacerbates, rather than reduces, racial tensions. University of California Regents v. Bakke, 438 U.S. 265, 298 (Opinion of Justice Powell) (1978).

Even Mr. Justice Brennan, who is no enemy of benign discrimination, has recognized that an effort to achieve proportional representation could be used as a "contrivance to segregate the group. . . thereby

frustrating its potentially successful efforts at coalition building across racial lines." United Jewish Organizations v. Carey, supra, (430 U.S. at 172-173). He further notes that such a policy "may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," (Id., p. 173), and that "We cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification." (Id., p. 174).

A more practical concern with proportional representation, however, has been articulated in the two cases dealing most directly with the subject of at-large voting.

In Whitcomb v. Chavis, supra, 403 U.S. at 156-157, it was said:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would

spawn endless litigation concerning the multi-member district systems now widely employed in this country." (403 U.S. at 156-157).

In the plurality opinion in City of Mobile v. Bolden, supra, Mr. Justice Stewart posed similar questions, in response to the dissenting opinion of Justice Marshall, which in effect, advocated a constitutional requirement of proportional representation for blacks or other persons who had been subjected to a history of discrimination:

> "It is difficult to perceive how the implications of the dissenting opinion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a 'political group'? How large must a 'group' be to be a 'political group'? Can any 'group' call itself a 'political group'? If not, who is to say which 'groups' are 'political groups'? Can a qualified voter belong to more than one 'political group'? Can there be more than one 'political group' among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one 'political group' among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the total size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself." (446 U.S. at 78, f.n. 26).

We reiterate what we have said before: The immediate question here is discriminatory impact vs. discriminatory intent, but the bottom line is proportional representation. Nothing could be more

impractical, more injurious, or more divisive of national unity than the idea that discrete groups are entitled to proportional representation. It will completely destroy any hope that the blacks and other racial minorities in this country will ever be integrated into the total society.

SECTION 2 WILL BAR MUNICIPAL ANNEXATIONS AND LOCAL GOVERNMENT CONSOLIDATIONS

Experience with Section 5 preclearance cases from covered jurisdictions indicates that the discriminatory impact amendment to Section 2 will, in practical effect, reduce if not altogether stop, municipal annexations and governmental consolidations in any jurisdiction where minorities are present.

In Perkins v. Matthews, 400 U.S. 379 (1971), annexations in covered jurisdictions were held to be subject to Section 5 preclearance requirements.

In City of Petersburg v. United States, 354 F. Supp. 1021 (D.C. D.C. 1972), affd. per curiam, 410 U.S. 962 (1973), Petersburg, Virginia, had effectuated an annexation of an area that had been under consideration for 5 or 6 years. The annexation was supported by both black and white citizens, and involved an area logically suitable for annexation. The effect of the annexation, however, was to reduce the black population from 55% majority to a 46% minority. When the annexation was submitted for preclearance, the Court held that it was not racially inspired, but found that the annexation would have the effect of decreasing black voting rights. Because of this and a past history of discrimination and racial bloc voting, the Court approved the annexation only on condition that the city change to ward elections, with blacks insured of safe "black" districts.

Later, in City of Richmond v. United States, 422 U.S. 358 (1975), a similar situation arose with respect to Richmond, Virginia, where the annexation reduced the black population from a 52% majority to a 42% minority. The Court took occasion in this case to explain its per curiam affirmance in the Petersburg case, declaring:

> "Petersburg was correctly decided. On the facts there presented, the annexation of an area with a white majority,

combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council. We agreed, however, that that consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen. It is our view that a fairly designed ward plan in such circumstances would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community" (422 U.S. at 370). (emphasis supplied)

This case established the principle of law that now governs annexations by jurisdictions subject to Section 5, and in effect says that where an annexation occurs which changes the black percentage, the jurisdiction must go to single-member districts arranged so as to insure racially proportional representation, i.e., an arrangement that will "afford them representation reasonably equivalent to their political strength in the enlarged community", supra.

Since §5 contains a "disparate impact" test similar to what is proposed for §2 by HR 3112, it is certain that the Courts will not require any less under §2, and for reasons presently to be explained, it is submitted that the Courts will likely apply an even more rigorous standard under §2.

The last-mentioned likelihood comes about in this way: Arguably, under a pure "effect" test which does not require any consideration of purpose or intent, any annexation which reduces a black population percentage would be barred. In fact, that was the argument made in the Petersburg and Richmond cases and not lightly rejected. This holding was made, however, under a "disparate impact test" which was construed in the peculiar context of §5, which does not impose a permanent standard such as §2, but only a threshold standard for initial preclearance, under a section of the Voting Rights Act which the Supreme Court has held was designed for a specific, limited purpose only, to wit, to

> ". . . [I]nsure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of their electoral franchise." Beer v. United States, 425 U.S. 130 (1976). (emphasis supplied)

Section 2, however, is a permanent law, and applies not just at the point in time of initial enactment, and unlike Section 5, is not limited in its legislative purpose to preventing only retrogression arising from changes, but is likely to be enforced according to its clear terms, unlimited by the peculiar purposes of §5. The Beer case itself demonstrates the tendency of the courts to enforce the Voting Rights Act in a broad, sweeping manner. While the case deals with preclearance of a new reapportionment plan and not an annexation, the case is nevertheless pertinent here as being indicative of the general attitude of the courts. In that case, a new reapportionment plan was devised so as to give the blacks in New Orleans one black voter majority district. Previously they had none. Both the Attorney General and the district court in the District of Columbia refused to approve the plan, however, because if the district lines had been drawn in an East-West configuration, rather than a North-South one, blacks likely would have achieved districts guaranteeing them proportional representation. In other words, the lower court held that the redistricting had to be done so as to maximize black voting strength, i.e., propostional representation. The Supreme Court rejected this contention only by looking at the peculiar purpose of §5, and then only by a 6-3 majority, Justices White, Marshall and Brennan contending that Under §5, proportional representation was required. The majority held that in §5, Congress was mainly concerned with changes which resulted in retrogression.

The considerations which prompted a majority of the Court to reject proportional representation in the Beer case will not be present under a permanent law such as Section 2. The latter's thrust is not just at covered jurisdictions, and is not limited to preserving the status quo ante.

The foundation for such a distinction has already been laid by the District Court in the District of Columbia in City of Port Arthur v. United States, 517 F. Supp. 987 (D.C. D.C. 1981), where the Court discussed the

implications of annexations at length, and in denying preclearance because a plan was not gerrymandered so as to insure proportional representation to blacks, held that the Beer rule did not apply to annexations, i.e., merely insuring that there was no retrogression, was not sufficient here.

Similarly, in the City of Richmond case, supra, the district court had disapproved the annexation altogether, despite the fact that the districts had been devised so as to insure blacks proportional representation. The Court was concerned mainly by the fact that blacks nevertheless would no longer be a majority in the new enlarged city. The Supreme Court rejected the district court's decision on this issue, but not without some difficulty, and even then, by only a 6 to 3 majority. 422 U.S. 358 (1975).

The message of all this is clear: The amended Section 2 will stop most annexations and governmental consolidations in their tracks, for under the wording of §2, without the limiting construction applicable to §5, any annexation which reduces a black or language-minority majority is proscribed

THE DISPARATE IMPACT AMENDMENT TO SECTION 2 WILL INVALIDATE CONGRESSIONAL DISTRICTING AND OTHER LEGISLATIVE DISTRICTING PLANS

In Wright v. Rockefeller, 376 U.S. 52 (1964), challenge was made to the state law prescribing the congressional apportionment for the four New York congressional districts in New York County (Manhattan Island) on the ground that the districts had been set up along racial lines. The Court rejected the challenge on grounds that plaintiffs "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines" (376 U.S. at 56).

In other words, a "discriminatory purpose" or "intent to discriminate" rule was applied to congressional reapportionment. See City of Mobile v. Bolden, 446 U.S. 55, 63 (1980), where Wright v. Rockefeller was explained in these terms. Had a disparate impact or "effect" test been employed as urged by Justices Douglas and Goldberg in dissent, it is apparent that the congressional districting act would not have survived challenge.

It is therefore clear for all who are willing to see that the "disparate impact" standard of an amended §2 is going to play havoc with congressional and other legislative districting plans. If a plan

impacts unfavorably on any minority, this fact alone condemns it. At this point in time, it is not possible to guess how such a rule will operate in practice. The signals are clear, however, and they indicate that districting is going to become much more difficult and racially oriented under the amended Section 2. The House Committee Report expressly indicates that a districting plan which "in other ways denies equal access to the political process would be illegal under §2."(Report, pp. 30-31).

THE AMENDED SECTION 2 WILL ALSO INVALIDATE CANDIDATE QUALIFICATIONS, VOTER QUALIFICATIONS AND NUMEROUS OTHER VOTING LAWS

In the voting dilution cases decided under Fourteenth Amendment standards, as defined in Zimmer v. McKeithen, 485 F2d 1297 (C.A. 5th 1973), affd. 424 U.S. 636 (1976), the courts have had occasion to identify a number of election law provisions which have a potential for imposing a disparate impact on minorities:

> Lack of residential subdistricts in at-large elections; majority vote requirement with run-off elections; place rule, requiring head to head confrontations; and anti-single shot voting requirements.

See White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, supra.

In addition, preclearance cases under Section 5 have also recognized that certain other laws have a discriminatory or disparate potential, such as reapportionment, McDaniel v. Sanchez, 68 L.Ed.2d 724 (1981); laws governing getting on the ballot, Hadnott v. Amos, 394 U.S. 358 (1969); Allen v. State Board of Elections, 393 U.S. 544 (1969); United Ossining Party v. Hayduk, 357 F. Supp. 962 (D.C. N.Y. 1971); polling place changes, Perkins v. Matthews, 400 U.S. 379 (1971); candidate qualifications, Dougherty County v. White, 439 U.S. 32 (1978); Allen v. State Board of Elections, 393 U.S. 544 (1969) and cf. Jenness v. Little, 306 F. Supp. 925 (D.C. Ga. 1969), app. dism. 397 U.S. 94; laws governing neighborhood registration drives, NAACP v. DeKalb County, 494 F. Supp. 668 (D.C. Ga. 1980); write-in candidates and assistance in voting, Allen v. State Board of Elections, 393 U.S. 544 (1969); and laws providing for appointment or other means of selecting public officers rather than by elections, Horry County v. United States, 449 F. Supp. 990 (D.C. D.C. 1978).

Of these, the one which has the most grave implications is that of candidate qualifications. The consequences of a "disparate impact" standard in this area will mean ultimately that the federal courts will have to review the reasonableness of state laws defining qualifications for all elected public offices, and determine whether the prescribed qualifications are relevant to the duties of the particular position. This is borne out by experience under Title VII of the Civil Rights Act of 1964, 42 USCA 2000e, et seq., dealing with equal employment opportunities. Despite the fact that the law does not directly impose a disparate or discriminatory impact test, 42 USCA 2000e-2, the Supreme Court held in Griggs v. Duke Power Co., 401 U.S. 424 (1971) that §703(a)(2) (42 USCA 2000e-(a)(2)),[6] imposed a disparate effect test, and that where it was seen that Duke Power's high school education and employment test requirements disqualified a greater proportion of blacks than whites, these requirements would be proscribed - despite an express approval of ability tests in the Act, 42 USCA 2000e-(h), and a showing that the requirements were not adopted with discriminatory intent - in the absence of a showing that the requirements had,

> ". . . a manifest relationship to the employment in question".
> (401 U.S. at 432).

The Griggs case has played havoc with many completely fair, non discriminatory employment requirements. Merely by showing that they have a disproportionate impact on minorities, places the burden on the employer to prove that they are "manifestly" related to job performance. This test is so subjective that it in effect permits the courts to substitute their judgment for that of the employer and to strike down such tests simply because the judge feels that some other test would do the job in a better way.

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6. This section declared:

> "It shall be an unlawful employment practice for an employer
>
> * * * *
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Certainly, if the Court has imposed such a requirement under a discriminatory impact test not clearly defined, and squarely in the face of a statute purporting to permit use of such tests,[7] the unequivocal discriminatory impact standards of Section 2 as it is proposed to be amended, without any limiting provisions at all, will most surely require that the Courts scrutinize carefully all state laws defining qualifications and educational requirements for all state and local offices. The extension of such a requirement to appointive offices and public employment in general would place in jeopardy the civil service systems in most states.

Here again, it is significant to recall what has been referred to before, i.e., that under an "impact" test, the validity of a law is made to depend upon how it works in a given case, so that a law prescribing specific educational qualifications might be valid in New Hampshire, and void in New York, Illinois or Georgia.

Certainly, voter qualifications would be affected by an amended Section 2.

THE SUPREME COURT'S INTERPRETATION OF SECTION 2 IN MOBILE V. BOLDEN IS CORRECT

The House Report accompanying HR3112 declared that:

> "'The purpose of the amendment to section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practice. In the 1965 Hearings, Attorney General Katzenbach testified that the section would reach any kind of practice. . . if its purpose or effect was to deny or abridge the right to vote on account of race or color.' [emphasis added] As the Department of Justice concluded in its amicus brief in Lodge v. Buxton, applying a 'purpose' standard under Section 2 while applying a 'purpose or effect' standard under the other sections of the Act would frustrate the basic policies of the Act." (Report, p. 29)

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7. 42 USCA 2000e-2(h) declares that "Notwithstanding any other provision of this subchapter, it shall not be unlawful employment practice for an employer to . . . give and act upon the results of any professionally developed ability test. . . "

This statement is not correct. There was no indication that when Congress passed the Voting Rights Act in 1965, it intended §2 to include a discriminatory impact or effect test.

It is true, as stated, that in the course of his testimony, Attorney General Katzenbach was asked by Senator Fong whether the word "procedure" as used in §2 would cover situations where days and times upon which registration offices are open were unduly restricted, and the Attorney General gave the answer relied upon. The exact line of questions was as follows:

> "Senator Fong. * * *
> Mr. Attorney General, turning to section 2 of the bill, which reads as follows:
>
> No voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color -
>
> there is no definition of the word 'procedure' here. I am a little afraid that there may be certain practices that you may not be able to include in the word 'procedure.'
>
> For example, if there should be a certain statute in a State that says the registration office shall be open 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?
>
> Attorney General Katzenbach. I would suppose that you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color.
>
> Senator Fong. The way is now written, do you think there may be a possibility that the Court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

Attorney General Katzenbach. I do not believe so, Senator, although the committee might consider that. . . " (emphasis supplied) (Hearings Before The Committee On The Judiciary, United States Senate, 89th Cong. on S. 1564, p. 191).

As shown above, the statement relied on by the 1981 House Committee report, was not given in response to a direct question as to whether §2 would have an "impact" test, but was a reply to a question as to whether registration office hours would be covered. To begin with, the Attorney General in effect said, "Yes", "if it had that purpose" (Id.). Moreover, it is clear that his reply confused the wording of §2 with that of Sections 4 and 5, which specifically use the terms,

". . . for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . " (42 USCA, Sections 1973b(a), 1973c).

Since Congress specifically used the term "effect" in Sections 4 and 5, and conspicuously omitted it in Section 2, it is apparent that this difference in language was intentional,and designed to give a different scope to Section 2 than to Sections 4 and 5.

In dealing with this very question, the United States Court of Appeals for the Fifth Circuit held in United States v. Uvalde Independent School District, 625 F.2d 547 (C.A. 5th 1980) cert. den. 68 L.Ed.2d 858 (1981):

"However, we point out that the single statute contains a number of different provisions, each with a different objective, that for its comprehension, critical examination of each section is essential, and that the reader cannot, therefore, assume that each of the sections is designed to reach the same objective, or is necessarily to be read in the same manner."

The Court further declared:

"However, Section 5 is more broadly remedial than Section 2 and reaches all changes in voting laws and not simply voting practices that deny or abridge the right to vote."

The Court further pointed out that Section 2 was construed in Dougherty County Board of Education v. White, 439 U.S. 32 (1978), by three judges as applying only to voting procedures that deny someone the right to vote, and that this view became the view of four judges in City of Mobile v. Bolden, supra.

It should also be pointed out that the word "deny" as used in Section 2, itself connotes "intent". See United States v. Uvalde Independent School District, 461 F. Supp. 117, 123 (D.C. Tex. 1978).

In Section 5, Congress was dealing with changes in particular areas which, because of past conduct, raised at least a suspicion of ulterior motives, in which situation it was obviously desired to impose a stricter standard. That is not true with respect to Section 2 which applies all over the United States.

It should also be noted that Section 2, just like the Fourteenth Amendment, uses the terms "deny or abridge", and those terms were construed in City of Mobile v. Bolden, supra, as imposing an intent requirement.

More importantly, during the hearings on the 1965 Act, in response to a statement by Senator Ervin, as to possible differences in legality of events occurring in North Carolina and New York, Senator Dirksen replied:

> "If I could have the attention of the Senator from North Carolina, that observation is not correct, because you have to go back to the all-inclusive section in this bill, which is §2. It says that no voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color. That is a restatement, in effect, of the 15th Amendment.
>
> Attorney General Katzenbach. Yes."
> (Hearings, Id., at p. 171.)

And, later at page 208, Senator Dirksen also referred to Section 2, characterizing it as,

> ". . . almost a rephrasing of the 15th Amendment. . ."

Attorney General Katzenbach agreed with this statement.

The United States Supreme Court took note of this legislative history in City of Mobile v. Bolden, 446 U.S. 55, 61, declaring,

> "Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that §2 'grants. . . a right to be free from enactment or enforcement of voting qualifications. . .or practices which deny or abridge the right to vote on account of race or color.' HR Rep No. 439, 89th Cong, 1st Sess, 23 (1965). See also S Rep No. 162, 89th Cong. 1st Sess, pt 3, pp. 19-20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of §5 of the proposed legislation, were prohibited from discriminating against Negro voters by §2, which he terms 'almost a rephrasing of the 15th [A]mendment.' Attorney General Katzenbach agreed. See Voting Rights: Hearings on S 1564 before the Senate Committee on the Judiciary, 89th Cong, 1st Sess, pt 1, p. 208 (1965)." (446 U.S. at 61).

It is submitted that under any reasonable interpretation, §2, by its very language, was intended to have a different scope than §§4 or 5, and that this Congress did not consider otherwise when it adopted the Voting Rights Act of 1965, any statements in the 1981 House Committee Report to the contrary notwithstanding.

The Supreme Court has already rejected the proposition that isolated statements by single individuals as to the meaning of terms in the Voting Rights Act should be determinative in construing the act. In Allen v. State Board of Elections, 393 U.S. 544 (1969), the question was whether the terms "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting . . .", as contained in the preclearance section, §5 (42 USCA 1973c),

and as illuminated by the definition of "voting" contained in §14(c)(1), extended coverage to candidate qualifications. The defendant state (Mississippi) relied on statements of Assistant Attorney General Burke Marshall to the effect that the Act was not concerned with candidate qualifications (393 U.S. at 564). The Court rejected this contention, declaring:

> "In light of the mass of legislative history to the contrary, especially the Attorney General's clear indication that the section was to have a broad scope and Congress' refusal to engraft even minor exceptions, the single remark of Assistant Attorney General Burke Marshall cannot be given determinative weight. Indeed, in any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can be conclusive." (393 U.S. at 568-9)

SECTION 5, THE PRECLEARANCE SECTION, SHOULD NOT BE REENACTED

I do not appear in opposition to all provisions of the Voting Rights Act.

I have set forth some views which I think the Congress should seriously consider in connection with the proposed amendment to Section 2 of the Act.

I do not oppose retention of these provisions outlawing all literacy tests, 42 USCA 1973b (§4 of the 1965 Act); 42 USCA 1973aa (§201 of 1970 act, as amended).

I do submit that the preclearance section, Section 5, should be repealed, as having served its original purpose, and being no longer justified by existing conditions, and replaced with a provision authorizing imposition of a preclearance requirement by judicial decree on a finding of purposeful discrimination.

This section constitutes the most drastic legislation ever enacted by Congress.

It was enacted to deal with what was concerned to be an emergency situation. Its rationale could be justified, if at all, not just on the basis that the laws of some states restricting the right to vote were

unconstitutional, since existing laws and remedies were capable of coping with that, but solely on the basis that in some states, new laws were being enacted to circumvent court decisions as rapidly as the courts were striking down the old ones.[8] That situation, which was seen to exist in only 3 states,[9] was responsible for the act's preclearance section being made applicable to six states.

For the first and only time in the history of this country, congressional acts declared that a state could not ever enact a law without permission of the Attorney General or the district court in the District of Columbia.

If this is good federal law as to state voting laws, it is equally good as to state labor laws, criminal laws, education laws, conservation laws, and the whole gamut of legislative affairs.

I will reiterate here what I said in arguing the 1966 South Carolina Voting Rights case before the Supreme Court, modified only to make it applicable to Congress:

> "We do not deny that discrimination may have been practiced in some areas of the south. I do not stand here to defend it. Instead, I am ashamed of it. Nor do we gainsay the right of Congress to make corrective action. But a state, no more than an individual, does not lose the protection of the Constitution merely because it may have in some respects fallen short of its responsibilities. To paraphrase Judge Wisdom, what all Americans know, this Court knows, and all Americans know that the Voting Rights Act was enacted under

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8. It was so stated in the Committee Report. See 2 U.S. Cong. & Adm. News, p. 2550 (1965) and recognized in the Supreme Court case upholding the Act, South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966). The Attorney General admitted in 1965 that there were few known violations in South Carolina, Id., p. 2474, and the writer personally knows of only one or two in Georgia. See United States v. Raines, 362 U.S. 17 (1960), and Thornton v. Martin, 1 Race Rel. L.R. 213 (D.C. Ga. 1955). Instances of voting discrimination were not widespread at all in Georgia, and there had been no instances at all of state or local officials invoking alternative means of discrimination upon being enjoined from pursuing a prior course of illegal conduct, as had been the case in Alabama, Mississippi and Louisiana. In South Carolina v. Katzenbach, supra, the Supreme Court stated that evidence of voting discrimination in Georgia, South Carolina and parts of North Carolina was fragmentary (383 U.S. at 329-330).

9. Note 8, Id.

> the most turbulent conditions, with substantial numbers of people threatening civil rebellion and issuing periodic ultimatums to Congress. I would hope that so long as this (Congress) sits, (you will not), to appease the surging mob in the street, invoke an unconstitutional means to a constitutional end."[10]

The drastic, unprecedented nature of Section 5 has not gone unnoticed.

In 1965, it was referred to in the Wall Street Journal as being an "immoral law." (Issue of March 22, 1965).

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), which upheld the validity of the law, Chief Justice Warren characterized the act as creating

> ". . . stringent new remedies" (383 U.S. at 308)

and that the Act was

> ". . . an uncommon exercise of congressional power" (383 U.S. at 334).

Justice Black, dissenting from that part of the decision upholding §5, alluded to the fact that Congress had exercised its power,

> ". . . through the adoption of means that conflict with the most basic principles of the Constitution" (383 U.S. at 358).

In Allen v. State Board of Elections, 393 U.S. 544 (1969), the Act was referred to by Chief Justice Warren as being

> ". . . an unusual, and in some respects a severe procedure . . ." (393 U.S. at 556).

In the same decision, Justice Harlan referred to the Act as being "a revolutionary innovation in American government" (393 U.S. at 585).

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10. See Time Magazine, Jan. 28, 1966, pp. 18-19.

In Dougherty County Board of Education v. White, 439 U.S. 32 (1978), Chief Justice Burger and Justices Powell and Rehnquist observed that Section 5,

> ". . . marked a radical departure from traditional notions of constitutional federalism, a departure several members of this Court have regarded as unconstitutional",

and they further noted that the

> ". . . Justice Department has conceded in testimony before Congress that it is a 'substantial departure. . . from ordinary concepts of our federal system.' Hearings on S 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong, 1st Sess, 536 (1975) (testimony of Stanley Pottinger, Asst. Atty. Gen., Civil Rights Division). (439 U.S. at 48)

In United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978), Justice Stevens, with Chief Justice Burger and Justice Rehnquist concurring, characterized the preclearance requirement as

> ". . . one of the most extraordinary remedial provisions in an act noted for its broad remedies. Even the Department of Justice has described it as a substantial departure from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable" (435 U.S. at 141).

In Berry v. Doles, 438 U.S. 190 (1978), Justice Powell stated:

> "It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States. The need to bring a measure of common sense to its application is underscored further by the fact that state and local officials now are supplicants for the Attorney General's dispensation of approval under §5 at the rate of over 1,000 per year, and this rate is by no means indicative of the number of submissions involved if all covered States and political units fully

complied with the preclearance requirement, as interpreted by the Attorney General." (438 U.S. at 200-201).

Since the passage of the 1965 Act, seven (7) Supreme Court judges have considered §5 to be unconstitutional.

In South Carolina v. Katzenbach, supra, Justice Black dissented from the court's opinion upholding Section 5, declaring that the section violated the rule prohibiting federal courts from rendering advisory opinions on the constitutionality of laws (383 U.S. at 357) and for the more important reason, as stated by him:

> "Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution most meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either 'to the States respectively, or to the people.' Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. (383 U.S. at 358-9).
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> * * * *
>
> "Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against state officials once an

operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result." (383 U.S. at 360).

Justice Black also pointedly observed that the original constitutional convention rejected a provision which would have given Congress the very veto power asserted in Section 5, and that the action of the King in requiring the Colonies to obtain preclearance of their laws in distant places was one of the grievances which led to the Revolutionary War, for included among the catalog of complaints enumerated by Thomas Jefferson in the Declaration of Independence, was these:

"He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended he has utterly neglected to attend to them.

* * * *

For transporting us beyond Seas to be tried for pretended offences:

* * * *

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever." (Declaration of Independence)

Justice Harlan expressed doubts as to the validity of the Section, given the Court's expansion of the section to cover many things which were not intended to be covered originally, and as to which there was no history of violations. Allen v. Board of Elections, 393 U.S. 544, at 586, f.n. 4 (1969).

In Georgia v. United States, 414 U.S. 526, 543 (1973), Justice White expressed misgivings as to Sections 5's validity,[11] as did Justice Powell.[12]

In Dougherty County Board of Education v. White, 439 U.S. 32 (1978), Justice Powell, with Chief Justice Burger and Justice Rehnquist concurring, again expressed doubt as to the validity of Section 5 (439 U.S. at 48).

In City of Rome v. United States, 446 U.S. 156 (1980), Justices Powell, Stewart and Rehnquist expressed grave doubts as to the validity of Section 5, as construed by the majority opinion in that case to prohibit individual political subdivisions to bail out where the subdivision's state was a covered jurisdiction (See 439 U.S. at 200, 211).

It is thus apparent from the foregoing that even the judges who believe Section 5 to be constitutional, all agree that it is a drastic, uncommon exercise of legislative power by Congress, and a number of other justices have serious doubts as to its constitutionality.

When enacted, the Congress recognized the unusual nature of the preclearance provision, but found justification on the basis of the emergency circumstances found to exist at that time. As stated by the Supreme Court:

> "Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defined and

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11. "Although the constitutionality of §5 has long since been upheld, South Carolina v. Katzenbach, 383 U.S. 301 (1966), it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect. It is even more serious to insist that it initiate litigation and carry the burden of proof as to constitutionality simply because the State has employed a particular test or device and a sufficiently low percentage of its citizens has voted in its elections." (411 U.S. at 543).

12. "It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review." 411 U.S. at 545, referring also to Justice Black's dissent in South Carolina v. Katzenbach.

evaded court orders or have simply closed their registration offices to freeze the voting rolls." South Carolina v. Katzenbach, supra (383 U.S. at 314).

The unusual circumstances justifying Section 5 no longer exist. As pointedly stated by an editorial in the National Review of November 27, 1981:

"When the Voting Rights Act was passed by Congress in 1965 it was justified as a temporary emergency measure. Some Southern jurisdictions had abused literacy tests and other ostensibly neutral devices so as to prevent eligible blacks from registering to vote. The 1965 Act forbade abuses and also required jurisdictions that had employed them to 'pre-clear' any changes in their voting laws with the Justice Department. Complaints about the constitutionality and the wisdom of this 'second Reconstruction' were answered by reference to the enormity of the wrong and the brief duration of the remedy. Any covered jurisdiction would be able to 'bail out' of the pre-clearance requirement after five years by showing that it had not used any discriminatory test or device.

The emergency, however, got worse and worse, as federally regulated emergencies tend to do. The Voting Rights Act was extended and the scope of its coverage expanded in 1970 and 1975. The most important change, however, has been a subtle administrative and judicial redefinition of the problem addressed by the Act. Compliance is no longer measured by the absence of overt discrimination or even by the number of blacks who register and vote, but by the number of 'minority districts' and of black and Hispanic elected officials. The Carter Justice Department generally disapproved redistricting plans that created fewer 'minority districts' than it was theoretically possible to create by artful use of the gerry-mander. The United States District Court for the District of Columbia, where all bail-out suits and appeals from Justice Department objections must be brought, has adopted a similar

> standard for deciding whether a jurisdiction has 'denied or abridged the right to vote' within the meaning of the Act. The affirmative-action principle, superimposed on the right to vote, has produced the right to win.
>
> The new Voting Rights Act Extension of 1981, already passed by the House, would ratify and extend this redefinition." (National Review, Nov. 27, 1981, pp. 1394-5).

The traditional, normal processes of law are now adequate to cope with any problem that may arise in the area of voting rights. The abuses addressed in 1965 dealt mainly with "tests and devices" such as literacy tests. Those have been permanently outlawed throughout the United States. Retention of that ban will obviate all legitimate problems likely to arise.

Retention of Section 5 can only be justified now on the basis, not to prevent discrimination, but to guarantee that only laws which affirmatively favor minorities will ever become law. That is the way that Section 5 is now being used.

This is so because,as pointed out in the National Review editorial, Section 5 has been unjustifiably expanded by judicial construction to cover things not within its letter or original intent.

Section 5 uses the terms "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" 42 USCA 1973c, and voting is defined in Section 14(c)(1) as including "all action necessary to make a vote effective in any primary, special or general election, including but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast. . . " 42 USCA 1973 l (c)(1).

From these provisions, it is clear that only matters dealing directly with registration, voting, and counting of votes was covered by Section 5.

In three cases reported under the title of one, Allen v. Board of Elections, 393 U.S. 544 (1969), however, the Court, with Justices Black and Harlan dissenting, construed the act far beyond anything justified by the wording or legislative history. In that case, the Court held the preclearance provisions of Section 5 applicable to such laws as those authorizing change to county-wide voting, change to appointment of officials rather than election, and laws governing how independent candidates get on the ballot. Justice Harlan dissented, declaring:

> "In moving against 'tests and devices' in §4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads §5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by §4, despite the fact that the two provisions were designed simply to interlock. The District Court for the District of Columbia is no longer limited to examining any new state statute that may tend to deny Negroes their right to vote, as the 'tests and devices' suspended by §5 had done. The decision today also required the special District Court to determine whether various systems of representation favor or disfavor the Negro voter - an area well beyond the scope of §4." (393 U.S. at 585-6).

In Perkins v. Matthews, 400 U.S. 379 (1971), a divided court held that annexations were subject to preclearance, and reiterated its holding that a change to at-large elections was also covered. Justice Harlan dissented again, declaring that "Given a change with an effect on voting, a set of circumstances may be conceived with respect to almost any situation in which the change will bear more heavily on one race than on another. In effect, therefore, the Court requires submission of any change which has an effect on voting. I think it plain that the statutory phrase - 'with respect to voting' - was intended to have more limited compass." (400 U.S. at 398).

Later, in Dougherty County Board of Education v. White, 439 U.S. 32 (1978), an even more divided Court held the section applicable to candidate qualifications. Justice Stevens expressed his disagreement with the holding, but concurred because of prior decisions. The Chief Justice, and Justices Powell and Rehnquist dissented, declaring that the "Court's ruling is without support in the language or legislative history of the Act" (439 U.S. at 47).

Georgia v. United States, 411 U.S. 526 (1973), held the preclearance provision applicable to state reapportionment plans. Chief Justice Burger again expressed his view that Allen v. State Board of Elections had been wrongly decided (411 U.S. at 541).

Had Section 5 been confined to its originally intended scope of covering only changes relating to registration, voting and counting of the vote, there would be some justification for its limited geographical application, at least originally (although I submit that there is no longer any justification for it at all).

The fact is, however, that as a result of the expansive construction given to the Act in Allen, Perkins and Dougherty County, the section's confinement to just a few states can no longer be justified morally or legally, because the concerns now served and the problems addressed are equally valid all over the United States, and not just in a few states. Justice Harlan made this very point in Allen (indicating in a footnote that he has difficulty in sustaining the constitutionality of the Act given its broad scope of coverage and limited geographical application). He declared:

> "The Court's construction of §5 is even more surprising in light of the Act's regional application. For the statute, as the Court now construes it, deals with a problem that is national in scope. I find it especially difficult to believe that Congress would single out a handful of States as requiring stricter federal supervision concerning their treatment of a problem that may well be just as serious in parts of the North as it is in the South." (393 U.S. at 586). (emphasis supplied).

Practically, it is not realistic to assume that the Congress is going to make Section 5 nationwide in application. This very fact,

however, demands that in equity and fairness, the provision be repealed, for as stated by Justice Black,

> "Never would this law have emerged from congressional committee had it applied to the entire United States. Our people are more jealous of their own local governments than to permit such a bold seizure of their authority." (400 U.S. at 406-7).

I recognize that the claim is made that the Voting Rights Act has been the most successful Civil Rights Legislation ever adopted. That may be, but it is no reason for retaining Section 5. The dramatic increases in voting, and consequently, black participation and office holders, is due mainly to the abolition of literacy tests, and since that ban has been made nationwide by later amendments, those gains will not be affected by the repeal of §5 and its substitution by a suspension law geared to a finding of violation in a given case.

Moreover, to the extent that §5 may have resulted in some minorities being elected because of the affirmative action - reverse discrimination implementations of §5 by the Attorney General and the District of Columbia district court, they are ill-begotten gains which the recipients were not justly entitled to. The Third Reich was perhaps the most efficient governmental organization ever devised, but that did not make it right, honorable, or a desirable example to follow.

CONCLUSION

I respectfully submit that the amendments to Section 2 should be rejected; that the permanent nationwide ban on literacy tests be retained; that Section 5 be repealed, and a provision substituted along the lines of that proposed in the House of Representatives by Representative Hyde under which a Court in any case where discrimination in voting is found in fact, be empowered to impose a temporary preclearance provision, with preclearance by that Court itself, and that this provision be given nationwide application.

Senator THURMOND. I believe our next witness is Mr. Joseph Rauh, counsel for the leadership conference on civil rights.

Mr. RAUH. I think Mr. Dorsen has to get away and I will yield, sir.

Mr. DORSEN. Mr. Rauh will yield to me.

Senator THURMOND. All right, that will be fine. Come around then, Mr. Dorsen. We will be glad to hear from you.

STATEMENT OF PROF. NORMAN DORSEN, SCHOOL OF LAW, NEW YORK UNIVERSITY

Mr. DORSEN. Thank you very much, Mr. Chairman. It is very nice to see you. I have an extensive statement that, with your consent, I would like to put into the record but I have a summary that I would like to present now.

Senator THURMOND. That would be fine. We will put your statement in the record, and then you could just briefly summarize it.

Mr. DORSEN. That is exactly right. Thank you very much.

My name is Norman Dorsen. I am a lawyer admitted in New York, the District of Columbia, and other Federal courts. Before engaging in private practice, I was a law clerk to Chief Judge Calvert Magruder of the Court of Appeals for the First Circuit, and also a law clerk to John Marshall Harlan, Justice of the United States Supreme Court.

In view of the fact that Mr. Justice Harlan's name was mentioned a moment ago, I would like to say that one of Justice Harlan's cardinal precepts was to have Congress and not the courts to act and accept responsibility for the development of the law, and that is what I shall be asking for in a moment. I think it is very dangerous to speculate about Justice Harlan's views on the issue pending before the Congress.

Since 1961 I have been a faculty member at New York University, where I am now Stokes Professor of Law. I have lectured at Harvard, Ohio State, Texas, Oxford, Michigan, Arizona, and the University of California. I was president of the Society of American Law Teachers from 1973 to 1975. I have appeared as counsel and argued many constitutional cases in the United States Supreme Court. Finally, I am and have been since 1976 the president of the American Civil Liberties Union. Although I am appearing today in my individual capacity, my views on this issue and those of the ACLU are similar.

The first thing I would like to say is that this is not a quota bill, this is not a proportional representation bill. The ACLU does not support quotas or proportional representation in voting and any suggestion that we are doing so in supporting the amendment to section 2 is absolutely unfounded. I am sure that in the question period we can explore this further if it is your wish, Mr. Chairman.

The Attorney General and several Members of Congress have expressed the concern that by amending section 2 as proposed in S. 1992, by making clear that proof of unlawful purpose is not required in cases brought under that provision, it might be unconstitutional. Some of that concern may stem from confusion created by the Court's recent decision in the *Mobile* case.

In that case a plurality, not a majority, of the Court held that a 15th amendment violation requires proof of purposeful discrimination, and that section 2 of the Voting Rights Act merely restates the prohibitions of the amendment. The question in *Bolden* was whether Mobile's system of electing its city government violated the 14th and 15th amendments or section 2 of the act.

The constitutional issue presented by the proposed amendment to section 2 is not whether the practices prohibited by that section would violate the Constitution but whether the amended version of section 2 is "appropriate legislation" pursuant to Congress powers under the 14th and 15th amendments to prohibit discrimination in voting. The Court in *Bolden* did not address that issue.

Understandably, Congress might be reluctant about overturning *Bolden*. But amended section 2 does not overturn *Bolden* because it does not dispute that the 15th amendment continues to require a showing of purpose. Accordingly, any concerns that the proposed section 2 is prohibited by *Bolden* are completely unjustified.

There are, however, constitutional questions raised by the amended section 2 concerning the limits of Congress power. These questions can be answered by analyzing several Supreme Court decisions that have provided substance to the concept of appropriate legislation.

Amended section 2 focuses on the results and consequences of discriminatory voting or electoral practices rather than the intent or motivation behind them. This naturally raises the question whether and to what extent Congress has the power to enforce the 14th and 15th amendments by prohibiting practices that may not violate the Constitution itself.

Based upon an extensive reading of the applicable cases, it is my firm conclusion that Congress need not legislate coextensively with the Civil War amendments as long as there is a basis for a congressional determination that the legislation "furthers an enforcement objective related to the evils comprehended by the amendment." That is a direct quote from *South Carolina* v. *Katzenbach*.

Because the evil comprehended by these amendments includes purposeful discrimination in voting, Congress can prohibit State election practices that do not violate the Constitution if Congress rationally could conclude that the prohibition is designed either to eliminate the risk of purposeful discrimination, or to correct past abuses of voting rights, or to correct discrimination against minorities in areas other than voting—housing, education, employment.

A second issue raised by amended section 2 is whether it comports with the requirement that appropriate legislation must be remedial. Section 5 of the act, as we all know, intrudes significantly on State sovereignty because it requires Federal approval of any change in the election laws of a covered jurisdiction. The Supreme Court, in approving this "uncommon exercise of congressional power," placed considerable emphasis on the reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the act.

A nationwide preclearance requirement is a substantial Federal intrusion on State sovereignty and would likely be upheld only if Congress had reliable evidence of nationwide voting discrimination. Amended section 2 is significantly less intrusive, and the Court

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probably would not require findings of nationwide voting discrimination to justify its enactment.

The requirement that legislation enforcing the Civil Rights amendments be remedial can be met if the provision is necessary to address the risk of purposeful discrimination. Amended section 2 abundantly satisfies those criteria because even if Congress does not find recent nationwide racial discrimination in voting, section 2 would satisfy the Court's requirement that legislation enacted pursuant to Congress powers must be remedial.

Finally, amended section 2 does not permit a defendant jurisdiction to defend a suit brought under that provision by proving that the questioned practice was not enacted with an intent to discriminate. Accordingly, assuming the 14th and 15th amendments require purposeful discrimination, section 2 could be challenged as going beyond Congress power because it does not permit a defendant jurisdiction to prove the absence of purposeful discrimination.

This argument does not hold up. Although there is some academic authority that Congress does have the power to expand the scope of constitutional rights that have been recognized by the courts, the proposed amendment to section 2 does not seek to expand those rights. As I have indicated, it is a valid exercise of Congress enforcement power and not a redefinition of the scope of the 15th amendment.

The Supreme Court confidently can be expected to reason that it is within Congress broad enforcement power to prohibit practices with discriminatory effects and to keep proof of purposeful discrimination entirely out of section 2 litigation. Congress has this power because it is extremely difficult and unreliable—and indeed a major intrusion on the legislative process—to prove purposeful discrimination. Making purposeful discrimination the key issue would create an unacceptable and unnecessary risk that purposeful discrimination would be undetected.

For these reasons, Congress undoubtedly has the power to prohibit practices that create the risk of purposeful discrimination.

I would be happy to answer any questions, sir, that you or any staff member may have.

Senator THURMOND. Mr. Dorsen, you have stated very eloquently your proposition that Congress has the power through the 15th amendment to change section 2 of the Voting Rights Act. Specifically, at page 2 of your written remarks you state, and I quote: "The proposed amendment of section 2 is an appropriate and reasonable remedy for removing the effects of past intentional discrimination in voting."

Would you please explain where in the section 2 amendment or the House report there is a requirement of a showing of past intentional discrimination in voting?

Mr. DORSEN. Well, there is a whole history of past intentional discrimination in voting that I understand to be the basis of the President's and the Attorney General's decision to support the extension of the Voting Rights Act. We had over 100 years of evidence of that discrimination, and while the House report in many respects is an admirable document, I do not think it purports to be an entire, comprehensive study of the voting discrimination that has occurred in this country for decades.

Senator THURMOND. I do not think you have answered my question.

Mr. DORSEN. Well, I think I have.

Senator THURMOND. The question I asked you was: Would you please explain where in the section 2 amendment or the House report there is a requirement of a showing of past intentional discrimination in voting?

Mr. DORSEN. Oh, section 2 does not do that. Section 2 has a results test. I may have misunderstood you and I apologize for that, Senator.

Senator THURMOND. Does the amended section 2 presume a history of intentional voting discrimination?

Mr. DORSEN. Yes.

Senator THURMOND. Are you telling us that it is your belief that amended section 2 will apply only to jurisdictions covered by section 5?

Mr. DORSEN. No, we think that section 2 would apply, as I believe it is written, to the country as a whole. It would deal with the problems of section 2 which are rather different from the preclearance problems of section 5.

Senator THURMOND. Mr. Dorsen, are you the present president of ACLU?

Mr. DORSEN. Yes, I am.

Senator THURMOND. Senator Hatch requested that his counsel for the committee be allowed to propound some questions.

Mr. DORSEN. I am very happy to have him do that. Mr. Markman is an old colleague.

Senator THURMOND. Therefore, he will propound questions until Senator Hatch returns.

Mr. MARKMAN. Thank you, Mr. Dorsen. I am sorry that Senator Hatch is not here. He should be back momentarily, we hope. If I could just take the liberty of asking just a very few questions that Senator Hatch——

Senator THURMOND. If you will excuse me just a minute, I have to leave to go to a luncheon for the President of Egypt. Our next witness, I believe, is Mr. Joseph Rauh.

Mr. Rauh, counsel can continue with you if it is agreeable, or if you want to wait until Senator Hatch returns you can do that, whichever you prefer.

Mr. RAUH. Senator Hatch made a personal attack on me this morning. I went to see Senator Hatch when he left the table there, and I said to Senator Hatch that if he did not come back I would make the point that he is a hit-and-run driver——

[Laughter.]

Mr. RAUH [continuing]. And I intend to make that. I don't care who is here but I understand from Mr. Markman that Senator Hatch will return to face the answer to the attack he made.

Senator THURMOND. He is scheduled to return, so you can decide which you would prefer to do.

Mr. RAUH. I am going to wait for Senator Hatch if he is coming back momentarily.

Senator THURMOND. In the meantime, you may go ahead, counsel.

Mr. MARKMAN. Thank you.

With respect to Mr. Rauh's comments, Senator Hatch is making an effort to get back. I hope you did not construe what I said as a guarantee that he would be back momentarily. He has been here for the first 5 days for virtually all the witnesses, and I know he would like to be here for your testimony as well.

There will be another Senator coming in as well in just a minute, Mr. Dorsen.

We have had a lot of talk at this hearing about whether or not the proposed new standard in section 2 would bring us any closer to the concept of proportional representation or not. Could you please share with this committee what your own views would be on proportional representation?

Mr. DORSEN. Well, as I said, this is not a proportional representation amendment. The law prior to the *Mobile* case applied an effects standard, a results standard. Plaintiffs lost many cases under that standard. There was no holding by any court that proportional representation would follow. There are other considerations besides impact that would be relevant to a determination under the new amendment, and therefore proportional representation is, it seems to me, wholly irrelevant.

Mr. MARKMAN. I am sorry. I was a little bit unclear in my question. Your statement was very eloquent in support of what you have just said but what would your personal views be on the desirability or lack of desirability of proportional representation?

Mr. DORSEN. Here is Senator Hatch now. I am happy to see him. How are you, Senator?

I would personally be against proportional representation. I think that people are entitled to vote under a fair and constitutional system and that proportional representation has not been our system.

Mr. MARKMAN. What is wrong with proportional representation, in your view? Why is it an undesirable policy?

Mr. DORSEN. Well we do not want to have automatic election of people because of racial characteristics or ethnic characteristics or others that do not give the voter a choice.

Mr. MARKMAN. Would you view that as unconstitutional?

Mr. DORSEN. Well, I would want to see a bill. I have taught constitutional law for 21 years and I have learned not to give offhand constitutional opinions, so I would not want to go that far but I do not regard this bill—as I said a moment ago, Senator Hatch—as a proportional representation bill.

Mr. MARKMAN. Except for the Voting Rights Act, are you aware of any Federal statutes that apply an effects test that were passed under anything other than the commerce clause of the Constitution?

Mr. DORSEN. Well, I think my full statement toward the end of the testimony gives several examples, pages 15 and 16, where a results test has been applied under civil rights laws. It is set out there on pages 15 and 16. Congress has approved it under the Fair Housing Act, under section 5 of the Voting Rights Act, and under titles VI and VII.

Mr. MARKMAN. Let me ask you another question if I could, please, Mr. Dorsen. Suppose that a State chose to reduce its voting age to 16 this year. As I understand it, that would be its constitu-

tional prerogative. Let's suppose further that several years from now that same State decided that such an experiment had not been successful, perhaps simply because it concluded that 16- and 17-year-olds were simply too immature to cast ballots. Would it be permissible for such a jurisdiction to restore its 18-year-old minimum age?

Mr. DORSEN. Well, are you talking about a covered jurisdiction under the preclearance——

Mr. MARKMAN. Any jurisdiction under section 2, under the proposed change in section 2, rather.

Mr. DORSEN. Well, the way I read section 2, apart from the effect or results on minorities you would also have to consider the factors that the fifth circuit stated in the *Zimmer* case. You would have to look at what the facts were based on the four or five considerations that the court of appeals stated, and therefore I do not think you can decide that question without examining the facts in a particular jurisdiction based on the criteria of the *Zimmer* case—bloc voting, access to the system and various other——

Mr. MARKMAN. Can I add one specific factor here and see if this could help you make a determination? Suppose that in this case there was clear evidence that a disproportionate number of the minority individuals in that jurisdiction were 16 and 17, as compared to the nonminority population? In fact, I believe that this is commonly the case and I think that most demographers would probably agree with that. Would it still be appropriate for this jurisdiction to reestablish the higher age limit?

Mr. DORSEN. Well, my answer is the same. I think that is a helpful new fact. It obviously would trigger the kind of inquiry that section 2, if amended, would provide. It would pass the first step but it would not necessarily lead to a particular result in the courts.

The point here—I do not think we should be too indirect or possibly elliptical about this—the suggestion has been made that if section 2 is amended the way we recommend that you do amend it, that that would automatically lead to a finding of unconstitutionality or illegality whenever there is a disproportionate impact. We reject that interpretation.

The courts would follow the practice of considering that fact as it was done before the *Mobile* case. It would be a relevant fact but it would not be a dispositive fact. They would consider a variety of other things, like the history of discrimination in the area, a lack of access to the political process, bloc voting, and that would be a determination that the court would make.

I am trying to be as clear as I can in answering that question. I think it is an important and relevant question but it must be answered in the context of the facts of a particular jurisdiction.

Mr. MARKMAN. The Constitution guarantees a State a republican form of government. Do you believe that the citizens of the States have the constitutional right to choose any form of government not prohibited by the Constitution?

Mr. DORSEN. Well, I have learned never to say "never" and never to say "always." But I think in general that that is true, yes.

Mr. MARKMAN. Where, with respect to the proposed change in section 2, does Congress get the power to strike down electoral provisions which do not offend the Constitution, and how far precisely

does that power extend? When Congress exercises that power, should it not carefully consider the extent to which it is infringing upon the right of self-government? Isn't that one of the totality of circumstances that has to be considered?

Mr. DORSEN. That of course is a question that is frequently asked, and the Supreme Court has frequently answered it. The Supreme Court answered it very recently in the *Fullilove* case. The Supreme Court answered it in the *City of Rome* case. Chief Justice Burger, if I remember correctly, joined Justice Marshall's opinion basically responding to that consideration.

If Congress under its legislative authority can perceive a basis for finding that a prohibition in the statute would eliminate the risk of purposeful discrimination, or would address purposeful discrimination, or correct past abuses, or correct discrimination against minorities, the Supreme Court will uphold it. That is the law of this country, the constitutional law of this country going back to the *Morgan* case 15 years ago. I realize there were dissents in that case but those dissents have never prevailed in the Supreme Court.

Senator HATCH. Let me ask one question, Mr. Dorsen. Let me quote briefly from a recently published Judiciary Committee print on legislation known as the human life bill, S. 158. I believe that you are familiar with this legislation and certainly I know that the ACLU has commented and testified upon this legislation.

The print reads: "The constitutionality of S. 158 is supported by Supreme Court opinions concerning the power of Congress to enforce the 14th amendment. Supreme Court decisions recognize broad power in Congress under section 5 of the 14th amendment to 'enforce' the provisions of this article. The Court, in *Katzenbach* v. *Morgan,* has upheld the power of Congress to expand the substantive scope of the 14th amendment right beyond the Court's previous interpretation." Now would you agree with this analysis of S. 158?

Mr. DORSEN. No; I think that I might agree with the general principle stated, although I would quarrel with some phraseology, but I do not agree with its conclusion because the human life bill is not expanding rights, it is contracting constitutional rights. *Roe* v. *Wade,* as you and I have discussed in the past, held that women have a right to choose whether or not to bear a child. The human life bill, if it were enacted, would restrict that right.

Senator HATCH. Of course, it depends on whose rights we are talking about, the right of the woman or the right of the fetus.

Mr. DORSEN. I am sure that that is a relevant observation but you asked me my opinion, and in my opinion it is the right of the woman that is relevant, and that is the opinion of the Supreme Court until this moment.

Senator HATCH. Certainly that is true, thus far.

Let me ask you the same question I have asked the others: What is a "discriminatory result?"

Mr. DORSEN. I hope I will not be thought to be facetious but I am glad you asked me that question.

Senator HATCH. Well, it is important that I ask it to you also because I do not think that either Mr. Sensenbrenner or the others have really answered it, but perhaps you can.

Mr. DORSEN. I am not sure I can but I will try. I heard the testimony of Mr. Sensenbrenner and I saw the concern you had for that issue.

The court in that case, in a case where there is a disparate result, would have to make a determination under section 2 whether or not that result was prohibited by the amended provision. The court would consider a number of factors. I have heard Mr. Sensenbrenner say "the totality of the circumstances"——

Senator HATCH. That is what they all say.

Mr. DORSEN [continuing]. And you rightly answered him, in my opinion, that that was inadequate. It is inadequate. That could be said about anything under the Sun

Senator HATCH. Yes.

Mr. DORSEN. However, there are considerations that are relevant. The first thing I would refer to is Justice White's opinion in the *White* v. *Regester* case, in which he said: "The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question." That is a direct quote from the *White* v. *Regester* case.

I believe one can be more specific still. In the *Zimmer* v. *McKeithen* case that you are no doubt familiar with——

Senator HATCH. Right.

Mr. DORSEN [continuing]. The Court stressed four or five different factors: the history of discrimination in the jurisdiction; the lack of access to the political process—the one I just mentioned; racial bloc voting; evidence that the current administrative system perpetuates discrimination; and perhaps whether the area is depressed sociologically and economically.

A court would have to make a finding. You have said in the earlier discussion with other witnesses that as a practicing lawyer you have seen judges make all kinds of findings. Well, this would be the kind of finding those judges would make.

Senator HATCH. Would one of those matters be the existence of at-large election districts?

Mr. DORSEN. Well, I am not sure. I think that if an at-large election district did have the disparate result or impact——

Senator HATCH. Or any of these other aspects.

Mr. DORSEN. Yes; then the court would be permitted to make the finding, subject to review by the court of appeals and the Supreme Court.

Senator HATCH. Well, that is what I have been contending, that if you have an absence of proportional representation coupled with the presence of an at-large election district, then the court may rule, at that particular point, that that at-large election district is unconstitutional.

Mr. DORSEN. Not per se. It would have to make the finding based upon the circumstances.

Senator HATCH. They would have to find something more but, frankly, in what city or jurisdiction in this country would you not be able to make some finding, somewhere, of some factor that would justify that ruling when linked up with the absence of proportional representation?

One thing I have found with you, Professor Dorsen, is that you have shot very straight with our committee and other committees I have been on in the past, and I admire your legal ability. However, how could you avoid proportional representation and the elimination of at-large districts?

Mr. DORSEN. First of all, I appreciate your comments——

Senator HATCH. I am merely expressing what I know to be the truth.

Mr. DORSEN [continuing]. Since we have been on different sides of some of these issues. I appreciate it particularly for that reason.

I would answer you by saying that in some at-large situations there would be a defensible finding that the system was invalid but not in all.

Senator HATCH. Tell me how an at-large district lacking proportional representation could rebut the evidence?

Mr. DORSEN. Well, the answer in my judgment would ultimately lie in what the district judge would find, subject to review. In any case you could say that a judge could make an arbitrary finding.

Supposing in a case of the kind you posit, the plaintiffs come up with a very weak case of historical discrimination, a very weak case of bloc voting——

Senator HATCH. Let's say they lack proportional representation and they have an at-large district. Isn't that judge basically compelled because of those two factors to outlaw the at-large district?

Mr. DORSEN. No. I would not, with respect, agree with that.

Senator HATCH. However, you have to admit there is a logic of reasoning to support that contention, and that is why most of these people have come in and said that "this will result in proportional representation."

Mr. DORSEN. My response to that would be that it is conceivable. I do not think it is likely, and I would suggest to you, sir, that the Supreme Court of the United States sitting right now that decided the *Mobile* v. *Bolden* case is not likely to follow the suggestion that you have just made.

Senator HATCH. However, there would be nothing to prevent the court, or any district or circuit court, from doing so, based upon the existence of one other factor of evidence and lack of proportional representation is there? If they wanted to, they could certainly find another factor and outlaw that at-large voting district; that is, assuming the Supreme Court does not find section 2 as amended by the House bill to be unconstitutional, which I should think that it would.

Mr. DORSEN. The question you are asking is, Is it possible that a court or a series of courts can act arbitrarily? My answer to that is "yes." In our system the courts can always act arbitrarily.

Senator HATCH. No, but I believe you were arguing a little bit more than that. You are saying that if there exists a past history of discriminatory conduct or even one of the present five or six elements, that you previously mentioned, plus an at-large voting district, a court could very easily conclude that that at-large voting district had prevented people from fully exercising their franchise. Correct?

Mr. DORSEN. I would have to say we are dealing here with a complicated matter, and I am trying to meet the high standard you have set for my testimony here.

Senator HATCH. Well, you usually do.

Mr. DORSEN. I would like to say that your question plucked out one of the four or five factors. What you did was say, assuming the disparate result plus one other factor, would that lead or could it lead to a particular result? My testimony is that there are four or five factors that are relevant.

If you say, could a court conceivably do it on the basis of one factor, my answer is yes, but it would probably be arbitrary to do it in a lot of circumstances.

Senator HATCH. Among the additional bits of objective evidence to which the House report refers are "a history of discrimination, racially polar voting, at-large elections, majority vote requirements, and prohibitions on single-shot voting."

Among other factors that have been considered relevant by the Justice Department's Civil Rights Division in the past in evaluating submissions by covered jurisdictions under section 5 of the Voting Rights Act are "disparate racial registration figures, a history of English-only ballots, maldistribution of services in racially definable neighborhoods, staggered electoral terms, municipal elections which dilute minority voting strength, the existence of dual school systems in the past, impediments to third-party voting, residency requirements, redistricting plans which fail to maximize minority influence, numbers of minority registration officials, reregistration or registration purging requirements, economic costs associated with registration," et cetera, et cetera, et cetera.

What I am saying is that at-large voting districts may well become one of the considered factors, along with all of these others, if section 2 as amended by the House is in fact enacted into law.

Mr. DORSEN. We are not engaged nor are you, sir, engaged with your colleagues in trying to fashion a law for any one particular situation.

Senator HATCH. That is correct.

Mr. DORSEN. In any way that this is decided there are going to be complex findings of fact. I would make two points at this stage, with your permission: One is that the alternative to the amended section 2 would be even worse because it would require not only a finding based on the factors which you have just read from the House report but, in addition, a question of finding of purpose or motive which the Supreme Court in the *O'Brien* case, in the *Palmer* v. *Thompson* case, has said again and again is a very, very elusive, difficult, and intrusive criterion.

Therefore, what I am saying as my first point—and I would like to make the second one also, if I may—is that all the factors you mention would exist under the current law plus the purpose and motive problem. Therefore, you are not improving the situation by staying under current law; you are making it worse.

The second point is this——

Senator HATCH. If I could just make one statement regarding that point before you move on to your second point; it seems to me that what the Court is saying is that you can look at all of those factors, but you must at least look at them through the focus of

intent. Through that process, adequate protection would be provided.

Please, go on to your next point, Mr. Dorsen.

Mr. DORSEN. I think it is relevant and I appreciate your comment.

Senator HATCH. Thank you.

Mr. DORSEN. I understand that point, and it has been made several times.

Senator HATCH. I am sorry to interrupt you again but I feel I must. One of the problems during this debate has been a propensity on both sides of this issue to get awfully emotional during the course of the discussion. It is ridiculous to say that anybody who legitimately raises this issue of intent, must be a racist or they would not raise that issue; you and I both know that. The question has to be raised. This debate has to take place.

Whatever the Congress does in its ultimate wisdom, I cannot control. All I can do is raise the issue. It is like the issue that I have raised about affirmative action. It was an important issue to raise because nobody previously has really debated it in the Congress. Everybody is scared to death to debate it for fear that they will be accused of racism. We have had Congressmen come in here and say that they felt intimidated to vote for this bill in the House, because any amendment, no matter how valid or just, was considered to be an anticivil rights amendment.

I decry that. I think that is wrong. We have to have the guts to stand up and debate these issues. Now I may be wrong in my feelings here, but I do not think that I am.

Consider my friend, Joe Rauh. Joe feels I am definitely wrong on this. I appreciate his very strong feelings in that regard. I fell equally as strong on the other side. I respect his efforts in the fight for civil rights through the years.

Take affirmative action as an example. Now that the debate has been raised through the Equal Protection Amendment that I filed, allowing us to hold hearings that brought to light both sides on this issue, we are holding hearings in the Labor Committee where we are trying to find some positive, reasonable way of putting minorities to work without quotas, goals, and timetables. Maybe we can, maybe we cannot accomplish that goal; I think we can.

Mr. DORSEN. Can I make one point?

Senator HATCH. Yes.

Mr. DORSEN. I understand what you are saying, that there is a suggestion hovering, and maybe some people have said it explicitly, that the people who take your position are racists. Now I would like to suggest first of all——

Senator HATCH. First of all, I do not know many people who say that people who take this position are racist but there have been some who have espoused that view.

Mr. DORSEN. I will make it clear I am not saying it.

Senator HATCH. I know.

Mr. DORSEN. I also want to say that if you keep a system where purpose and motive to discriminate is the standard, you will be adding fuel to the fire of that point because each time that the plaintiffs must go into court and prove that the legislators who did

a certain thing did it for the reason that they do not want blacks to have equal representation, that is a finding of racism.

The system we propose would take the racism issue out of the criteria. Courts would not be required to make a finding of intentional, purposeful discrimination.

Senator HATCH. Well, Professor, that is what discrimination is all about, proving whether people are acting wrongfully because of or on account of race.

Mr. DORSEN. That is true.

Senator HATCH. Let me just add to that thought, if I may. If I am right, this will lead to an outlawing of at-large districts in many of the 12,000 jurisdictions in this country and will lead to single-member districts in which we will have the ghettoization of minority groups, doing these people a great disservice. Although they may be able to guarantee electing a member to Congress, they will lose the broad cross section of support and leverage politics that they are able to effectively utilize now.

Mr. DORSEN. Well, that assumes a current state of affairs that, with all respect, I do not think exists.

Senator HATCH. A lot of people do.

Mr. DORSEN. It seems to me that the civil rights groups which represent the constituencies you have described are not as concerned about that as about getting equal access and equal——

Senator HATCH. Then why the *Mobile* case? That was one of the major purposes behind the effort in the *Mobile* case.

Mr. DORSEN. I am not saying that——

Senator HATCH. You do not think that if this law is enacted that every advantage will be taken in any attempt to outlaw at-large districts? I do not have any doubt in my mind about this.

Mr. DORSEN. Whether they will or not, I do not know. However, I do know that they will not have the power to do it without findings by courts and ultimately by the Supreme Court in any given case, based on the——

Senator HATCH. I agree with that but I am saying that if you have any of these other factors coupled with that element, the court can evoke section 2 and require a total governmental reorganization.

Mr. DORSEN. About 5 minutes ago—I know Joe is waiting and you want to get to him, as you should—I said there were two points I was going to make and I did make one, and then we had a very interesting discussion. I want to make the second.

As in many issues, there are specific questions, some of them technical, some of them constitutional, and then there is a broad, underlying issue that everyone must face up to. If one looks at the history of this country and even the recent history of this country, it is impossible not to conclude that there is still a great deal of racial discrimination.

Senator HATCH. I agree with you.

Mr. DORSEN. I know you do not disagree with that.

Senator HATCH. No, I agree with you on that. I think there is still a great deal of racial discrimination.

Mr. DORSEN. Yes, and the Attorney General of the United States said the same thing in testifying when he said, "I endorse the extension of the act."

Now the question that I would put to a fair-minded person is: Which formulation of section 2 is going to do more to eliminate the vestiges of this racial discrimination? I do not have the slightest doubt in my mind that the amendment we propose will do that.

If you asked me, are there any risks associated with that, I would say of course there are risks with anything but there is at bottom still the unfulfilled promise of the 14th and 15th amendments. The Congress of the United States ultimately, not this month but 4 months from now, is going to have to face up to that question.

If someone says, "Look, you are going to do this with this at-large district or the other," nobody can predict the future. The Supreme Court of the United States is not a radical, revolutionary organization that is going to overthrow two centuries of election law in this country.

The question is whether or not these people who are the minority, the people who are getting the short end of the stick, are going to continue to do that or whether they are going to be able to get better access to the system. Ultimately that is the question I think Congress is going to have to face, without disparaging the questions and concerns that you have, Senator Hatch.

Senator HATCH. I understand that and I appreciate your point.

Let me ask you a couple of questions for Senator Kennedy, who is not here.

Mr. DORSEN. All right.

Senator HATCH. He raised this question: "In the *Oregon* v. *Mitchell* case which upheld the extension of the literacy test ban nationwide, did the Court require findings that the test had been misused to discriminate in every State to which the ban was being extended?"

Mr. DORSEN. No, they did not.

Senator HATCH. OK. Was that a majority opinion in *Oregon* v. *Mitchell*?

Mr. DORSEN. On the literacy test I think it was 8 to 1 or 9 to 0. I cannot remember. It was an overwhelming vote on the literacy test issue.

Senator HATCH. Senator Kennedy's second question is: "We keep hearing that the House bill is an improper attempt to overrule the Supreme Court's decision about what the Constitution does or does not prohibit. If section 2 is enacted, will Congress in any way change what activity would violate the 15th and the 14th amendments in any case brought directly under the Constitution, or would that remain determined by the Court's decisions in *Bolden* and *Arlington Heights*?"

Mr. DORSEN. The answer is no. The *Bolden* and *Arlington Heights* decisions would still govern on the constitutional issue. I have been speaking only about section 2, the statutory issue.

Senator HATCH. Assume, if you will, a State senate has no black members but four districts have very substantial black minorities, so that blacks have an undeniable impact, maybe even a balance of power under this illustration. Faced with the 1990 Census, the State legislature must draw up a reapportionment plan.

Let's assume that the legislature is hostile to civil rights, and in order to minimize black influence in the senate creates two districts with overwhelming black majorities to confine black influ-

ence to two districts. Under a 14th amendment equal protection theory, this plan, it would seem to me, would be invalidated because it is racially motivated. You would agree with that?

Mr. DORSEN. Yes.

Senator HATCH. OK. Let's go to another example. The legislature decides to maintain current lines for these four districts for a variety of political reasons—that is, to protect incumbents—but there is no racial motivation at all. Nevertheless, a private citizen brings a section 2 action and shows that black candidates for the State senate in these four districts have been "consistently" defeated for a "substantial" period of time, which is a test set out in the House report, and that there has been bloc voting by both the majority and minority.

The Court therefore finds that the reapportionment plan is illegal and orders a redistricting plan to create two districts with black majorities, in essence the same plan which was declared unconstitutional under the 14th amendment equal protection challenge in my first example. Thus, an amended section 2 would empower courts to order precisely the same type of racially conscious districting schemes which it would also be obligated to strike down if set up by the racist State legislature.

Now to me this absurdity results from the paradoxical nature of an amended section 2. On the one hand it would still prohibit purposeful discrimination in electoral districting, and I would cite the House report for that, but on the other hand it would force States—and if they failed, courts—to maintain a degree of proportional representation through the vehicle of districting.

This absurdity reaches its height when one considers that the identical districting scheme which would be struck down if enacted out of racial malice, would be upheld if enacted out of a State's effort to comply with the proportional representation ideal of the results test. That, at least, is my interpretation of this matter.

The underlying reason for the paradoxical ramifications of the results test and its application to electoral districting is the simple fact, that the law would be simultaneously saying to the States, "Thou shalt not racially gerrymander," and "Thou shalt racially gerrymander." Now how would you explain the paradox which section 2 would create?

Mr. DORSEN. I would explain it, without attempting to deal with every element of that interesting examination question that you just presented——

[Laughter.]

Senator HATCH. It is more than an examination question. It is a real possibility.

Mr. DORSEN. I am sure I would not do very well on it.

However, I would draw your attention in all seriousness to Justice Blackmun's concurring opinion in the *Bake* case when he said, "The great paradox"—and he may even have used that word, or "irony"—"is that in order to cure racism we must take race into account." He went along with the affirmative action position in *Bakke* because of a realistic awareness of where society is. It is a very short opinion; he is a very conservative gentleman, in many ways a very traditional one but, discussing a not dissimilar situation, he said sometimes one must take race into account in order to achieve a cure for the history of racism. The example you gave is a

history of racism and perhaps the second result would have to follow. As I said, I do not want to deal with it too precisely because I do not remember every detail.

Senator HATCH. Well, I certainly did not intend to give you an examination question either, although I have waited a long time to be able to do that, you know. [Laughter.]

Mr. DORSEN. I am always happy to have one, since I give so many.

Senator HATCH. You may want to use this one in the future.

Mr. DORSEN. I do urge you to look at Justice Blackmun's opinion because I think it is very close to the concern that you expressed.

Senator HATCH. Thank you. I always enjoy your testimony.

Mr. DORSEN. Thank you very much.

Mr. Markman, thank you.

Senator HATCH. Thank you.

[The prepared statement of Mr. Dorsen follows:]

PREPARED STATEMENT OF NORMAN DORSEN

Mr. Chairman and members of the subcommittee; my name is Norman Dorsen. Thank you for asking me to appear before you and testify about extension of the Voting Rights Act of 1965. I am a lawyer admitted to the bar in New York, the District of Columbia, and other federal courts including the Supreme Court of the United States. Before engaging in private practice, I served as law clerk to Chief Judge Calvert Magruder of the U.S. Court of appeals for the First Circuit, and as law clerk to Justice John Marshall Harlan of the U.S. Supreme Court.

Since 1961 I have been a faculty member at New York University School of Law, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Ohio State, Texas, Oxford, Michigan, Arizona and the University of California. I was president of the Society of American Law Teachers from 1973–75. I have also appeared as counsel in many constitutional cases in the U.S. Supreme Court. Finally, I am and have been since 1976 the President of the American Civil liberties Union. While I am appearing today in my individual capacity, my views on this issue and those of the ACLU are similar.

I would like to address my remarks to whether there is a constitutional basis for amendment of § 2 of the Act as proposed in S. 1992. My conclusion is that there is. Congress has the power, pursuant to its authority to enforce the Fourteenth and Fifteenth Amendments, to enact legislation which goes beyond the specific prohibitions of these two amendments, where the legislation is appropriate to fulfill constitutional purposes. In addition, the proposed amendment of § 2 is an appropriate and reasonable remedy for removing the effects of past intentional discrimination in voting.

A. CONGRESS HAS BROAD POWERS TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

When Congress enacts voting rights legislation to enforce the Fourteenth and Fifteenth Amendments, it necessarily intrudes on the "broad powers [of the state] to determine the conditions under which the right of suffrage may be exercised." *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966); *see also Oregon* v. *Mitchell*, 400 U.S. 112, 125 (1970); *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965). While the Supreme Court recently has invoked the federalism doctrine to invalidate congressional legislation enacted pursuant to the Commerce Clause,[1] the Court has made clear congressional authority are necessarily overridden by the power to enforce the Civil War amendments "by appropriate legislation." *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980). The reason for lesser federalism concerns is that the Fourteenth and Fifteenth Amendments, by their own terms, embody significant limitations on state authority. *Id.; see also Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

The Supreme Court has reiterated on several occasions that Congress has broad powers to enforce the Fifteenth and the other Civil War Amendments. In *South*

[1] *See National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976) (holding that a federal statute that set minimum wages and maximum hours for state and local employees exceeded the scope of the commerce power because a state's interest in determining wages and hours of its employees is an "undoubted attribute of State sovereignty").

Carolina v. *Katzenbach*, supra, the Court rejected South Carolina's argument "that Congress may use any rational means" to enforce the Fifteenth Amendment's prohibition on racial discrimination in voting. 383 U.S. at 324.

In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), the Court held that legislation enacted pursuant to the Enforcement Clause of the Fourteenth Amendment would be upheld if the Court could find that the enactment "is plainly adapted to [the] end" of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with 'the letter and spirit of the Constitution,'" regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause. *Id.* at 651 (*quoting McCulloch* v. *Maryland*). the Court stated that Section 5 of the Fourteenth Amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *See also City of Rome* v. *United States, supra*, 446 U.S. at 176, 177 ("Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination", or "create[s] the risk of purposeful discrimination").

B. THE CIVIL WAR AMENDMENTS MAY BE ENFORCED BY "APPROPRIATE LEGISLATION"

I. Principles of Federalism: The Remedial Requirement.—Various members of the Court have implied that the term "appropriate legislation" contained in section 2 of the Fifteenth Amendment imposes a limitation on Congress' broad powers to enforce the Civil War Amendments. *See, e.g., City of Rome* v. *United States, supra*, 446 U.S. at 213 (Rehnquist, J., dissenting); *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (Black, J., announcing the judgments of the Court); *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 326, 331. Although the Court in *City of Rome* stated that federalism concerns are lessened when Congress legislates pursuant to its power to enforce the Fifteenth Amendment, the concept of "appropriation legislation" appears to embody a limitation based, in part, on principles of federalism.

For example, in *South Carolina* v. *Katzenbach, supra*, the Court upheld the constitutionality of the preclearance requirement in section 5 of the Act only after noting the substantial legislative record demonstrating a need for the preclearance remedy. The Court also stated that the bailout procedure was important to the constitutionality of section 5 and protected against the "possibility of overbreadth." 383 U.S. at 331. *Also see, City of Rome* v. *United States, supra*, 446 U.S. at 205 (Powell, J., dissenting).

While nationwide racial discrimination in voting might be necessary to justify, or make "appropriate," extending section 5 to the entire country, such findings would be unnecessary to justify amending § 2 because it is less intrusive on state functions. As Justice Powell has stated, "[p] reclearance involves a broad restraint on all state and local voting practices, regardless of whether they have been, or even could be, used to discriminate." *City of Rome* v. *United States, supra*, 446 U.S. at 202–03 n.13 (Powell, J., dissenting). By contrast, amended section 2 does not require federal preclearance of anything; it merely prohibits practices that can be proven in a court of law to have discriminatory results.

In *City of Rome* v. *United States, supra*, the Court upheld Congress' power to prevent a section 5 jurisdiction that, upon the record in that case, had not engaged in any purposeful discrimination in nearly two decades from enacting an election change that had a discriminatory effect but was not enacted with discriminatory intent. The Court announced a deferential standard for reviewing legislation enacted pursuant to Congress' enforcement power. Legislation is "appropriate" to enforce the Fifteenth Amendment if Congress rationally could conclude that it is necessary to remedy prior constitutional violations, to effectively prevent purposeful discrimination by a governmental unit, or to eliminate "the risk of purposeful discrimination." 446 U.S. at 177; *see also id.* at 213 (Rehnquist, J., dissenting).

In *City of Rome*, the Court indicated that it would find acceptable *any* legislation that is rationally related to the objective of preventing the risk of purposeful discrimination. Nothing in the Court's analysis suggests that Congress could rationally conclude that electoral changes that have a discriminatory impact "create the risk of purposeful discrimination" only when the jurisdiction proposing the electoral change has a "demonstrable history of intentional racial discrimination in voting." 446 U.S. at 177. In fact, as Justice Rehnquist pointed out in his dissent, based on the evidence in the record, Rome had been free from any racial discrimination for nearly two decades. Justice Rehnquist noted that the lower court found that the challenged practice had not been enacted with discriminatory intent, and that the city: "has not employed any discriminatory barriers to black voter registration in

the past 17 years. Nor has the city employed any other barriers to black voting or black candidacy. Indeed . . . white elected officials have encouraged blacks to run for elective posts in Rome, and are 'responsive to the needs and interests of the black community.' The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods." *City of Rome* v. *United States, supra,* 446 U.S. at 208 (Rehnquist, J., dissenting).

There was another holding in *City of Rome,* relating to eligibility for bailout, that also implies that Congress can enact legislation that affects jurisdictions innocent of constitutional violations. The Court held that governmental units within a covered state may not seek independently to bail out of Section 5 coverage. In a case decided two years earlier, the Court held that whenever a state falls within the coverage of Section 4, any political unit within the state must preclear new voting procedures under Section 5. *United States* v. *Board of Commissioners (Sheffield, Alabama),* 435 U.S. 110 (1978) ("*Sheffield*"). The effect of *City of Rome's* bailout holding, when coupled with *Sheffield,* is that governmental units within a state are forced to preclear election changes merely because they lie within the territory of a covered state even if they have never engaged in racial discrimination in voting. In addition, the opportunity to bail out from the preclearance requirement is not independently available to a political unit that may otherwise satisfy the bailout criteria, just because the state in which it is located remains covered.

The Court has on several other occasions upheld Congress' power to enforce the Civil War Amendments by enacting legislation that affects jurisdictions innocent of constitutional violations. *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), involved a challenge to Section 4(e) of the Voting Rights Act of 1965. That section provided that no person who has completed the sixth grade in a Puerto Rican School in which the predominant classroom language was not English may be denied the right to vote in any election because of his or her inability to read or write English. The statute effectively prohibited enforcement of the laws of New York requiring an ability to read and write English as a condition of voting. *Id.* at 643–44.

The provision was challenged by the State of New York one year after its enactment. The Court held that Congress could prohibit enforcement of New York's literacy requirement by legislating under Section 5 of the Fourteenth Amendment, whether or not the Court would find that the Equal Protection Clause itself prohibited New York's literacy requirement.[2] Justice Harlan pointed out in his dissent that the majority upheld the enactment even though there was no legislative findings that Section 4(e) was "a remedial measure designed to *cure or assure* against unconstitutional discrimination . . ." *Katzenbach* v. *Morgan, supra,* 384 U.S. at 669 (Harlan, J., dissenting) (emphasis added). *See also Oregon* v. *Mitchell, supra* 400 U.S. at 131–34 (upholding provision in Voting Rights Act of 1970 that prohibited voting literacy tests anywhere in the nation, even though there were no findings of nationwide discrimination in voting, and no findings that literacy tests had been used nationwide to purposefully discriminate against minorities).

Finally, in *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980), the Court upheld the constitutionality of a minority set aside provision [3] in the Public Works Employment Act of 1977, which allocated four billion dollars to state and local governments for public works projects. The Court held that the set-aside provision did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. *Fullilove* represents another example of valid congressional legislation enacted to enforce the Civil War amendments that effects those innocent of any constitutional violations. The Court acknowledged that the provision applied to contractors that never had been guilty of racial discrimination. *Id.* at 484–85. These contractors might, nevetheless, be excluded from government contracts unless they satisfied the set-aside requirement.

City of Rome, Sheffield, Morgan, Oregon, and *Fullilove* indicate that Congress, pursuant to its power to enforce the Civil War Amendments, can enact legislation that affects jurisdictions without a proven history of racial discrimination in voting.[4] Accordingly, even without findings of nationwide racial discrimination in

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[2] In a companion case, Cardona v. Power, 384 U.S. 672 (1966), the Court avoided deciding whether the application of New York's English literacy test to those literate in Spanish was unconstitutional under the Equal Protection Clause. In addition, in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), the Court held that literacy tests were not per se violations of the Equal Protection Clause or the Fifteenth Amendment.

[3] The set-aside provision required that at least ten percent of the funds allocated under the Public Works Employment Act had to be set aside for minority business enterprises unless the Secretary of Commerce determined otherwise.

[4] *City of Rome, Oregon,* and *Morgan* also sustained congressional action that prohibited practices that were not necessarily unconstitutional. This issue will be considered in greater detail in Section (B)(2), *infra.*

voting, amended section 2 can withstand a challenge to its constitutionality on federalism grounds despite its interference with the conduct of state elections.

2. PRACTICES THAT DO NOT VIOLATE CONSTITUTIONAL RIGHTS

The proposed amendment of Section 2 also might be challenged as beyond the scope of "appropriate legislation" because it prohibits practices that have a discriminatory effect; such practices do not necessarily violate the Fifteenth Amendment, which requires proof of purposeful discrimination. It is well settled, however, that Congress' power to enforce the Civil War Amendments themselves. The Supreme court and lower federal courts have recognized that Congress may require more than is required by the Constitution to effectively guarantee constitutionally protected rights.[5] Congress also may prohibit practices that do not violate the Constitution.

The first case to directly consider this issue was *Katzenbach* v. *Morgan, supra.* Morgan involved New York's challenge to the constitutionality of section 4(e) of the Voting Rights Act, which prohibited English literacy tests for voting. New York argued that "§ 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides . . . that the application of the English literacy requirement . . . is forbidden by the Equal Protection Clause itself." 384 U.S. at 648. The Court's response was clear: "We disagree . . . A construction of § 5 [of the Fourteenth Amendment] that could require a judicial determination that the enforcement of state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional . . . *Id.* at 648–49. The Court upheld the challenged provision even though the Court previously had held that literacy requirements were not *per se* violations of the Fourteenth or Fifteenth Amendments. *Lassiter* v. *Northampton County Boad of Elections,* 360 U.S. 45 (1959). *See also City of Rome* v. *United States, supra* (holding that even assuming that the Fifteenth Amendment prohibits only purposeful discrimination, Congress had the power to prohibit an electoral change in a jurisdiction subject to section 5, solely on the basis of its disproportionate racial impact).

In holding that Congress could go beyond the substantive scope of the Fourteenth and Fifteenth amendments to enforce the amendments, the Court in *Morgan* and *City of Rome* defined the scope and limits of Congress' enforcement power. In *City of Rome* the Court permitted Congress to prohibit a practice that may violate the Fifteenth Amendment because Congress rationally could conclude that the challenged practice "creates the risk of purposeful discrimination." 446 U.S. at 177. In *Morgan,* the Court stated that the test for the scope of Congress' power to enforce the Fourteenth Amendment is not whether the Court would find that the prohibited practice violates equal protection. Rather, the Court said, the test is whether the Court can "perceive a basis" for Congress' judgment that what it is outlawing violates equal protection,[6] or remedies *other* violations of wqual protection—such as in housing or education. *Id.* at 652–56.

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[5] *See, e.g., Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) (upholding Congress' power to require affirmative action, in the form of a minority set-aside requirement in public works projects, even though affirmative action is not compelled by the Fourteenth Amendment); *United Jewish Organizations, Inc.* v. *Carey,* 430 U.S. 144 (1977) (upholding race conscious redistricting by New York to preserve minority voting strength in district subject to section 5 of the Voting Rights Act); *Puerto Rican Organization for Political Action* v. *Kusper,* 490 F.2d 575, 578 (7th Cir. 1973) (upholding preliminary injunction requiring Chicago Board of Election Commissioners to provide voting assistance in Spanish to United States citizens born in Puerto Rico even though plaintiffs' conceded that "refusing assistance in Spanish is not unconstitutional"); *accord, Torres* v. *Sachs,* 381 F. Supp. 309 (S.D.N.Y. 1974).

[6] The only case in which a federal voting law was found unconstitutional is *Oregon* v. *Mitchell,* 400 U.S. 112 (1970). In that case the Court upheld a nationwide ban on literacy tests and a ban on residency requirements in presidential and vice-presidential elections. However, the Court also found a provision enfranchising 18-year-old voters in state elections unconstitutional, although the provision was upheld with respect to federal elections. In rejecting the 18-year-old vote provision for state elections, the principle rationale was that such legislation was beyond Congress' enforcement powers because it had nothing to do with Fourteenth Amendment concerns. *Id.* at 130. (Black, J., announcing the judgments of the Court). *Accord, id.* at 293–96 (Stewart, J., joined by Blackmun, J. and Burger, C. J., concurring in part and dissenting in part). There is no question that amended section 2 responds directly to Fifteenth Amendment concerns.

The Court held that it could "perceive a basis" for Congress believing that (1) the literacy tests violated equal protection, even though the Court itself might not reach that conclusion, and (2) that elimination of New York's English literacy test might result in removing other violations of equal protection against citizens of Puerto Rican origin.[7] For example, by giving Puerto Ricans the opportunity to vote, discriminations against them in respect to various public services might be ameliorated.

The Court in *Morgan* announced a very expansive view of Congress' enforcement powers. The "perceive-a-basis" standard is the most deferential attitude toward congressional legislation, especially if the legislation can be directed at correcting discrimination in areas other than voting. Under this view, amended section 2 could be upheld, even if it did not respond to prior or threatened constitutional violations of voting rights; it would be sufficient if the prohibition of electoral practices that result in discrimination improves the plight of minorities everywhere that have suffered discrimination in education, housing, law enforcement, or employment. *See, e.g., Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests, in part, because minorities that have been victims of purposeful discrimination in education in some parts of the country have migrated throughout the country. Accordingly, use of literacy tests has unavoidable, even if unintentional, effect of discrimination).

The Supreme Court also has upheld Congress' power, in enacting other major Civil Rights statutes, to impose more exacting requirements than the minimum safeguards contained in the Constitution, and to prohibit practices that may not violate the Constitution. Although the Constitution requires proof of purposeful discrimination,[8] the Court has upheld Congress' power to use an effects standard under section 5 of the Voting Rights Act,[9] and under the Fair Housing Act,[10] Titles

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[7] Section 4(e) was sponsored in the Senate by Senators Javits and Kennedy and in the House by Congressmen Gilbert and Ryan, all of New York, for the explicit purpose of responding to the fact that large segments of the Puerto Rican population in New York were ineligible to vote. See 111 Cong. Rec. 11028, 11060–74, 15666, 16282–83, 19192–201; *see also* Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 100–01, 420–21, 508–17 (1965).

[8] *See* City of Rome v. United States, *supra* (Fifteenth Amendment); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (Fourteenth Amendment); Washington v. Davis, 426 U.S. 229 (1976) (Fifth Amendment).

[9] City of Rome v. United States, *supra*.

[10] In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court held that the defendant's rezoning actions did not violate the Equal Protection Clause absent a finding of discriminatory intent. However, recognizing that Congress may prohibit practices that are not prohibited by the Fourteenth Amendment, the Court remanded the case for a determination whether the Village's conduct violated the Fair Housing Act, 42 U.S.C. §3601 et. seq. On remand, the Seventh Circuit held that a violation of the Fair Housing Act could be established without a showing of discriminatory intent. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

VI[11] and VII[12] of the Civil Rights Act of 1964, and under the Emergency School Aid Act ("ESAA").[13]

3. AMENDED SECTION 2 IS NOT AN ATTEMPT BY CONGRESS TO EXPAND THE SCOPE OF THE FIFTEENTH AMENDMENT

Justice Rehnquist dissented in *City of Rome*, arguing that the majority had in effect held that Congress had the power to determine for itself what violates the Fifteenth Amendment. 446 U.S. at 210–11, 219–20 (Rehnquist, J., dissenting). Justice Rehnquist acknowledged that Congress can paint with a broad brush to prevent purposeful discrimination and that practices with discriminatory effects may create a risk of purposeful discrimination. However, he questioned how Rome's challenged practice—which had been proven to be free of purposeful discrimination—created any risk of purposeful discrimination. Justice Harlan's dissent in *Morgan* raised the same ultimate concern. *See Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 668 (Harlan, J., dissenting) ("In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment") (emphasis in original).

Notwithstanding the position clearly articulated by Justice Rehnquist, the majority in *City of Rome* upheld Congress' power to prevent electoral changes with discriminatory effects whether or not they were enacted with a discriminatory purpose. The Court's holding can be explained in two ways. Either the Court was permitting Congress to expand the scope of the Fifteenth Amendment, as Justice Rehnquist claimed, or the Court was following the logical implication of Congress' broad enforcement power. Although the Court did not explicitly indicate which theory of congressional power it was adopting, it appears that the Court did not view its holding to imply that Congress had the power to determine what is a substantive violation of the Fifteenth Amendment.[14]

Amended section 2, like the provision upheld in *City of Rome*, prohibits election practices that have discriminatory effects even if it could be shown that they were not enacted with discriminatory purpose. The Court's rationale in *City of Rome*, applies with equal force to validate an effects standard for section 2. The Court applied a rational basis test in *City of Rome*, which is the same standard of review the Court used to uphold the preclearance requirement, the section 5 coverage formula, and the ban on literacy tests in *South Carolina* and *Morgan*. Applying that deferential standard of review, the Court upheld the effects test under section 5 in *City of Rome*, because Congress rationally could conclude that the prohibited practice created the risk of purposeful discrimination, and Congress has the power to prevent that risk.

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[11] In *Lau* v. *Nichols*, 414 U.S. 563, 567–69 (1974), the Supreme Court held that Title VI, 42 U.S.C. §2000d, supplemented by administrative regulations, prohibits actions having discriminatory effect even though the Constitution prohibits only intentional discrimination. A majority of the Court retrenched from its position in *Lau*, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), by suggesting that Title VI is coextensive with the Equal Protection Clause. However, the *Bakke* opinions were based on the conclusion that Congress *intended* to incorporate the constitutional standard into Title VI; Bakke did not undermine the principle established in *Lau* that Congres could impose an effects standard if it wanted to.

[12] *See* Griggs v. Duke Power Co., 101 U.S. 424 (1971) (Title VII, which was intended to carry out the objectives of the Fourteenth Amendment, prohibits employment practices that have a discriminatory effect; absence of intent to discriminate is no defense); *accord* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975). Congress acted pursuant to section 5 of the Fourteenth Amendment in extending Title VII to state and local agencies. Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976). Although the Court held in Washington v. Davis, *supra*, that the Fourteenth Amendment prohibits only intentional discrimination, the Court in Dothard v. Rawlinson invalidated height and weight requirements for prison guards solely on the basis of their disproportionate impact on women, 433 U.S. 321, 328–29, even though the Court recognized that the plaintiffs had not alleged or proved discriminatory purpose. *Id.* at 328 n.11. *See also* Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980) (proof of intentional discrimination is not essential to recovery in a Title VII action against a governmental agency even if Title VII was enacted pursuant to Fourteenth Amendment power alone. Although lack of discriminatory intent is not a defense under Title VII, the employer can rebut a prima facie showing of discrimination by showing (1) that selection criteria are job-related; (2) business necessity; (3) a bona fide occupational qualification, or (4) a bona fide seniority or merit system. *See* Schlei and Grossman, *Employment Discrimination Law* 1196 (1976).

[13] *See* Board of Education of City School District v. Harris, 444 U.S. 130 (1979) (ineligibility for ESAA funds should be measured by a discriminatory impact standard).

[14] Chief Justice Berger and Justice Blackman joined the majority opinion in *City of Rome*. However, ten years earlier, both Justices made clear in *Oregon* v. *Mitchell*, supra, that they did not accept the view that Congress could define the scope of the Fourteenth Amendment.

In applying that analysis to amended section 2, the Court can be expected to reason that Congress rationally could conclude that purposeful discrimination is extremely difficult and unreliable to prove. Congress also rationally could determine that electoral practices with discriminatory impact create a risk of purposeful discrimination. The logical response to these findings would be to conclude that there is a risk that purposeful discrimination will remain undetected and undeterred if intent to discriminate is an issue that must be proven by plaintiffs or disproven by defendants in section 2 litigation.

Justice Rehnquist's solution of switching the burden of proof on the issue of intent ameliorates but does not eliminate the problem. Evidence aimed at disproving discriminatory purpose is unreliable and is likely to consist of self-serving statements—which prove or disprove nothing. Moreover, allusions to the absence of incriminating evidence also establishes little because evidence of purposeful discrimination in voting is inherently difficult to find and is the very reason why even Justice Rehnquist would permit shifting the burden of proving purposeful discrimination. *City of Rome,* v. *United States, supra,* 446 U.S. at 214 (Rehnquist, J., dissenting). Accordingly, Congress rationally could conclude that to effectively enforce the Fifteenth Amendment, and to avoid the risk of purposeful discrimination in voting everywhere, it is necessary to prohibit practices that have discriminatory effects. Because of the problems of proof, Congress also rationally could decide not to subject these practices to adjudication on a case-by-case basis on the issue of purposeful discrimination.

Testimony in hearings held this year before the House Subcommittee on Civil and Constitutional Rights showed that many discriminatory laws have been in effect since the turn of the century. *See, e.g.,* Hearings, June 24, 1981, C. Vann Woodward, J. Morgan Kousser; *see also,* H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 29 (1981). It is almost impossible to establish that a particular statute was enacted with a racially discriminatory purpose, especially when the law was passed many years ago. *Id.* J. Morgan Kousser, James Blacksher. Even when recently passed election laws are challenged as discrimnatory, plaintiffs are unlikely to find the type of "smoking gun" evidence that establishes discriminatory purpose. Legislators are unlikely to reveal their discriminatory purposes in legislative histories, or in the press.

The Supreme Court has acknowledged that legislative motivation often is impossible to ascertain. Accordingly, the Court has viewed inquiry into legislative motives as futile and likely to lead to undesirable results. For example, in *Palmer* v. *Thompson,* 403 U.S. 217, 225 (1971), the Court stated: "[I]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason * * * it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." *See also United States* v. *O'Brien,* 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. . . [w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork"). Indeed, Justice Rehnquist conceded in his dissent in *City of Room* that it was difficult to prove "that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks. . ." 446 U.S. at 214 (Rehnquist, J., dissenting).[15]

Not only is purposeful discrimination often difficult to notice, and impossible to prove, but ferretting it out is almost always extremely costly and time consuming. Among the factors noted by the Supreme Court in upholding the constitutionality of

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[15] *See also* Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978) ("A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared"); Hart v. Community School Board of Education, 512 F.2d 37, 50 (2nd Cir. 1975) (noting the difficulty in discerning the intent of an entity such as a municipality); United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975) (plaintiff need not show that the housing discrimination was racially motivated, "because clever men may easily conceal their motivations"); Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam) ("intent, motive, and purpose are elusive concepts").

Numerous commentators also have noted the problems with inquiring into legislative motives, *See, e.g.,* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment after Feeney,* 79 Colum. L. Rev. 1376, 1379-80 n. 24 (1979); P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 Sup. Ct. Rev. 95; J. H. Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 Yale L. J. 1205, 1212-17 (1970).

key provisions of the Voting Rights Act of 1965 was that "[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man hours spent combing through registration records in preparation for trial." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 314. One witness testifying in the House hearings last Spring stated: "[T]he time required in proving purposeful or intentional discrimination makes the effort in a simple voter registration suit pale by comparison. In *South Carolina* v. *Katzenbach,* the Court spoke of spending six thousand hours. . . to prove a voter registration discrimination suit, . . . that kind of proof would be only one small component of the challenge in an at-large [election discrimination case]. One would not only be combing through the registration records, but all sorts of different evidence considering the political climate in the community, the behavior of the elected government and all aspects of its operations, the private lives of the political powers in the state or county, etc. The plaintiffs have to look everywhere for possible circumstantial evidence . . . [which] is an overwhelming task." Testimony of David Walbert before the House Subcommittee and Constitutional Rights, June 24, 1981.

Given the widely acknowledged difficulties in proving purposeful discrimination, and in inquiring generally into legislative motives, it is not surprising that Congress might conclude that the problems of proof are too expensive, complex, and unreliable for a case-by-case adjudication of discriminatory purpose. The Court should be particularly receptive to Congress' decision to distrust proof of purposeful discrimination or its absence in light of its recent response to the same problem in *Bolden.* Notwithstanding the Court's traditional deference to a lower Court's findings, the plurality decision in that case overturned the findings of two lower courts in respect to whether a particular election system was purposefully discriminatory. Moreover, as stated above, the Court in *South Carolina* recognized as a legistimate congressional objective to simplify lawsuits brought to enforce voting rights. Accordingly, the Court can be expected to "perceive a basis" upon which Congress could conclude that amended Section 2, which rejects lack of purposeful discrimination as a defense, responds to Fourteenth and Fiftheenth Amendment concerns and is necessary to "avoid the risk of purposeful discrimination."

CONCLUSION

For the foregoing reasons, the Supreme Court can be expected to uphold the amendment to Section 2 as within the scope of Congress' power to enforce the rights protected by the Fourteenth and Fifteenth Amendments.

Senator HATCH. Our next witness will be Mr. Joseph Rauh, counsel for the Leadership Conference on Civil Rights. Joe has been actively involved in civil rights litigation for many years and has testified repeatedly before our committee. I have to confess again, I always enjoy his testimony and the interchanges which we have. They are always, at least from his standpoint, instructive and stimulating.

Mr. RAUH. Thank you, Mr. Chairman.

Senator HATCH. I must say that I enjoyed your written testimony as well.

Mr. RAUH. We will put that in the record and then we will not bother——

Senator HATCH. I did not agree with it but I did enjoy it.

STATEMENT OF JOSEPH L. RAUH, JR., LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. RAUH. Usually when a man gets up here he says he is happy to be here. I am not, and I want to tell you why.

I have testified on the 1957 voting rights law, the 1960 law, the 1964 law, the 1965 law, the 1970 law, and the 1975 law, and I never thought I would have to do it once more. I thought by now the States would have complied with laws that started back in 1957. I find it tragic in our country that 25 years after we passed our first

voting rights law and 40 years after we tried to pass our first law, we still have a serious situation in this country.

Senator HATCH. I take it, then, that you do not think any States have complied with those laws?

Mr. RAUH. I did not say any States have not complied. But there was only one State left that has not complied, that would be enough to continue the voting rights law. I did not say anything so invidious as that no State has complied with the law.

Senator HATCH. I did not think you had but I wanted to make sure.

Mr. RAUH. My complaint with you, Mr. Chairman, is that you are "complexifying" a very simple situation. I would like to say on that point that I make no contention of motivation on why you are "complexifying" it. In other words, I am prepared to use an effects test here, not an intent test. I would not say your intent was to hurt civil rights.

Senator HATCH. No, I do not think you would.

Mr. RAUH. However, I would say that by "complexifying" this issue, that is the effect. That does not make you a racist and no one ought to call anybody a racist who does not have an anti-civil-rights intent. I agree with Mr. Dorsen that you are making the problem worse when you try to say only intent matters because then the person who is found to have that intent is going to be deemed a racist.

What I am saying is, you can have the effect of hurting civil rights. That is a matter of judgment. I think you are doing that, someone else would say you are not, but certainly neither one makes you a racist. I will defend that.

Senator HATCH. I know you will.

Mr. RAUH. If anybody said that in my presence, I would say, "No, the effect of what Senator Hatch is doing in 'complexifying' this simple issue"—which I will state in a moment—"the effect of that is to hurt the civil rights cause." However, I am not suggesting and I resent anybody who would suggest that that brings an intent issue into it.

I think intent is a bad concept generally. It has to be used in criminal law. That is the way our criminal law is built. It generally is not used in civil law and it is a bad concept from start to finish, except where it is absolutely necessary.

Senator HATCH. Joe, you and I have had a lot of debates, and I do not want to interrupt you again but I feel it necessary to do so at this point. I have never questioned or impugned your motives, nor have you mine. I think that your motives have always been good as you have fought these battles through the years. I think you realize that I am very troubled by the implications of these issues, from an intellectual standpoint.

But let's examine your position with respect to this issue. You have agreed that I have no racial motivation. I do not have any intent to discriminate, that I am merely trying to find my own way in this matter, to see what is best for society. How then would you distinguish me from, say, another Senator, who does have a racial motivation in being either against or for the Voting Rights Act extension?

Mr. RAUH. I distinguish you simply: He is a racist; you are not.

Senator HATCH. How do you make that determination?

Mr. RAUH. You just said "intent." You said: How do I distinguish you from another Senator who does have a racial motivation? If he has an intent to hurt blacks——

Senator HATCH. However, you are saying the effect of having a public debate on this matter and raising these issues is to hurt civil rights. How would you make a distinction between this hypothetical Senator who is racially motivated, with an intent to be a racist, from others who have no intent to discriminate, who has but simply a desire to resolve this matter in the best interests of society and the Constitution?

Mr. RAUH. Well, I thought I had answered that, sir, that if you——

Senator HATCH. How do you distinguish the treatment of these persons?

Mr. RAUH. I accepted your definition. You said he intended his actions, and I am saying that I would consider him a racist. I would not consider anybody a racist who wanted to make an argument as you are making here. My complaint—and I would like to explain it when I get a chance—is that you are making complex what it seems to me, after having watched this issue through the laws back to 1957, is quite simple.

May I develop why I think it is simple?

Senator HATCH. You may but let me just make one additional point on that: If you are correct, then even though I do not have any racial motivation and the other Senator does, under the effects test we would both be guilty of a racial violation. That in my opinion is not fair to me, because I am raising an honest consideration of this issue.

Is the Voting Rights Act still an antidiscrimination piece of legislation or are you trying to transform it into something completely different from what it really was intended to be?

Mr. RAUH. I do not think you are guilty of anything except error.

Senator HATCH. Thank you, I think.

Mr. RAUH. You suggest I am saying you are "guilty" of something. I do not say you are guilty of anything. I say you are guilty of being wrong, and the word "guilt" is an inappropriate word there.

Senator HATCH. I have been wrong before.

Mr. RAUH. I say that you have——

Senator HATCH. Oversimplified.

Mr. RAUH. "Complexified."

Senator HATCH. "Overcomplexified," you are saying?

Mr. RAUH. I am the one on the side of simplicity here.

Senator HATCH. You are guilty of oversimplifying, then.

Mr. RAUH. Yes, I am going to be guilty of oversimplification. I assume you are going to think that but let me just get to the real issue here.

Senator HATCH. OK. Go ahead.

Mr. RAUH. You contend I was wrong in saying that you are making a constitutional mountain out of a molehill. Let me tell you exactly what I mean by that. You are arguing that Congress may not have the power to enact section 2 the way the House

passed it. Now that was a constitutional question of magnitude once, but it is settled.

Senator HATCH. I am arguing that to enact section 2, as amended by the House would be very detrimental. It may in fact, be unconstitutional to do this, in addition to being very ill-advised. The Supreme Court may—as you conclude in your statement—say the Congress does have that power to set a new constitutional standard. I do not agree with this.

Mr. RAUH. No; I say they have already said it. My difference with you is, the Supreme Court has said over and over and over again under section 2 of the 15th amendment and section 5 of the 14th amendment that Congress has the power to go beyond what the Constitution requires in the enforcement of the right to vote.

It seems to me that since that question is settled, then the only remaining question is: Should Congress go beyond what the Constitution requires? I think when you attacked my statement it was based solely on that question, namely, whether Congress can go beyond what the Constitution says and it is clear Congress can.

We are not seeking to reverse *Bolden*. That is the point I want to make. We do not suggest reversing *Bolden*. *Bolden* stands for exactly what it says: The 15th amendment requires an intent test. However, under section 2 of the 15th amendment and section 5 of the 14th amendment we want to go further and add an effects test. We are scared the intent test will not work. The effects test is clearly the one that will work and the House put that in. I say to you, there is no question on the constitutionality of section 2 of the House bill. I have not——

Senator HATCH. You want to go beyond the Constitution, and you think you can do that even though the *Bolden* case says that the 15th amendment requires an intent test.

Mr. RAUH. The 15th amendment does but section 2 of the 15th amendment does not.

Senator HATCH. Don't you agree that section 2 is codification of the 15th amendment?

Mr. RAUH. I am surprised at a lot of these great experts missing this but I guess I ought to admit I did not see this paragraph the first time either. *Bolden* is an invitation for Congress to do something. Listen to this, right out of the *Bolden* case. Referring to the statute, the Court says:

"In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellee's 15th amendment claim." It is perfectly clear that they are saying, "but Congress can add something to the 15th amendment claim," and that is exactly what has been done in section 2 of the House-passed bill.

Senator HATCH. Go ahead.

Mr. RAUH. Excuse me. I guess it is hard to listen to two people at the same time.

Senator HATCH. It seems to me you are just saying that section 2 means exactly the same thing as the 15th amendment.

Mr. RAUH. No; I am not.

Senator HATCH. That is what the Court has said.

Mr. RAUH. We are not communicating.

Senator HATCH. No; but that is what the Court said.

Mr. RAUH. No; the old section 2 means the same as the 15th amendment.

Senator HATCH. Yes; the old section 2 reflects the same meaning as that reflected by the 15th amendment.

Mr. RAUH. Our new section 2 goes beyond the 15th amendment.

Senator HATCH. Let me try to understand this unique theory of constitutional law; you are saying that although we have the Constitution of the United States, limiting Congressional authority, if Congress so chooses it can go beyond the Constitution and add to the 15th amendment even though we have had a well-defined case like the *Bolden* case, which is in opposition with the proposed changes. Congress can reinterpret the Constitution and impose greater obligations upon the States through the 15th amendment?

Mr. RAUH. Under section 2 of the 15th amendment and section 5 of the 14th amendment Congress has under the Supreme Court decisions—and this has been settled by now—the power to go beyond what would be the law in the absence of congressional action. I just read you from *Bolden* where even as late as the case that you are relying on, they are saying that Congress has not added anything to the 15th amendment. That presumes that Congress can add, and that is what section 2 of the 15th amendment and section 5 of the 14th mean. You have the *Lassiter* case. You have the *Rome* case. Time and again they have made this clear. The best example, of course, was *Morgan* v. *Katzenbach*.

Senator HATCH. However, Joe, you turn right around on the human life bill and say that that is impossible under the Constitution. It seems to me that Jesse Helms and John East are arguing the same thing that you are.

Mr. RAUH. Let me answer that one.

Senator HATCH. Let me tell you what is argued.

Mr. RAUH. In my business that could be an awful bad charge. I had better answer that.

[Laughter.]

Senator HATCH. I thought that you would catch the significance of what I was saying there, but let me stress to you, that I have difficulties in both instances. From what source has Congress obtained the constitutional authority, that is being exercised by substituting a results test in section 2 for the constitutional 15th amendment intent test? Furthermore, what provision of the 15th amendment is Congress "enforcing" in its change in section 2?

Mr. RAUH. Enforcement which is permitted is that Congress may pass any reasonable law that has a reasonable relation to the purpose of insuring the right to vote. Now what you have said, sir, about Mr. Helms and Mr. East is answered by the Supreme Court. Sometimes the Court is very farsighted. They have answered that.

In footnote 10 in *Katzenbach* v. *Morgan*, they make the distinction between what we are asking for and what Senator East is asking for. Here it is: "Contrary to the suggestion of the dissent, section 5"—that is section 5 of the 14th amendment and it would be the same for section 2 of the 15th amendment—"section 5 does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court. We emphasize that Congress power under section 5"—that is of the 14th amendment—"is

limited to adopting measures to enforce the guarantees of the amendment. Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."

Therefore, when the Supreme Court has said that the right to abortion is a part of our liberty under due process, Congress cannot say the contrary in a statute but it could enforce by statute the right to an abortion. That is the difference.

Senator HATCH. That is dictum, as you know—and I might add that it is the rankest form of dictum, being in the form of a footnote—but even if the law were as you argue it——

Mr. RAUH. Some of the best stuff is footnotes. [Laughter.]

Senator HATCH. Well, I agree with that. However, let me just say this: Even if that were a holding, the Supreme Court could very well say that the human life bill involved an expansion of rights under the 14th amendment—the rights of the unborn.

I am aware of *Katzenbach* and *Mitchell* and *Fullilove* but I do not believe that it is settled law by any means. I do not believe that its application is clear here, particularly when we are talking about violating article 6 guarantees of a republican form of government.

Mr. RAUH. Sir, I did think we were going to get agreement that it is settled law that Congress can go beyond the 14th and 15th amendments.

Senator HATCH. I do not think it is.

Mr. RAUH. I am sorry that we cannot get that because I think we would still have our disagreement on whether they should——

Senator HATCH. Yes.

Mr. RAUH [continuing]. Which is the second half of it. However, I am really, genuinely surprised that you do not feel that *Lassiter,* the two *Katzenbach* cases, *Fullilove,* what I read from *Bolden,* that those together do not clearly say that Congress can go beyond the constitutional amendments. I am still prepared to argue with you whether they should. That is different. However, I honestly do believe that you ought to recognize that Congress has the power to do what section 2 does. Then the argument comes down to, should it? I hope that sometime we can get agreement that S. 1992 is constitutional. Is it wise? That we would have——

Senator HATCH. I have real difficulties with its constitutionality as well as its wisdom.

Mr. RAUH. Now on the question of wisdom, you have been through it with so many others. I hate to go into it once more. But I deeply believe that from a civil rights standpoint it is essential that we have an effects test rather than an intent test. I am not going to repeat the bad aspects of intent, how hard it is to prove. You have heard litigators tell you all about that. As far as I am concerned, the civil rights groups here are very fortunate to have these litigators come and give their full time to trying to explain how the intent test does not work.

I was trying to say earlier that I think intent is essentially a criminal concept. In fact, I heard you say that last night on MacNeil-Lehrer. You were very good. However, this is a point that I picked up there. Twice in urging intent you had to use the criminal law. I think that is a bad analogy, sir. I think that criminal law ought not to be brought in here. I think it is a bad thing when you

import criminal law into civil rights enforcement. As a matter of fact, the whole civil rights enforcement effort has been to get it into civil law. That was the real problem.

Senator HATCH. The essence of discrimination has always been the wrongful treatment of individuals because of their skin color. The "effects" test radically transforms this idea. It confuses discrimination and disparate impact.

Mr. RAUH. Well, now we are back where I would not brand anybody a racist——

Senator HATCH. Perhaps you would not, but that is in effect what section 2 does, as altered by the House.

Mr. RAUH [continuing]. Where it is the effect of their act, not their intent.

Senator HATCH. You would not, I agree. I do not believe you would, but that is what in reality this law does.

Mr. RAUH. I am willing to give everybody the benefit of the doubt. I am willing to say that the tax exemption business did not make anybody a racist. The effect of it was very hurtful to civil rights but I would not use the word "racist" even on that.

Senator HATCH. However, you know what the problem is here: The way this is written, it completely transforms the act from its original intent of equal access into an act requiring equal results. I do not see how anybody can conclude that this would not lead to proportional representation if the Supreme Court accepts it.

Mr. RAUH. Let me try.

Senator HATCH. Go ahead.

Mr. RAUH. Now what is the test?

Senator HATCH. If I am right and this does result in proportional representation, I think the black and the Hispanic people as well as many others in this country, will be done the gravest disservice. In the final analysis there will be more segregation, more racism, more antiminority attitudes in this country than we have ever had before.

Mr. RAUH. I apologize. I did not quite get the point.

Senator HATCH. I am saying, if I am right, that this will lead to proportional representation based on race; it will result in minority political ghettoization. Certainly we may have more individual blacks serving in government at all levels, but in the end we are going to have more segregation, more estrangement, more racism, and more resentment than we have today; and, in the final analysis, less overall influence and ability to influence the political systems in this country by the minority groups than we have today. Effective utilization of a 35-percent minority base in an at-large election can perhaps do a lot more than having just, say, one of the three city commissioners or county commissioners elected in a black political district.

Mr. RAUH. There is a great deal in what you have just said. The difficulty to me is the premise; namely, that section 2 leads toward proportional representation. I think there we have the wrong premise, and I would put it a little differently.

We only have two tests you could use, or you could use the combination of the two the way section 5 of the present Voting Rights Act does. It uses both intent and effect. However, since you have the two tests, which one is the better test?

I would say the effect test is clearly the better test. The intent test gets you into all the side issues of subjective motivation; most importantly the effect test gets more directly at what we are trying to stop. We are trying to stop the results of discrimination, not just the intended discrimination. A guy might be wrong, a legislature might be wrong, and the effect of their acts may be discriminatory.

Now you say, well, how are you going to keep it from going the whole way to proportionality? I thought Professor Dorsen was excellent in his presentation of how you would keep at-large voting from becoming a per se illegality. I would be against a statute that would make at-large voting per se illegal.

Let me put it this way: If Congress decided to say that any at-large voting was illegal on a civil rights basis, I would be against that. If possibly someday Congress decided that in governmental interests generally—forget about race, forget about discrimination—that there was something valuable in local districts as against at-large voting, maybe Congress has the power to do that. That is a much tougher question. That would be a really hard exam question.

However, I would be against saying on race grounds that you automatically knock out at-large voting. I do not think the courts are going to do that. As a matter of fact, Mr. Parker put in a very good document here in which he pointed out that even under the effects test, a lot of cases against at-large voting have been lost. I do not think you are going to win every time with the effects test.

Senator HATCH. I do not either but it certainly makes it a lot easier.

Mr. RAUH. Yes, and I think that——

Senator HATCH. Rightly or wrongly.

Mr. RAUH. Yes; I think rightly and you think wrongly. However, that is——

Senator HATCH. Not necessarily, but I am saying I think in many cases it can be wrongly applied, and that is one of the problems that I have with it. More importantly, however, it is an appropriate test.

Mr. RAUH. Well, I am not for a per se test, and I do not think you are going to have it. Look, I know what happens in most of these situation. Where you really have a case, the blacks can show other discrimination against them. They do not get the public services the white areas get. They find someday the polling place is suddenly moved, or something. There are all sorts of possibilities here.

Where you really have a fair-run city or a county or other local body, where government is really fairly operated at large, the courts are not going to knock out at-large voting my experience with the courts is that they are not quite as hot for doing these things as some of your questioning and feelings would imply. I think courts are essentially conservative bodies who do not want to go beyond the important points. Unless they really feel that there has been real discrimination through the at-large system, courts are not going to treat section 2 as ordering them to stop at-large voting.

It seems to me that one has a choice to make. It will be easier to prove discrimination with the effects test, but it should be easier.

This is not a criminal area. I want to keep away from motivation and intent. It seems to me both from your and my standpoint, Senator Hatch, we would be better off with an effects test and nobody shouting "racist" at anybody.

Senator HATCH. Thank you, Joe. We always enjoy listening to you, too, and we appreciate how sincere and dedicated you are in this as well other areas.

[The prepared statement of Mr. Rauh follows:]

PREPARED STATEMENT OF JOSEPH L. RAUH, JR.

MR. CHAIRMAN, I AM JOSEPH L. RAUH, JR., AN ATTORNEY PRACTICING IN WASHINGTON, D. C. I HAVE PARTICIPATED IN THE ENACTMENT OF CIVIL RIGHTS LEGISLATION FOR 30 YEARS, INCLUDING THE VOTING RIGHTS LAWS OF 1957, 1960, 1964, 1965, 1970 AND 1975. I ALSO HAVE BEEN ENGAGED IN EXTENSIVE CONSTITUTIONAL LITIGATION BEFORE THE SUPREME COURT AND OTHER COURTS FOR SOME 40 YEARS.

I HAVE BEEN ASKED TO TESTIFY BY SOME MEMBERS OF THE COMMITTEE ON THE LEGAL ISSUES THAT HAVE BEEN RAISED ABOUT THE PROPOSED AMENDMENT OF SECTION 2 OF THE VOTING RIGHTS ACT WHICH IS CONTAINED IN S. 1992, THE BILL INTRODUCED BY SENATORS MATHIAS AND KENNEDY, AND ALSO IS CONTAINED IN THE HOUSE-PASSED BILL.

Senator Hatch I must confess that I am sad to be here. I had hoped that after what we went through in 1965 and 1970 that we would not have to be debating again whether this Nation should have a strong, effective voting rights law. I thought we had finally settled that. Now it seems that these battles which had been put behind us will have to be reargued and refought still one more time.

Earlier this week you said you were afraid the hearings thus far might have made us lose sight of the forest for the trees. I disagree. I think the forest has emerged quite clearly in the past few days. The clear winds of testimony have blown down the cardboard camouflage that the Attorney General has been busy erecting to distract our attention. Perhaps there was a danger at the beginning of these hearings that the press and the public would not be able to see the forest for the straw men. I think that danger is past.

Today I want to focus on what you said were the two main issues with regard to Section. 2.

First, may Congress reinstate the results test in

Section 2, even though the Supreme Court has held that both the Fourteenth and Fifteenth Amendments to the Constitution require proof of intentional discrimination? Is it constitutional?

Second, you asked whether it was sound policy to do so, even should it be constitutional.

My answer to both questions is a firm "yes."

S. 1992 Is Clearly Constitutional

On the first day of these hearings, Mr. Chairman, you said the proposed new language for Section 2 "involves one of the most important constitutional issues ever to come before this body."

Now I have seen a lot of controversial Congressional hearings involving unresolved constitutional questions. Without denying the crucial importance of this legislation, I submit to you, Senator, that you are making a constitutional mountain out of a molehill. We clearly have a policy dispute between us about whether Section 2 should be amended. But the constitutional power of Congress to do so is absolutely clear. By now it is hornbook constitutional law.

Of course, Congress does not have the power to overrule the Supreme Court's interpretation of what the Constitution itself permits and prohibits. That requires a constitutional amendment because the Supreme Court is the final arbiter of what violates the direct commands of the Constitution.

However, it is now equally well-established that Congress has the constitutional power under the Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to enact appropriate legislation which it reasonably believes is necessary to ensure full enjoyment of the rights protected by those amendments.

In Lassiter v. Northhampton Election Board, 360 U.S. 45, the Supreme Court held that literacy tests, unless discriminatory on their face, did not violate the Fourteenth Amendment Equal

Protection Clause. Nonetheless, in South Carolina v. Katzenbach, 383 U.S. 301, and Katzenbach v. Morgan, 384 U.S. 641, the Court upheld the constitutionality of a statutory ban on literacy tests in certain geographic areas and certain situations under the Voting Rights Act. Congress had concluded that such a prohibition was necessary and proper to ensure that the Fourteenth Amendment right to be free from voting discrimination would not be denied and that the effect of past discrimination would not be perpetuated.

The Court has similarly upheld the power of Congress to enact appropriate legislation to enforce the Fifteenth Amendment. On the same day that the Bolden case was decided, the Court reaffirmed that power in City of Rome v. United States, 466 U.S. 156, 176-177. Justice Marshall, speaking for the Court, wrote that even though the Bolden decision indicated that a violation of the Fifteenth Amendment required proof of discriminatory intent, Section 5 of the Voting Rights Act, undisputedly an effects test, was still constitutionally valid because Congress could reach activity not directly barred by the Amendment itself. The Court's decision in Fullilove v. Klutznick 448 U.S. 448, written by Chief Justice Burger, also reaffirmed this Congressional power in the case of the minority subcontractor set-aside program. In short, this is hardly an earth-shaking or novel Constitutional proposition. Congress may pass a statute which prohibits discrimination without requiring proof of intent, if Congress concludes that requiring such proof would create undue risk that activity which the Fifteenth or Fourteenth Amendment does prohibit would be insulated from effective challenge.

There is only one other aspect of the constitutional issue that needs mention. The Attorney General testified that Congress could not exercise its constitutional power to amend the nationwide provision of Section 2 without a detailed record of abuse in every state. He points to the fact that the

Supreme Court relied on that kind of record for the covered jurisdictions, when it upheld Section 5 in South Carolina v. Katzenbach, supra. That argument overlooks two basic differences between the challenge to Section 5 and the present proposed amendment of Section 2. It also overlooks the subsequent Supreme Court decisions. Without question, the preclearance of Section 5 is a substantial disruption of the normal boundaries in our federal system and an unusual interference with local control over election procedures. The Court indicated that for such a significant remedy Congress needed to have a specific record of abuse in the covered jurisdictions.

The proposed amendment in Section 2 is nowhere near the departure from traditional federalism that Section 5 involves. It merely would return the legal standard in actions brought against discriminatory voting practices to what it has been for many years. That hardly calls for the kind of case-by-case justification required for Section 5.

In addition, the Court in South Carolina emphasized that overwhelming record in the covered jurisdictions precisely because they had challenged being singled out for special treatment. Obviously that concern is irrelevant to Section 2, which is nationwide in scope.

Most important on this point is the Supreme Court's decision in Oregon v. Mitchell 400 U.S. 112 (1970). Oregon upheld the 1970 amendment to the Voting Rights Act, which extended the suspension of literacy tests nationwide on a temporary 5-year basis.

The Court upheld that provision, even though there was no specific record of misuse of literacy tests in every state not already covered by the limited ban of the 1965 Act. Justice Black found that there was enough general evidence before the Congress about the potentially discriminatory impact of such tests for Congress to have found such a nationwide "ban on

literacy tests was appropriate to enforce the Civil War amendments "112 U.S. at 133.

So, too, might Congress conclude from the record in these hearings that the difficulty of providing discriminatory intent created substantial likelihood that intentional discrimination barred by the Fifteenth Amendment would continue, and the impact of past discrimination go unremedied, unless the "results test" were adopted as the statutory legal standard in Section 2.

Congress would not, by such an amendment, be overturning the Supreme Court's decision in Bolden about what the Fifteenth Amendment requires. That assertion has been repeatedly made and it is false. The Fifteenth Amendment test in constitutional litigation would remain a requirement of intent, at least while Bolden remained the controlling precedent.

The "Results Tests" Is the Appropriate Standard

The second issue which you and the Attorney General have raised is the wisdom of the "results test." You have both claimed that because it lacks an "intent" test the Mathias-Kennedy bill would require quotas and make any failure to have proportional representation of minorities a violation of Section 2. You have alleged that it would be the death knell for at-large elections.

At first, there was a lot of emphasis on what the legal standard has been in past challenges to at-large elections or other election practices on grounds of racial discrimination. We heard the suggestion that the law has always required proof of intent in such cases.

Now we have had a number of days of hearings. Witness after witness who are experts in such litigation have testified without contradiction that until Bolden no proof of intent was required. The House Report, and the sponsors of the Senate bill, have made clear that the legal standard which S. 1992 would codify is the test laid down in two Supreme Court cases, Whitcomb v. Chavis, 403 U.S. 124, and White v. Regester, 412 U.S. 755.

I have been around this twon for a few years, and I know that when a bill codifies a legal test from a particular case or line of cases, you look at the track record under those decisions to see what that legal standard will mean in practice.

You and the Attorney General say that the standard will lead to quotas. Yet each of those expert witnesses testified that for many years under that White v. Regester standard the courts never required a quota or proportional representation. They never found that the absence of proportional representation sufficed to establish a violation, even in the case of at-large elections. In fact most of the decisions, including the two Supreme Court cases, expressly disavowed any right to a particular election outcome. In short, the record is overwhelming that there is no basis for the scare tactic claims that the White v. Regester standard, which this bill adopts, would lead to proportional representation.

Under White v. Regester the plaintiffs must prove additional factors or circumstances establishing that, in the context of the entire local political system, the challenged practices deny equal access to participate in the political process.

That point has been made repeatedly, Mr. Chairman. I would like to deal with your response to it. You have responded that the plaintiffs could always establish an additional fact or two which would suffice to support a violation. You stated that even the disclaimer of quotas in S. 1992 would only require "an additional scintilla of evidence," which plaintiffs could always supply.

If that were true, Mr. Chairman, I might agree with your position. But as Mr. Justice Holmes observed, a page of history is worth a volume of logic. The proof of the pudding is in the eating. And if it is so clear that plaintiffs challenging at-large elections could always meet the White v. Regester test, then I ask you why plaintiffs lost in a substantial

number of cases prior to Bolden. These were cases in which the court did not require proof of discriminatory intent and plaintiffs showed some dilution. The courts simply found that plaintiffs had not adequately demonstrated they had been denied equal access to the political process.

The White v. Regester standard is a reasonable one. Its track record is reassuring and belies the allegations made about S. 1992.

Senator HATCH. Our last witness today will be Mr. Rolando Rios, the legal director of the Southwest Voter Registration Education Project. He has been actively involved in voting rights litigation throughout the Southwest for a number of years.

Mr. Rios, we are very happy to have you here.

STATEMENT OF ROLANDO L. RIOS, LEGAL DIRECTOR, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT

Mr. RIOS. Good morning.

Thank you, Mr. Chairman, members of the subcommittee. I am Rolando Rios, and I am the legal director for the Southwest Voter Registration Education Project, a project that is directed at increasing the political participation of Chicanos and Indians in the Southwest.

My work with the project has put me in what I consider a good position to be able to see what effects voting litigation has on registration and turnouts of minorities. For example, in San Antonio, since the city has gone to single-member districts I have noticed a steady increase in the political participation of minorities, that is, by voter registration and turnout rates. Contrary to what has been suggested by the chairman, if San Antonio is an example of going to proportional representation I do not see how it can be a political ghettoization of minorities.

We have a Chicano mayor there. I serve on a board that has to do with Hispanic arts. Money is being spent on Hispanic arts that has never been spent before. There is more of a dialog between the Anglo and the Chicano communities. Businesses are being developed into the west side and the south side that traditionally had been excluded, not by intent but by mere misunderstanding and miscommunication between the minorities and the dominant community. In short, in San Antonio the change to single-member districts has been tremendous for the realization of democracy as it should work on the local level.

Indeed, we feel that in order for democracy to thrive, all political groups, all substantial elements must participate. I remember my first case in Victoria, Tex. My plaintiff, Victor Canales, a middle-class gentleman, a veteran of World War II, I asked him, "Do you vote?" He said, "No, I stopped voting in local elections 10 years ago." I asked why. He said, "Well, because minorities have stopped running."

I said, "Why have they stopped running?" He said, "Well, because they don't ever get elected." I said, "Why don't they get elected? Is it because minorities don't come out to vote?" He said, "Well, I don't know. People do come out to vote. It is just that they never get elected."

I started doing some work in that county and I found out that the city council, the school board were all at large and they had never elected a minority. This is in a community that is 40 percent minority. I am sorry, the school board was at large and the county commissioner's court was by single-member district although they were slightly gerrymandered.

Therefore, we filed a lawsuit against the county, and also the Department of Justice objected to the at-large system in the city of Victoria when they annexed certain Anglo areas. They were forced to go to single-member districts, and now there is a minority on the city council for the first time in the history of Victoria, and this is in a community that, at least my client tells me, in 1970 Chicanos were not permitted to go to the barbershops downtown.

It has been a tremendous improvement as far as I have been able to see in Victoria, in that minorities are now getting more involved. We do have one Chicano on the city council and we do have one Chicano on the commissioner's court, and both are a result of litigation and a letter of objection from the Department of Justice.

In Dimmitt, Tex. we have done two voter registration drives there where a client of ours, Carmen Cataño, has two Chicano kids in the school district. The school district is about 55 percent minority. She has been constantly trying to get the school district to hire bilingual teachers and they have not. She has been trying to get them to move on bilingual education and they have not. Of the seven school board members, there has never been a minority elected to the school board.

Therefore, Ms. Cataño decided to run. She ran twice, and the minorities registered. We had an increase and they came out to vote, but because of the at-large election system, it is impossible for her to get elected. I did not know what to tell her when she asks, "What do I need to do? I do a good campaign and get the minorities out to vote, and I can't get elected." The at-large school board does not permit minorities to get elected where there is polarized voting; then Anglo school boards do not want to listen to bilingual education issues or the hiring of bilingual teachers.

This scenario is repeated in many, many communities in Texas. The Southwest Voter Registration Education project surveyed 361 school boards, all of which are at-large. We wanted to measure the level of minority representation on the school boards. We found 42 school boards that had over 50 percent Chicano student population, none of which has any minorities on the school board. Each school board has approximately 7 school board members, so if you multiply 7 times 42, that is 294 elected officials, none of which are minorities. Yet, these officials make decisions that affect minority students.

The education of Chicanos is an extremely important issue in every community that I go to in Texas and in other parts of the Southwest. In Texas recently a Federal court declared that "The crippling educational deficiencies affecting the main body of Mexi-

can Americans in Texas presents an ongoing ethnic tragedy, catastrophic in degree and disturbing in its latency for civil unrest and economic dislocation." This is a declaration from the Federal court in 1981.

We feel that one of the reasons the educational system in Texas is failing miserably is because it has no input from the minorities. What do I tell a minority parent when her son, a Chicano student in Texas, has a 47-percent chance of not finishing high school—this compares to approximately 14 percent for an Anglo student—and that if he or she is in school by the time he or she is in the eighth grade, chances are that 75 percent of the Chicano students in the schools in Texas at the eighth-grade level are already reading below grade level. It is our feeling that if we get more minorities on the school boards, then issues of hiring bilingual teachers and bilingual education would be issues that would be seriously tackled in Texas.

I have just returned from New Mexico where we filed a lawsuit against the State legislature. The legislature adopted a reapportionment plan that uses two tactics to dilute the voting strength of minorities: packing and cracking.

In one of the districts that I analyzed in Albuquerque, the total population for that particular district—it is district 13, and it is in the memorandum I have submitted—is 29,900 people. This particular district is over 70 percent Chicano. You go over to the north side in district 31, that has 15,500 people and it is about 89 percent Anglo. Each district elects one representative. This is a clear example of the packing of minorities into a few districts so that their overall political strength is weakened. This also violates the one-person one-vote rule.

An example of "cracking" can be seen in Roswell, where the minority community was cracked into three house districts so that each district has approximately between 30 and 35 percent minorities. Again, if these lines had been drawn differently minorities could have as much as 55 percent population in one particular district. In Roswell I am told by my clients down there that there has never been a minority elected to the legislature from that area.

All of these situations can be affected if this committee amends section 2. I support section 2 because it will reinstate dilution law as it was before *Bolden*. There is some concern that the proposed amendment applies a new standard. However, it is clear from all I have read that the new evidentiary standard has been set by *Bolden*. In my written testimony, I have cited a case called *Jones* v. *The City of Lubbock* in which in the fifth circuit Judge Goldberg remanded the case to the district level, stating that *Bolden* has set new standards, it is a new ball game, and that due process would require that the parties in the case try to present new evidence to see how it complies with the new standards that were set by *Bolden*.

There is also some concern that the amendment to section 2 will cause a flood of litigation. It has been my experience that all of these cases, dilution cases, are very expensive and very complex and that the likelihood of there being a flood of litigation is just not realistic.

Also, the fear of proportional representation, I am not sure I understand clearly what the fear is but as I mentioned, in San Antonio the fact that we now have more minorities in the city government has created a very positive attitude and increased political participation by the community as a whole. This has happened in Houston, it has happened in Dallas, and also happened in Victoria to some extent.

Finally, I would just like to say that the Chicanos, as I speak with them, are not complaining about the fact that in some situations ballot boxes were taken out of the polling places and taken home so that people could vote, or that unregistered people are permitted to vote. Those are clearly illegal and we can deal with them. It is the subtle and sinister devices that are used to dilute the integrity of the voting strength of minorities that we are complaining about because as far as we are concerned, it is like playing poker in a game where the cards are stacked against you.

Thank you, I would like to submit for the record two reports done by my organization, one is on the Latino vote in 1980, the other is on Chicano representation on Texas school boards.

Senator HATCH. Thank you, Mr. Rios. We appreciate your testimony.

Mr. Rios, you say that the most the Federal courts have required is the creation of single-member districts. In *Kirksey* v. *Hinds County,* the county was already divided into districts drawn not by elected officials but by a Federal district judge. Even though there was absolutely no allegation that the judge's plan was intentionally discriminatory, the fifth circuit ordered him to gerrymander the lines so that the county's 40 percent black population could control two of the five seats. Now if that is not proportional representation, what is?

Mr. RIOS. I think we are confusing the two stages of litigation, that is, the proving your case part and then the remedy stage. What I have mentioned, what I meant to say in my statement is that in dilution litigation, once the factors as delineated in *Zimmer* and *White* have been established, then the courts do require that you go to single-member districts but that is in the remedy stage. The point I was trying to make is that it has never been that simple, that you go in, you file a lawsuit and the court automatically requires you to go into single-member districts and requires proportional representation.

Also, when I wrote that, Senator, I was not sure I understood what was meant by "proportional representation." I thought we were talking about getting a specific number of minorities elected, per se. I know that in Texas sometimes minorities elect nonminorities.

Senator HATCH. Could you please elaborate upon the Fresno County case which you mention in your paper? You indicate that the Anglo community was "caught by surprise" at the election of several Hispanic candidates, and promptly initiated a recall campaign. Now can you describe this a bit?

Mr. RIOS. OK. What happened in Sanger——

Senator HATCH. Let me just ask one more question: Did they attempt to recall the individuals simply because they were Hispanics?

Mr. RIOS. No, it is not always that simple to establish that. The minorities that I have spoken with say that there is a feeling that they have recalled them simply because they were minorities and they took over the city council itself. What happened was, we did some successful registration drives, three minorities ran, and for the first time ever there was a majority of minorities on the city council.

The reaction of the Anglo community was that they were surprised and they did not realize what had happened. They did not realize that the movement was so strong so they did make a recall election, and it was a petition signed by 1,200 people, 60 of which were minorities and the rest were nonminorities. They had a reelection, and it was at-large again, and two of the minorities were defeated.

The only reason I raise this example is to show that in certain situations the at-large system can work in a very debilitating manner——

Senator HATCH. If they made the recall because the Hispanics were too strong, then why didn't the Hispanics win again?

Mr. RIOS. Like I said, we did a couple of registration drives. You can win in an at-large election system if you kind of quietly run a registration campaign, do not make too much noise, and then on election day come out in full force and win, you see. What I am saying is that they were taken by surprise and they did not realize the strength with which the minorities had gotten organized and gotten out the vote. All I am saying is that after that happened, the adverse effects of the at-large system took full force in that they can recall, and this is what they have done in Sanger.

Senator HATCH. Senator DeConcini has some questions to submit in writing for the record. If you could answer those as quickly as you can, we would appreciate it.

Mr. RIOS. Yes, sir.

Senator HATCH. I might add for all other witnesses as well, there may be other questions from other Senators both on this subcommittee and on the full committee so with all witnesses, we hope you will answer the questions as soon as you can.

Mr. RIOS. Thank you.

Senator HATCH. Thank you so much. We appreciate having you here.

[The prepared statement of Mr. Rios follows:]

PREPARED STATEMENT OF ROLANDO L. RIOS

Good morning Mr. Chairman and members of the Subcommittee, I am Rolando L. Rios from San Antonio, Texas, Legal Director for the Southwest Voter Registration Education Project (SVREP). Thank you for the opportunity to be here today to present my views on the continued need for the Voting Rights Act (VRA).

I have been practicing law for three years doing voting litigation throughout Texas, Arizona, New Mexico, and parts of California. The experience I've had working with the voter registration project has given me an opportunity to witness the effects voting litigation and the VRA have upon the voter registration, education and turnout rates of minorities in the Southwest. The Southwest Voter Registration Education Project, in existence since 1975, has conducted over 350 registration education projects throughout the Southwest directed at increasing the political participation of Mexican Americans and Indians. Registration rates of Mexican Americans in certain parts of Texas are as low as 35%. This compares to 65% for Anglos in the same areas. In New Mexico, registration rates for Indians are as low as 20%; this compares to over 60% for Anglos in those areas.

Our premise has always been that for our democracy to remain healthy, all substantial elements of society must participate in the political process. To the extent that groups in a democracy are excluded, for whatever reason, from the political process, democracy and all its potential suffers.

In Victoria, Texas, Victoria County, one of my first lawsuits, my client Victor Canales, a middle-aged man, veteran of World War II, told me he stopped voting about ten years ago. I asked him why? He said because Chicanos do not run for office anymore. Victoria has a population of over 68,000; 38% of the population is minority. When I asked Mr. Canales why minorities did not run, he said they use to run but they would never win, so they stopped running. Did they not win because of a lack of support? No, there was support in the minority community; however, after some investigation, I discovered that the legal framework within which elections are conducted was set up so that minorities cannot win.

In Victoria, the city council was at-large, numbered post with majority rule requirement; the school board was at-large numbered post majority rule and the county commission was by single-member districts. With the high degree of polarized voting, the gerrymandered commissioner precinct lines, and the at-large election systems, it was impossible for a minority to get elected to office other than on a token basis. Even if every Chicano got registered and turned out to vote, minority candidates would still not win.

After a lawsuit against the county and a letter of objection forcing the city of Victoria to abandon the at-large election system, there is a minority on the commissioners court and a minority on the city council. Further there has been some increase in voter registration of minorities. These changes are a direct result of changing the election structure. The school board is still at-large and minorities still do not feel that they have representation on the school board.

In Dimmitt, Texas, Castro County, Carmen Catano, who has two sons in the Dimmitt ISD, has been trying to get the school board to consider issues of bilingual education and the hiring of bilingual teachers. (Dimmitt ISD has a student population of 1,707, of which 936 or 54.8% are Chicanos.) Getting no response from the board, Ms. Catano decided to run for the board herself; she ran in 1979 and in 1981. Both times the Chicano registration increased and turnout increased. However, because of racially polarized voting and the at-large election scheme, Ms. Catano lost. She asked me what she did wrong? I had to explain to her that it is impossible for a minority to get elected to the Dimmitt ISD because the election game is set-up to insure that minorities lose elections. The Dimmitt ISD never has had a minority on its board.

In Sanger, California (Fresno County) the Chicanos ran a very successful registration drive and, for the first time ever, elected three minorities to the city commission which is elected at-large. The Anglo community was caught by surprise and was upset at the results. They called for a recall election; because of the at-large election two of the minorities were defeated and removed from office.

The at-large election system is having a devastating effect on our registration drives in the Southwest. In Texas, Chicanos are extremely concerned about providing a proper education for their children. Recently a federal court declared:

> ..."The crippling educational deficiencies afflicting the main body of Mexican Americans in Texas presents an ongoing ethnic tragedy, catastrophic in degree and disturbing in its latency for civil unrest and economic dislocation."
>
> (United States of America v. State of Texas No. 5281 (USDC), Eastern District of Texas, January, 1981 p. 16. Order signed January 9, 1981)

Chicanos are concerned and they want to have input into the decision-making process; however, the most sinister device being used against them is the at-large election scheme. In Texas, except for those few school boards that have been sued, every school board is elected at-large by place with majority-rule requirement. SVREP surveyed 361 school boards to measure the representation of minorities. (The 361 school districts included over 80% of Texas' Chicano student population.) There were 42 school districts with 50% or greater Chicano student population that had no Chicanos on the school board. Only when minority enrollment reached an average of 90.1% did Chicanos constitute a majority on the school board. Of 193 school districts with 20-49% Chicanos student population, none had a majority of Chicanos on the school board.

I've just returned from New Mexico where we filed suit last week against the New Mexico legislature for adopting legislative reapportionment plans that blatantly discriminate against Chicanos and Indians. The adopted plans used the tactics of packing and cracking the minority communities. An example of packing can be seen in the city of Albuquerque where House Districts had population figures as follows:

TABLE A

HOUSE REPRESENTATIVE DISTRICT	TOTAL POPULATION 1980 CENSUS	MINORITY POPULATION	% MINORITY
17	16,640	4,153	24.96 (S.S.)
27	17,041	2,644	15.52 (S.S.)
31	15,574	1,828	11.74 (S.S.)
16	20,804	13,655	65.64 (S.S.)
12	24,725	16,717	67.61 (S.S.)
13	29,912	21,665	72.43 (S.S.)
4	23,257	16,731	71.94 (Indian)
SENATE DISTRICT			
22	25,469	3,227	12.67 (S.S.)
11	43,977	31,615	71.89 (S.S.)

As can be seen in the above table, District 13 with over 70% minority population has a total population of 29,912. This compares to only 15,574 in the District 31 which is 89% Anglo. If one totals up Districts 13, 12, and 16, where minorities constitute a substantial majority the total population is 75,441 (29,912 + 24,725 + 20,804). This total divided by 18,613 (the population that ideally each district should contain) indicates that 4.04 districts should have been allocated to this area of town instead of the 3 that were given. By contrast, Districts 31, 27, and 17, where Anglos constitute a substantial majority, the total population of these districts is 49,255. This figure divided by the ideal of 18,613 equals 2.6 instead of the 3 districts that were given to this part of town. This type of packing clearly dilutes the voting strength of minorities.

As can be seen in Table A above, the Indian population is affected in the same way. District 4 which is 71% Indian has a total population of 23,257. This is over 4,500 more persons than the ideal of 18,613.

An example of cracking can be seen in the city of Roswell. Attachment A is a picture of the line drawing that occurred there.

As can be seen, the barrio is the only area that is divided into three house districts. None of these three districts contains more than 35% minorities. If drawn differently, a district with 55% minority population could have been drawn in Roswell.

Every situation mentioned above will be affected by what this committee does with respect to Section 2 of the Voting Rights Act. I urge this committee to support amending Section 2 of the Voting Rights Act so that the adverse effects of the City of Mobile v. Bolden case may be eliminated. Under the standard that existed prior to Bolden, minorities could challenge at-large school boards by proving the so-called Zimmer factors. This long list of factors, which I am sure has been discussed here before, is a rational method for challenging discriminatory election devices.

There is some concern that amending Section 2 to an "effects" standard will create a new legal standard leading to a flood of litigation and the creation of "proportional representation." These fears are not founded on reality. The new standard was created by Bolden as was clearly stated in Jones v. City of Lubbock, No. 79-2744 (see Attachment B). This vote dilution case was remanded by the Fifth Circuit to the District Court after the Bolden decision. The court through Judge Goldberg instructed:

> Since the Supreme Court has completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens, we must remand this case to the district court to reexamine the evidence, and its findings, in whatever light is radiated by Bolden. In addition, due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations. Therefore, the litigants in this action must be allowed, if they so desire, to present further evidence on remand to establish their claims under the law announced in Bolden. See Kirksey v. City of Jackson, 625 F.2d 21 (5th Cir. 1980).

As Judge Goldberg says, Bolden created "new regulations" by which plaintiffs are now forced to comply. The proposed amendment to Section 2 will reinstate the law as it was before Bolden.

As far as the expected flood of litigation is concerned, no such thing can occur because of the complexity and expense involved in dilution litigation. I've worked with the

Mexican American Legal Defense and Educational Fund and with SVREP for a combined total time of approximately six years. M t of this time has been spent on voting litigation. I know o no more than four or five dilution lawsuits that were filed during this time. As Legal Director for SVREP I have advised our board that at most two or three dilution lawsuits can be handled a year.

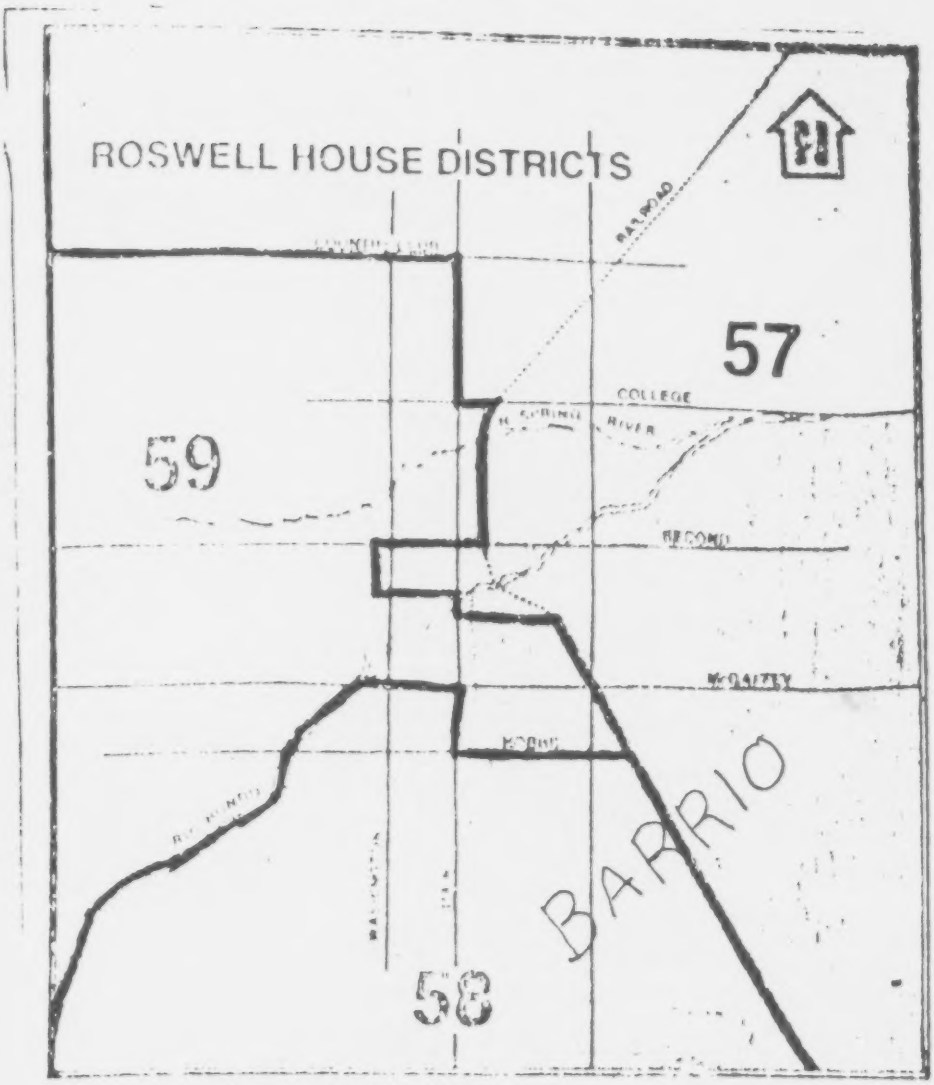
Those who claim that amending Section 2 will result in proportional representation have not read opinions issued by the courts. I know of no court that has ever required proportional representation. The most that federal courts have required is the creation of single-member districts. The reason single-member districts are required is to provide minorities with a fair chance to participate in the electorial process not to insure that a proportion of minorities is elected.

Chicanos in the Southwest are concerned about their voting rights and they want to participate in democracy. SVREP recently conducted a survey of the political attitudes of Chicanos. The survey included a scientifically drawn sample of 415 Chicanos in San Antonio, Texas, 322 Chicanos in Uvalde, Texas, and 462 Chicanos in East Los Angeles, California. 91% of the respondents (those who had heard of the Act) in San Antonio, 75% in Uvalde, and 88% in Los Angeles favored extension of the Voting Rights Act. Only 3% in San Antonio, 4% in Uvalde, and 7% in Los Angeles opposed the Act, the remainder in each area had no opinion.

Minorities in the Southwest are not complaining about the fact that the voting boxes are sometimes taken out of a polling place and taken to people's homes so they can vote, or that unregistered persons are permitted to vote. These actions are clearly illegal and we can stop them. It is when the cards are stacked against us that we complain. All we seek is a fair and equal opportunity to participate in democracy. Once given this opportunity we will participate, and democracy will flourish.

Thank you for your time. I have with me the report on school boards which I previously mentioned and a report on the Hispanic vote of 1980. I would like to leave these for the record.

Attachment A



Roswell House Districts Termed "Mississippi Apple Pie"
Barrio's Residents Distributed Among Three Districts

Attachment B

Rev. Roy JONES et al.,
Plaintiffs-Appellants,

Rose Wilson, individually and as representative of the Black and Mexican-American Voters of Lubbock, Texas,
Plaintiff-Intervenor-Appellant,

v.

The CITY OF LUBBOCK et al.,
Defendants-Appellees.

No. 79-2744.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 25, 1981.

Appeal from the United States District Court for the Northern District of Texas; Halbert O. Woodward, Chief Judge.

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

We remand this case for reconsideration in light of the Supreme Court's recent opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The parties should be allowed, if they so desire, to present additional evidence on remand.

REVERSED AND REMANDED.

GOLDBERG, Circuit Judge, specially concurring:

Black and Mexican American citizens of Lubbock, Texas, instituted this action, seeking a fair and prompt judicial response to an important and straightforward question: does the at-large electoral process for the selection of city councilmen in Lubbock violate the Fourteenth or Fifteenth Amendments to the United States Constitution? The district judge applied the then-existing Fifth Circuit law controlling the area—a jurisprudence produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds. Equally important, the district judge in applying the precepts set forth by this court sitting en banc in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.; East Carrol Parish Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), relied on legal principles whose merit had been tested and affirmed by the trial of reality and experience. However, since the issuance of the lower court's opinion in this case, a majority of justices of the United States Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) have rejected the *Zimmer* test,[1] simultaneously casting aside the ten years of thought, experience and struggle embodied within it. At this point, mine is not to make reply, mine is not to reason why.[2] We are constrained to follow the Supreme Court's decision in *Bolden* and to require the district courts to do the same.

1. At least five justices, the Chief Justice and Justices Stevens, Stewart, Powell and Rehnquist expressly rejected the use of the *Zimmer* test.

2. The plight, therefore, much parallels that experienced by Tennyson's Light Brigade:

> "Forward the Light Brigade!"
> Was there a man dismay'd?
> . . . . . .
> Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do and die.

Since the Supreme Court has completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens, we must remand this case to the district court to reexamine the evidence, and its findings, in whatever light is radiated by *Bolden*. In addition, due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations. Therefore, the litigants in this action must be allowed, if they so desire, to present further evidence on remand to establish their claims under the law announced in *Bolden*. *See Kirksey v. City of Jackson*, 625 F.2d 21 (5th Cir. 1980).

Recognizing the inevitability of a remand, both parties requested at oral argument that this panel provide guidance as to the meaning of *Bolden* in order to assist the district courts in this and similar future cases. The response to this request must, of necessity, be cursory and wholly inadequate. As Justice White surmised in his concurring opinion[3] in *Bolden*, the Supreme Court's decision "leaves the courts below adrift on uncharted seas with respect to how to proceed on remand." The Supreme Court is not a unified body; it is a bench shared by nine individuals. The words of minority groups of justices are the words of men; however, the shared expression of a majority of justices constitutes the highest law of our country. Therefore, although much was written by the justices in *Bolden*, little – save for the rejection of the *Zimmer* test – was actually decided therein. There was no majority opinion on the proper test to be employed in assessing the legality of an electoral system alleged to discriminate against minority citizens.[4] Moreover, I am not sufficiently clairvoyant to discern the complete body of law which will evolve from future trials and appeals to fill the void left by the Supreme Court's simultaneous rejection of *Zimmer* and its failure to construct a successor. We therefore reluctantly leave it to the district court to embark on the task of providing shape to the amoebic holdings of *Bolden* by applying that case to the present facts.

However, in an effort to provide some guidance to the Court below, note should be taken as to what was *not* decided by the Supreme Court in *Bolden*. The Court seems not to have repudiated its earlier decision in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); therefore, there was no clear holding on the need to prove discriminatory intent in order to establish a violation of the Constitution.[5] Similarly, there was no holding as to whether purposeful discrimination can be inferred from the "totality of the circumstances" or from the fact that an electoral process, which operated in a

3. 446 U.S. at 103, 100 S.Ct. at 1519, (Stevens, J., concurring).

4. The plurality opinion of Justice Stewart, joined in by the Chief Justice and Justices Powell and Rehnquist held that discriminatory intent must be shown. 446 U.S. at 72-74, 100 S.Ct. at 1503. The dissenting opinions of Justices Marshall and Brennan argued that proof of discriminatory impact is sufficient to establish a constitutional violation in election cases. 446 U.S. at 94, 100 S.Ct. at 1520. The remaining opinions of Justices Stevens, Blackmun and White did not address the question whether discriminatory intent must be shown as a prerequisite to finding a constitutional violation. 446 U.S. at 80, 89, 94, 100 S.Ct. at 1507, 1512, 1514.

5. *See* note 4, *supra*.

Attachment B, continued

discriminatory manner, was maintained despite an awareness of its discriminatory effects. *See Nevett v. Sides*, 571 F.2d 209, 231 (5th Cir. 1978) (Wisdom, J. concurring).[6] It is clear that these questions divided the Supreme Court producing the indecisive opinion and amorphous holding in *Bolden*; it is equally clear that their resolution will have to be the product of a long rebuilding process.

Justice Jackson once commented on the Supreme Court that "We are not final because we are infallible, we are infallible because we are final."[7] Clearly this reference to the Supreme Court as "final" was made from a very narrow perspective. The American decisional process cannot be understood as a finite straight line, with a trial beginning, an appellate middle and a Supreme end. Rather, the litigational paradigm is circular, with the Supreme Court's final words from yesterday's case serving as the starting phrase for tomorrow's opinion. Thus, the task falls on the appellate and trial courts to continually interpret and apply the mandates of the Supreme Court. Without guidance from above, the lower courts are sentenced to a term of confusion.

POLITZ, Circuit Judge, specially concurring:

I concur, without reservation, in the result reached and the legal basis for that result as set forth by Judge Goldberg in his concurring opinion, and share his concern about the limited precedential guidance provided by the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). I write in special concurrence because I do not quite share my colleague's distress that the burden of applying the *Bolden* expressions, precedential and otherwise, now falls onto the shoulders of the district courts and courts of appeals. I am satisfied that the trial and intermediate appellate courts can and will reach decisions, tailoring remedies when needed, consistent with *Bolden*, other controlling precedents and the Constitution. More specific guidance by precedential expressions would have been most welcome. But the difficulties the justices faced in attempting to reach a consensus is apparent in their six sepa-

6. Although a plurality of the Court noted that the "subjective intent to discriminate standard," *see Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), was applicable to at-large election cases, there seems to be several pitfalls to applying the "subjective intent" test in this context. First, the "subjective intent" standard, as elaborated in the two Supreme Court opinions, does not seem suited to deal with allegations of discrimination in the maintenance of an electoral system through the inaction of those in control, rather than in the actual formation of a given electoral scheme. For example, the electoral process in Lubbock, Texas was instituted in 1909—at a time when virtually no black citizens lived in that city. However, this system innocently instituted in 1909 may be preserved in 1981 due to its effectiveness in diluting the votes of minority residents, who now constitute about twenty-five percent of Lubbock's population. Second, unlike the personnel test at issue in *Washington v. Davis* or the zoning plan challenged in *Arlington Heights*, an electoral system may have been instituted or redesigned many years ago. Therefore, even if the formulation and institution of a given plan were being challenged (as opposed to its maintenance), it would be impossible to conduct the postmortem psychoanalysis of all of the legislators or councilmen responsible for the institution of the plan in order to meet the "subjective intent" standard of proof.

7. *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 427, 97 L.Ed. 469 (1953) (Jackson, J. concurring).

Attachment B, continued

rate writings in *Bolden*. The lower courts shall now set about the task of addressing and resolving those difficulties on a case-by-case basis.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Attachment B, continued

THE LATINO VOTE IN THE 1980 PRESIDENTIAL ELECTION

A Political Research Report

by

Choco Gonzalez Meza

Edited by Pamela Eoff

SOUTHWEST VOTER REGISTRATION
EDUCATION PROJECT

201 N. St. Mary's St., Suite 501
San Antonio, Texas 78205
(512) 222-0224

January, 1981

First Edition

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FOREWORD

This report is another in a series of studies conducted by the Southwest Voter Registration Education Project designed to measure the electoral participation of the Mexican Americans and Latinos in presidential elections.

The increase in the number of Hispanic votes cast in the 1980 presidential election over the 1976 election is further evidence of the coming of age of the Latino vote. It is important to note that the gratifying increase in the number of Hispanic voters is due to the several hundred voter registration drives undertaken by the Southwest Voter Registration Education Project and by almost every other major Hispanic civic organization. Indeed, it is clear that voter registration, voter education, and, in general, the mobilizing of our collective political strength, have come to enjoy the highest priority among all Hispanic groups. This development is the single most important factor enabling SVREP to conduct 100 voter registration drives a year throughout the Southwest. With the growing capabilities of SVREP, we can foresee the day when 150 campaigns a year will be organized in the six Southwestern states in which we operate.

The practical effects of these voter registration/voter education campaigns are most apparent at the local level. Subsequent studies by the Research Department of SVREP will quantify those results. Preliminary studies, however, show excellent advances throughout the Southwest with some particularly remarkable advances in selected areas. The strong political foundation being built at the local level by the increased number of Hispanics elected to office bodes well for continued advances in the future.

Finally, we would like to thank the members and officers of the over 1,000 local organizations that have participated in our drives. In particular

we would thank Mr. Ruben Bonilla, National Director of LULAC, Mr. Jose Cano, National Director of the American G.I. Forum, the Catholic Bishops, priests nuns and Catholic laypersons who have endorsed our campaigns and have urged their members to exercise the civic obligation we all have to participate in our republic's political process. We would also like to thank Mr. Hank Lacayo, National Chairman of the Labor Council for Latin American Advancement, for the financial contribution that helped defray part of the costs of this study.

It is a pleasure to be associated with these great American leaders in the historic process of mobilizing the collective political strength of the Hispanic citizens of this country.

William C. Velasquez
Executive Director

INTRODUCTION

The growing significance of the Hispanic vote in national politics demands a continuing assessment of the actual political strength of Hispanics at timely intervals. Presidential elections afford an excellent opportunity to measure that strength and its impact on national politics. This study is the latest of a series of studies undertaken by the Southwest Voter Registration Education Project and the second which specifically deals with Presidential elections.

The analysis of these results will be left to future studies focusing on the significance of the returns. No in-depth analysis is necessary, however, to note that a shift in voting patterns has occurred and that the Republican candidate for president received a higher percentage of the Latino vote and higher gross number of Latino votes than in past elections. It is hoped that this study will spark interest in analyzing the reasons for the shift.

SURVEY METHODOLOGY

Three methods were used in this survey to identify predominately Latino precincts. To ensure the degree of accuracy of the methods, each was crosschecked with the others and verified through manual counts.

Method I. Spanish surnamed voters were identified by precinct for each county in the states of California, Colorado and Texas, through the use of voter registration computer tapes from the Office of the Secretary of State, the U.S. Bureau of Census tape of the Official List of Spanish Surnames, and a computer sort program developed by Trinco Computer in San Antonio, Texas. The states of Illinois, Florida and New Jersey identified their own precincts

through the same process and provided SVREP with the data.

Method II. Manual counts were conducted in counties and states which do not have their data available on computer tapes. A manual count consists of hand counting and tabulating the number of Spanish surnamed voters in each precinct. Method II was utilized in Arizona and New Mexico.

Method III. In some states outside the Southwestern U.S. region, computer tapes were not available, and manual counts were impossible because of the large number of precincts. In those states, precincts with predominately Spanish surnamed residents were identified through the use of census tracts. To maintain a standard of accuracy, census tracts with a minimum of 80% Spanish surnamed population were used. This minimum standard is necessary to assure that Latino votes are, indeed, being counted. Once a heavily Latino census tract was identified, precinct and census tract boundaries were correlated. Precincts that were within the census tracts were included in the survey. The Spanish surnamed population percentages were verified by City Planning Departments; the precincts identified within the census tracts were verified through the Department of Voter Registrars.

This third method was used in New York, Michigan, Pennsylvania, Ohio, Indiana, Utah, Iowa, Kansas, and Wisconsin. It was then found that registration, voter turnout and presidential preference data could only be collected in New York and Michigan. Despite the substantial Latino populations in the remaining states, the data showed that these populations were dispersed throughout the cities and not concentrated enough to draw sound conclusions.

County and statewide projections in this survey were made from the tabulated precinct results. These projections are estimates, calculated after careful research.

The population estimates were computed using several Census Bureau reports and the 1980 Commercial Atlas and Market Guide. The census bureau reports included Current Population Reports P-25, No. 625, "Projections of the Population of Voting Age for States, November 1976"; General Social and Economic Characteristics for the United States, 1972; Current Population Reports Series P-20, No. 354," Persons of Spanish Origin in the United States: March 1979."

Registration rates for Latinos were determined by the Spanish surnamed precinct registration figures identified by the computer sort program, the manual counts done by the SVREP staff, and the surveys published by the U.S. Bureau of Census. The Census Bureau reports are Current Population Reports P-20, No. 253, "Voting and Registration in the Election of November 1974", Current Population Report P-20, No. 304, "Voter Participation in November 1976," Advance Report and Voting and Current Population Reports P-20, No. 344,"Voting and Registration in the Election of November 1978."

All state registration and voter turnout figures were provided by the Offices of the Secretary of State for each of the ten states surveyed.

The Latino Vote in the 1980 Presidential Election measures the actual level of electoral participation among Latinos in the Southwest and in other key states. The data contained in this report indicate the growing potential for political power among Latinos at the state and national levels.

The Southwest Voter Registration Education Project is greatly indebted to all those persons listed in the acknowledgements. Without their assistance, this report could not have been compiled.

Choco Gonzalez Meza
Research Director

ACKNOWLEDGEMENTS

Without the substantial research time and energy of numerous individuals, we could not have completed this national study which measures the political participation of Latinos in the 1980 Presidential election. Over 1,200 voting precincts were analyzed for the preparation of this document.

The efforts of Annette A. Aviña, Denise D. Pompa, Jean E. Jarosek, Laura Calderon, Mike Ramirez and Mary Caballero deserve recognition. Each of these dedicated individuals worked tirelessly on various parts of the study. To each one, I express my deepest appreciation.

I especially thank Elizabeth Cisneros Salazar for her patience in typing the numerous drafts of this report. Luciano Arredondo's graphics contributed greatly to the appearance of this document. I thank them for their dedication.

I would also like to thank the members of the staff of the Southwest Voter Registration Education Project for their help throughout the entire process of conducting this study.

Finally, I am especially grateful for the cooperative spirit of all the county employees and county elected officials who so graciously took time during the early morning hours following election night to report the election returns to us.

To all these individuals - Muchisimas Gracias.

Choco Gonzalez Meza

January, 1981

State	County	
Arizona	Maricopa	Kathy Francoeur
	Pima	Gilberto de Hoyos
	Pinal	C. Guiran
California	Fresno	Dianne Sherlock
	Imperial	Ms. Vinfrido
	Los Angeles	Jim Wisely
	San Bernardino	William H. Clinton
	San Diego	Maggie Schneidewind, Voter Outreach Coordinator
	San Francisco	Joy Patterson
	Santa Clara	George Marin
	Ventura	Myron E. Kampfer & Robert L. Hann, County Clerk
Colorado	El Paso	Elli Mitchell
	Conejos	Anabelle Gomez
	Costilla	J. Amos Sanchez
	Pueblo	John Giquere
Florida	Dade	Joe Malone and Joyce V. Dieffenderfer
	Hillsborough	Chuck Smith
Illinois	Cook	Rosemary Bombella, Special Assist. to Gov. on Hispanic Affairs
Michigan	Wayne	Vernon Allan & Pat Walker
New Jersey	Hudson	James F. Quinn, County Clerk
New Mexico	Bernalillo	Gilbert Sanchez
	Dona Ana	Delia Garcia Barncastle, County Clerk
	Eddy	Virgie Cole, County Clerk
New York		Betty Dolen
Texas	Bee	Julia V. Torres, County Clerk
	Bexar	Bob Green, County Clerk
	Brooks	Ovidio Arevalo and Mrs. Cavazos
	Cameron	Tencha de la Peña, Elections Administrator
	Dallas	Walter Benedict
	Dimmit	Rodrigo Guerra
	Duval	Albert Garcia
	El Paso	Helen Jamison
	Frio	Mary Hornbuffel, County Clerk
	Harris	Julie Luna

Texas	Hays	Lydell B. Clayton, County Clerk
	Hidalgo	J.R. Hinojosa Tonie Treviño & Mike Lopez
	Jim Hogg	Lilia Peña
	Jim Wells	Grace and Arnoldo Gonzalez, County Clerk
	Kenedy	Mrs. Faye Chandler
	Kleberg	Ura Dean Ware
	La Salle	Nora Mae Tyler
	Maverick	Enrique Lopez, County Clerk
	Nueces	Dr. Fred Cervantes & Jesse Treviño
	Presidio	Ida Prieto
	San Patricio	Dottie Malley
	Starr	Joe Lopez & Jose D. Hinojosa, County Clerk
	Sutton	Emma Lee Turner, County Clerk
	Tarrant	Estella Teague
	Tom Green	Oma Jones
	Travis	Mrs. Doris Shropshire, County Clerk
	Uvalde	Eileen Carlisle, County Clerk
	Val Verde	Mildred Hildreth & Mary Helen Cardenas
	Webb	Judith Zefferiri & Henry Flores, County Clerk
	Willacy	Lalo Gomez, County Clerk
	Wilson	Richard Bolf
	Zapata	Matias Cuellar
	Zavala	Diana P. Garcia, County Clerk

Latino Vote in the 1980 Presidential Election

The Southwest Voter Registration Education Project voter analysis indicates Latinos cast 2,172,711 votes in the 1980 Presidential election. Jimmy Carter received 1,520,898, or 70% of the Latino vote, compared to 543,178, or 25%, received by Ronald Reagan. Other presidential hopefuls received the remaining 5%.

A comparison of the 1976 and 1980 Presidential elections shows that President Carter received 8,102 fewer Latino votes in 1980, while Ronald Reagan received 185,178 more Latino votes than Gerald Ford in 1976. This constitutes a 52% increase in the number of Latino votes cast for the Republican presidential candidate over that of 1976.

In November 1980, there were an estimated 5,855,000 Latino citizens of voting age in the United States. Of these, approximately 3,426,900, or 59%, are registered to vote. At the time of the Presidential election there were an estimated 2,428,100 Latinos of voting age who were not registered and another 1,254,189 who were registered but did not vote. An estimated total of 3,682,289 elegible Latinos did not participate in this Presidential election.

A comparison of Latino voter registration and turnout from 1976 to 1980 shows increases of 30% and 19%, resnectively.

TABLE I

Comparison of Latino Voter Registration and Turnout for the '76 & '80 Presidential Elections in the United States

	Registration	Turnout
1976 1/	2,646,090	1,820,580
1980	3,426,900	2,172,711
Increase	780,810	352,131
% Increase	30%	19%

Illustration I

LATINO REGISTRATION and VOTER TURNOUT

= 500,000 Voters

Eligible Voting Age — 5,855,000

Registered Voters — 3,426,900

Actual Votes Cast — 2,172,711

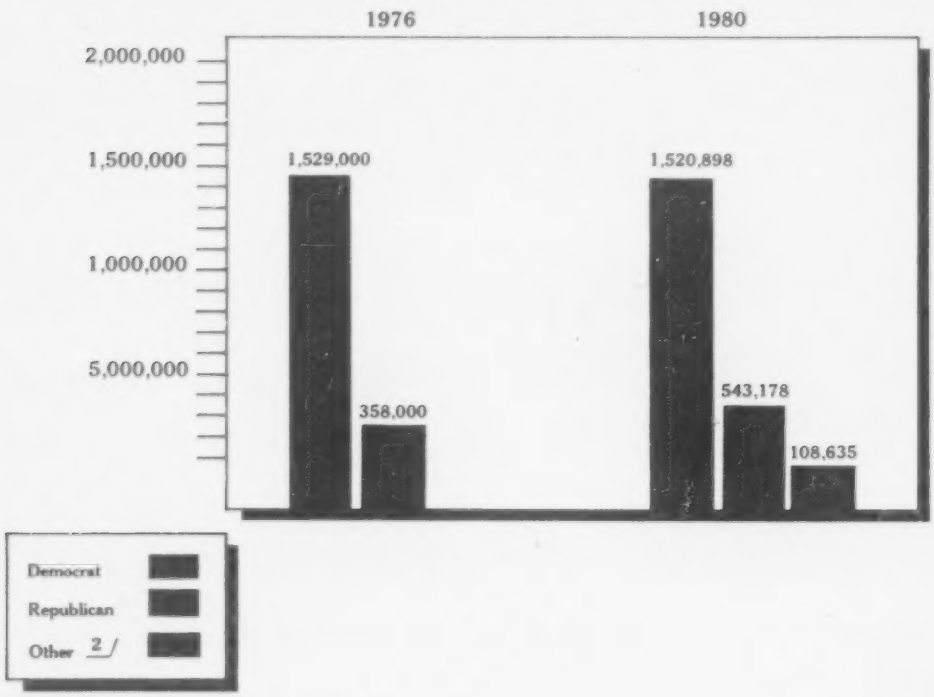
TABLE II

Comparison of the U.S. Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
	Latino Vote	%	Latino Vote	%
Democrat	1,529,000	81.0	1,520,898	70.0
Republican	358,000	19.0	543,178	25.0
Other	--		108,635	5.0

GRAPH I

Comparison of the U.S. Latino Vote for the Democratic & Republican Presidential Candidates



THE SOUTHWEST

An estimated 7,953,900 Latinos, or 63% of the total Latino population, live in the five Southwestern states of Arizona, California, Colorado, New Mexico and Texas. Sixty-four percent of all the Latino registered voters are also found in these states.

In the November 4, 1980 Presidential election, Latinos in the Southwest cast an estimated 1,329,704 votes. Latinos gave Carter 961,302 votes compared to Reagan's 291,659 votes. Carter received 669,643 more Latino votes than Reagan, garnering 72% of the Latino votes in these states. (Please refer to Table V, page 15.)

A comparison of the Southwestern Latino vote in the 1976 and 1980 Presidential elections indicates a shift of Latino support from the Democratic presidential candidate to the Republican and Independent candidates.

TABLE III

Comparison of the Southwestern Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	826,055	81%	961,302	72%
Republican	190,145	19%	291,659	22%
Other			76,743	6%

The Democratic candidate received 135,247 more Latino votes in 1980, compared to the 101,514 Latino vote increase received by the Republicans. The Republican support among Latinos, however, increased by 53%, compared

93-7[illegible] O - 83 -- 65

to the 10% increase for the Democrats.

At the time of the 1980 Presidential election, an estimated 1,662,805 eligible Latinos were not registered to vote in the Southwest, with another 847,291 registered Latinos not voting. Thus, there were 2,510,096 potential Latino voters who did not participate in the 1980 Presidential election.

Latino voter turnout in the Southwest was slightly lower than the Latino turnout nationally. Sixty-one percent of the Latino voters in the Southwest went to the polls, compared to 63% nationally.

Latino registration and voter turnout increased by 44% and 31%, respectively, since the 1976 Presidential election.

TABLE IV

Comparison of Latino Voter Registration and Turnout for the '76 & '80 Presidential Elections in the Southwestern United States

	Registration	Turnout
1976	1,512,300	1,016,200
1980	2,176,995	1,329,704
Increase	664,695	313,504
% Increase	44%	31%

Latino voter turnout in the five Southwestern states and the United States can be found in Table V, page 15.

TABLE V

Latino Vote in U.S. and 5 Southwestern States

	United States	Arizona	California	Colorado	New Mexico	Texas
Eligible Latino Voting Population	5,855,000	191,300	1,796,500	190,400	262,900	1,398,700
Registered Latino Voters	3,426,900	105,200	988,131	114,201	170,900	798,563
% Registered	59%	55%	55%	60%	65%	57%
Latino Votes Cast	2,172,711	72,588	642,285	83,366	116,212	415,253
Latino Turnout*	63%	69%	65%	73%	68%	52%
Latino Vote For Carter	1,520,898	50,086	449,600	59,190	74,376	328,050
% Carter	70%	69%	70%	71%	64%	79%
Latino Vote For Reagan	543,178	17,421	141,302	19,174	34,864	78,898
% Reagan	25%	24%	22%	23%	30%	19%
Latino Vote For Anderson & Clark	108,635	5,081	51,383	5,002	6,972	8,305
% Anderson & Clark	5%	7%	8%	6%	6%	2%

*Turnout represents percentage of registered persons who voted.

TABLE VI

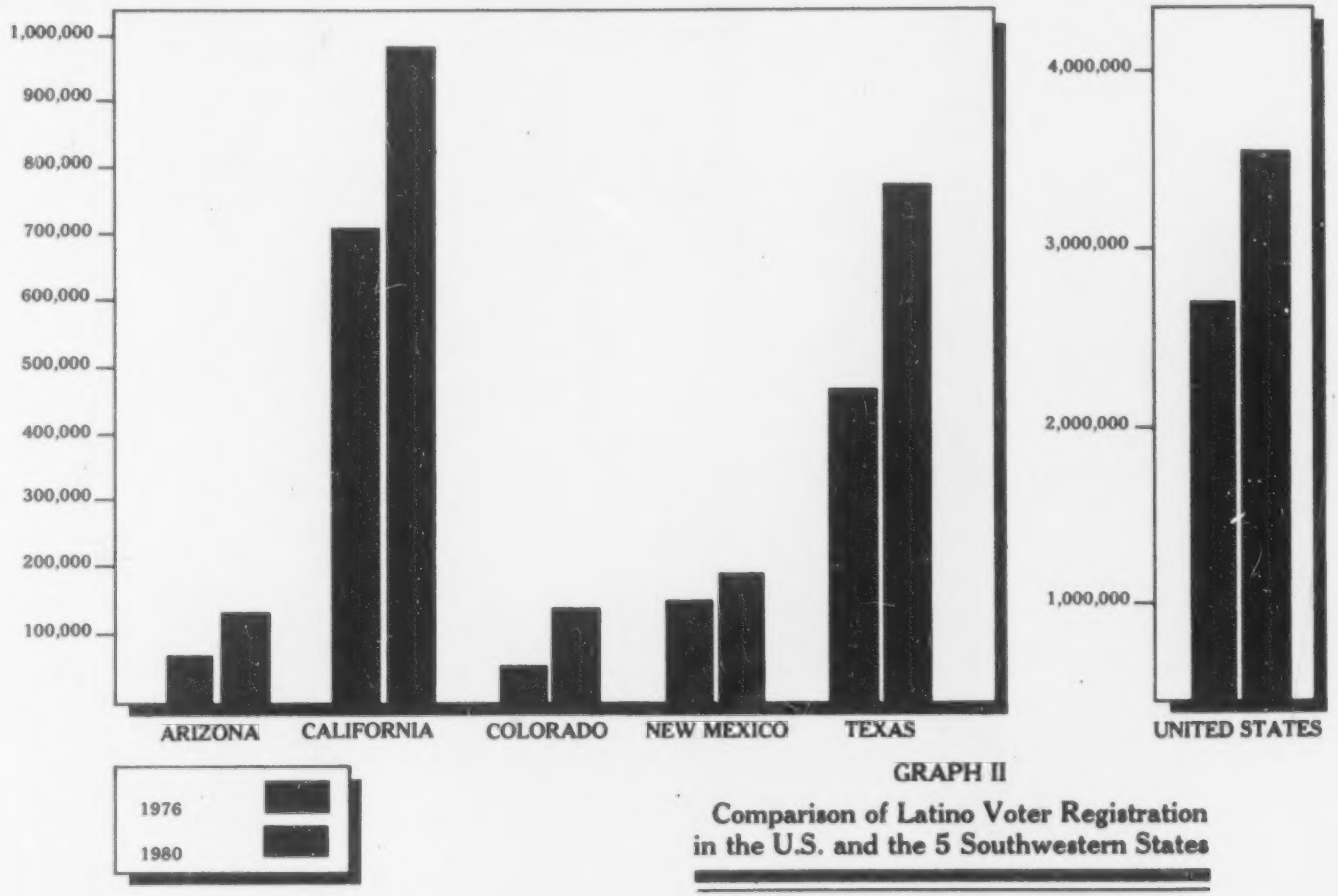
Comparison of Latino Voter Registration in the U.S. and the 5 Southwestern States

	1976	1980	Increase	%
United States	2,646,090	3,426,990	780,810	30.
Arizona	92,500	105,200	12,700	14.
California	715,600	988,131	272,531	38.
Colorado	81,000	114,201	33,201	41.
New Mexico	135,000	170,900	35,900	27.
Texas	488,000	798,563	310,563	64.

TABLE VII

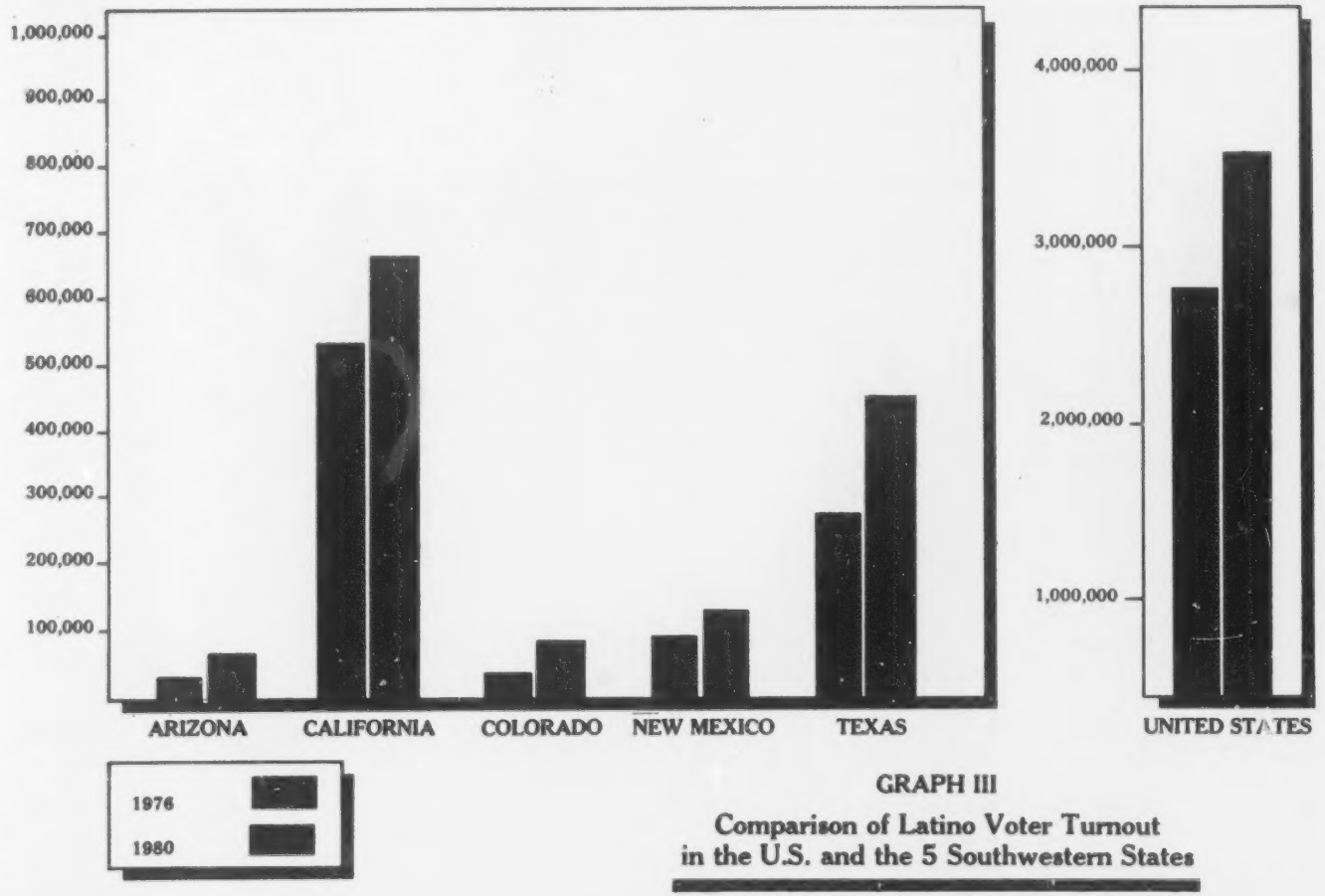
Comparison of Latino Voter Turnout in the U.S. and the 5 Southwestern States

	1976	1980	Increase	%
United States	1,820,580	2,172,711	352,131	19.
Arizona	58,300	72,588	14,288	25.
California	522,400	643,285	120,885	23.
Colorado	60,000	83,366	23,366	39.
New Mexico	97,300	116,212	18,912	19.
Texas	278,200	415,253	137,053	49.



GRAPH II

Comparison of Latino Voter Registration in the U.S. and the 5 Southwestern States



GRAPH III

Comparison of Latino Voter Turnout in the U.S. and the 5 Southwestern States

ARIZONA

Latinos in Arizona cast an estimated 72,588 votes in the 1980 Presidential election, with an estimated 50,086 voting for Carter and 17,421 for Reagan. Carter received 32,665 more Latino votes than Reagan, carrying 69% of all the Latino votes.

In comparing the Latino vote in the 1976 and 1980 presidential elections, the Southwest Voter Registration Education Project Research Department found the percentage of Latinos voting for Carter was significantly lower in 1980.

TABLE VIII

Comparison of the Arizona Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	47,800	82%	50,086	69%
Republican	10,500	18%	17,421	24%
Others	--	--	5,081	7%

In 1980, the Republican candidate received 6,921 more Arizona Latino votes than in 1976 while the Democratic candidate increased by 2,286 votes. The Republican support among Latino voters increased by 66%, compared to a 5% increase by Democrats.

In November 1980, an estimated 86,109 eligible Arizona Latinos were not registered to vote and another 32,612 registered Latinos did not vote. Thus, a total of 118,712 potential Latino voters did not participate in the 1980 Presidential election. The Latino voter turnout in Arizona was

lower than the general turnout. Sixty-nine percent of the registered Latino population voted, compared to an 80% turnout rate for the state as a whole.

The 69% Latino turnout in Arizona was slightly higher than the national Latino turnout. Latino registration and voter turnout increased by 14% and 25%, respectively, from that of the 1976 Presidential election.

TABLE IX

Comparison of the Arizona Latino Voter Registration & Turnout in the '76 & '80 Presidential Elections

	Registration	Turnout
1976	92,500	58,300
1980	105,200	72,588
Increase	12,700	14,288
% Increase	14%	25%

Latino voter turnout in selected cities and voting precincts can be found in Table XXVI on page 36 and Table XXVII on page 38.

CALIFORNIA

Approximately 642,285 Latino votes were cast in the 1980 Presidential election in California. Carter received 449,600 Latino votes, compared to Reagan's 141,302, giving Carter a margin of 308,298 more Latino votes than Reagan.

A comparison of the Latino vote in the 1976 and 1980 Presidential elections shows a decrease in the percentage of Latinos voting for Carter in November 1980.

TABLE X

Comparison of the California Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	423,145	81%	449,600	70%
Republican	99,255	19%	141,302	22%
Others 3/	--	--	51,383	8%

In the 1980 Presidential election California Latinos gave the Republican candidate 42,047 more votes than in 1976, compared to the 26,455 increase received by the Democrats. The percentage increase for Republicans among Latino voters was 42%, compared to a 6% increase for Democrats.

At the time of the 1980 Presidential election, 808,369 eligible California Latinos were not registered to vote, while another 345,846 registered voters did not vote. A potential 1,154,215 Latino voters did not participate in the 1980 Presidential election. In addition, the Latino voter turnout was lower than the general turnout. Sixty-five percent of the registered Latino population voted, compared to a 74% turnout rate for the state.

The 65% Latino turnout is slightly higher than the national Latino voter turnout of 63%. Latino registration and voter turnout in California increased by 38% and 23%, respectively, from that of the 1976 Presidential election.

TABLE XI

Comparison of the California Latino Voter Registration and Turnout in the '76 & '80 Presidential Elections

	Registration	Turnout
1976	715,600	522,400
1980	988,131	642,285
Increase	272,531	119,885
% Increase	38%	23%

Latino voter turnout in selected cities and voting precincts in California can be found in Table XXVI on page 36 and Table XXVII on page 38.

COLORADO

Latinos in Colorado cast 83,366 votes in the 1980 Presidential election. Carter received 59,190 Latino votes to Reagan's 19,174. Carter took 40,016 more Latino votes than did Reagan, with seventy-one percent of the Latino vote going to Carter.

A comparison of the Latino vote in the 1976 and 1980 Presidential elections indicates that a lower percentage of Latinos voted for Carter in 1980.

TABLE XII

Comparison of the Colorado Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	45,000	75%	59,190	71%
Republican	15,000	25%	19,174	23%
Other	---	--	5,002	6%

The Republican candidate garnered 4,174 more Latino votes in the 1980 Presidential election than in 1976, while the Democratic candidate received 14,190 more Latino votes. The percentage increase of Latino votes for Republicans was 28% compared to 32% for the Democrats. As of November 1980, there were 76,199 Latinos in Colorado who were not registered to vote. Another 30,835 registered Latinos did not vote. A total of 107,034 potential Latino voters did not participate in the 1980 Presidential election. The latino voter turnout was lower than the general turnout. Seventy-three percent of the registered Latinos voted, compared to an 85% turnout rate for the state.

The 73% Latino turnout is significantly higher than the national Latino turnout of 63%. Voter registration and turnout for Latinos in Colorado increased by 41% and 39%, respectively, since the last Presidential election.

TABLE XIII

Comparison of the Colorado Latino Voter Registration and Turnout in the '76 & '80 Presidential Elections

	Registration	Turnout
1976	81,000	60,000
1980	114,201	83,366
Increase	33,201	23,366
% Increase	41%	39%

Latino voter turnout in selected cities and voting precincts in Colorado can be found in Table XXVI on page 36 and Table XXVII on page 38.

NEW MEXICO

In the November 1980 Presidential election Latinos cast 116,212 votes in New Mexico. Latinos gave Carter 74,376 votes to 34,864 for Reagan, thus giving Carter 64% of their vote. Carter received 39,512 more votes than did Reagan. A lower percentage of Latinos voted for Carter in 1980 than in 1976.

TABLE XIV

Comparison of the New Mexico Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	68,110	70%	74,376	64%
Republican	29,190	30%	34,864	30%
Other	--	--	6,972	6%

The Democratic candidate received 6,266 more Latino votes in the 1980 Presidential election compared to the 5,674 increase received by the Republicans. The percentage increase for Democrats among Latino voters was 9%, compared to a 19% increase for Republicans.

As of November 1980, 92,000 eligible Latinos were not registered to vote and another 54,688 registered Latinos did not vote. There were 140,688 potential Latino voters who did not participate in the 1980 Presidential election.

The Latino voter turnout in New Mexico was slightly lower than the general turnout. Sixty-eight percent of the registered Latino population voted compared to a 71% turnout rate for the state.

The 68% Latino turnout is higher than the national Latino voter turnout of 63%. Latino registration and voter turnout in New Mexico increased by 26% and 19%, respectively, since the 1976 Presidential election.

TABLE XV

Comparison of the New Mexico Latino Voter Registration and Turnout in the '76 & '80 Presidential Elections

	Registration	Turnout
1976	135,200	97,300
1980	170,900	116,212
Increase	35,700	18,912
% Increase	26%	19%

Latino voter turnout in selected cities and voting precincts in New Mexico can be found in Table XXVI on Page 36 and Table XXVII on Page 38.

Texas

In the November 4, 1980 Presidential election, Latinos in Texas cast an estimated 415,253 votes, with 328,059 Latino votes going to Carter, compared to 78,898 votes for Reagan. Latinos gave Carter 249,152 more votes than they did Reagan, with 79% of the Latino vote going to Carter.

A comparison of the Latino vote in the 1976 and 1980 Presidential elections indicates a shift of Latino support from the Democratic

presidential candidate to the Republican and Independent candidates.

TABLE XVI

Comparison of the Texas Latino Vote for the Democratic & Republican Presidential Candidates

	1976		1980	
Democrat	242,000	87%	328,050	79%
Republican	36,200	13%	78,898	19%
Other			8,305	2%

The Democratic candidate received 86,050 more Latino votes in the 1980 Presidential election than in 1976, compared to the 42,698 increase received by the Republican candidate. The percentage increase for Democrats among Latino voters was 36%, compared to the 118% increase for the Republicans since the 1976 Presidential election.

At the time of the 1980 Presidential election, an estimated 600,137 Latinos were not registered to vote. Another 383,310 Latinos were registered for the 1980 Presidential election but did not vote. These figures show that approximately 983,447 potential Latino voters did not participate in the 1980 Presidential election. The Latino voter turnout was lower than the general turnout. Fifty-two percent of the registered Latino population voted, compared to a 68% turnout rate for the state as a whole.

The 52% Latino turnout was lower than the national Latino turnout of 63%. Despite these figures, Latino voter registration and turnout increased by 64% and 49%, respectively, since the 1976 Presidential election.

TABLE XVII

Comparison of the Texas Latino Voter Registration and Turnout in the '76 & '80 Presidential Elections

	Registration	Turnout
1976	488,000	278,200
1980	798,563	415,253
Increase	310,563	137,053
% Increase	64%	49%

Latino voter turnout in selected cities and voting precincts in Texas can be found in Table XXVI on Page 36 and Table XXVII on Page 38.

THE MIDWEST AND THE NORTHEAST

The Midwestern and Northeastern states included in this study are Michigan, New Jersey, New York and Illinois. Data for Michigan, New Jersey and Illinois were collected and analyzed in the same manner as for the Southwestern states. Unfortunately, the state of New York had not completed tabulation of the total number of registered voters at the time of publication. In order to include New York in this study adjustments had to be made. To arrive at the percentage of Latinos who voted, a projection was made using the 1976 Latino registration figures. Despite this problem the data collected in the Presidential race are sufficient to determine the percentage of Latinos who voted for Carter, Reagan, Anderson, and Clark. This data will be collected and included in the second edition of this report.

NEW YORK

As estimated 375,450 Latino votes were cast in the 1980 Presidential election in New York. Latinos gave Carter 319,133 votes and cast 48,809 for Reagan. Carter received 270,324 more Latino votes than Reagan, garnering 85% of the Latino vote.

A comparison of the 1976 and 1980 Presidential election returns indicates that the percentage of Latinos voting for Carter was slightly lower in 1980, i.e., 85% compared to 89% in 1976. Republican support among Latinos increased from 11% in 1976 to 13% in 1980.

In 1980, Carter received 41,453 more Latino votes than in 1976, compared to an increase of 14,489 for Reagan over the total received by Ford. The Republican support among Latinos, however, increased by 42%, compared to 15% by Democrats.

TABLE XVIII
Latino Voting in New York State

Latino Registered Voters	Latino Votes Cast	% Latino Turnout	% Carter	% Reagan	% Other
500,600	375,450	75.	85.	13.	2.

As of November 1980, there were 409,500 Latinos in New York who were not registered to vote. In comparing 1976 and 1980 voter registration figures, the Research Department found that Latino registration increased by 20% in New York.

Latino voting in selected cities and voting precincts can be found in Table XXVI on Page 36 and Table XXVII on Page 38.

ILLINOIS

Latinos in Illinois cast approximately 125,045 votes in the 1980 Presidential election, giving 111,290 votes to Carter and 10,004 votes to Reagan. Carter received 101,297 more Latino votes than did Reagan, carrying 89% of all the Latino votes in Illinois. This was one of Carter's strongest states and Reagan's weakest.

The voter turnout in the Latino community was higher than the general turnout; 89% of the registered Latino population actually voted, compared to an 85% turnout for the state. Although Latinos did have a higher turnout,

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there were still 75,700 Latinos who were not registered to vote and another 15,455 registered Latinos who did not vote. Thus, in the 1980 Presidential election, 91,155 potential Latino voters in Illinois did not vote.

TABLE XIX
Latino Voting in Illinois

Latino Registered Voters	Latino Votes Cast	% Latino Turnout	% Carter	% Reagan	% Other
140,500	125,045	89.	89.	8.	3.

Latino voter registration and turnout have increased by 6% and 20%, respectively, since 1976.

Latino voting in selected cities and states can be found in Table XXVI on Page 36 and Table XXVII on Page 38.

MICHIGAN

Latinos in Michigan cast approximately 26,036 votes in the 1980 Presidential election. Carter received 16,923 of the Latino vote, compared to Reagan's 7,810 votes. Carter received 9,113 more Latino votes than Reagan, carrying 65% of all the Latino votes in Michigan.

The Latino voter turnout was lower than the general turnout. Forty-six percent of the registered Latino population actually voted, compared to a turnout rate of 70% for the state.

At the time of the Presidential election there were 46,300 Latinos

of voting age who were not registered to vote, with another 30,564 registered Latinos not voting in the election. Thus, 76,864 potential Latino voters did not participate in the November 1980 Presidential election.

TABLE XX
Latino Voting in Michigan

Latino Registered Voters	Latino Votes Cast	% Latino Turnout	% Carter	% Reagan	% Other
56,600	26,036	46.	65.	30.	4.

NEW JERSEY

Approximately 60,060 votes were cast by Latinos in New Jersey in the November 4, 1980 Presidential election. President Carter received 37,838 votes compared to Reagan's 21,021. Carter gained 16,817 more votes than Reagan, winning 63% of the Latino vote.

The Latino voter turnout was lower than the general turnout. Sixty-six percent of all the Latinos registered actually voted, compared to an 80% turnout rate for the state as a whole.

On November 4, 1980 there were 92,000 Latinos of voting age who were not registered to vote. Another 54,688 registered Latinos did not vote. Therefore, a total of 146,688 potential Latino voters did not participate in this Presidential election.

TABLE XXI
Latino Voting in New Jersey

Latino Registered Voters	Latino Votes Cast	% Latino Turnout	% Carter	% Reagan	% Other
91,000	60,060	66.	63.	35.	2.

THE SOUTHEAST

Florida is the only Southeastern state with Latino population concentrations significant enough to warrant being surveyed. Of the Latino population in Florida, the majority are Cuban Americans, with Mexican Americans composing the next largest percentage of the Latino population. Voting precincts selected for this study are those that are predominately Mexican American or Cuban. The voting patterns of both groups were compared. In general, the Mexican American precincts are in Tampa and the Cuban American precincts in Miami.

Please refer to Table XXVI on page 36 to see the voting results of each city. Also, selected voting precincts for each city can be found in Table XXVII, Page 38.

FLORIDA

Latinos in Florida cast an estimated 154,674 votes in the 1980 Presidential election. President-elect Ronald Reagan received 91,257 Latino votes to Carter's 57,229. Reagan received 34,028 more Latino votes than Carter in Florida.

Fifty-nine percent of the Florida Latino vote went to Reagan. Florida is the only state surveyed in which the majority of Latinos voting cast their ballots for the Republican Presidential candidate. Reagan's strongest Latino support thus came from the state of Florida.

The voter turnout in the Latino communities was higher than the statewide turnout of 77%. Although Latinos did have a higher turnout, there still were 66,100 Latinos who were not registered to vote and another 91,426 registered Latinos who did not vote. In the 1980 Presidential election, 157,526 potential Latino voters in Florida did not vote.

TABLE XXII

Latino Voting in Florida

Latino Registered Voters	Latino Votes Cast	% Latino Turnout	% Carter	% Reagan	% Other
198,300	154,675	78.	37.	59.	5.

TABLE XXIII

Voting and Non-Voting Latino Population in 10 States and the U.S.

STATE	Eligible Latino Voting Age Pop.	Latino Reg. Voters	% Reg.	Voters Not Reg.	Latino Votes Cast 11/80	Reg. Non-Voters	Non-Voting Eligible Pop.
Arizona	191,300	105,200	55.	86,100	72,588	32,612	118,712
California	1,796,500	988,131	55.	808,369	642,285	345,846	1,154,215
Colorado	190,400	114,201	60.	76,199	83,366	30,835	107,034
Florida	264,400	198,300	78.	66,100	154,674	91,246	157,526
Illinois	216,200	140,500	65.	75,700	125,045	15,455	91,155
Michigan	102,900	56,600	46.	46,300	26,036	30,564	76,864
New Mexico	262,900	170,900	65.	92,000	116,212	54,688	146,688
New Jersey	159,600	91,000	66.	68,600	60,060	30,940	99,540
New York	910,100	500,600	55.	409,500	—	—	—
Texas	1,398,700	798,563	57.	600,137	415,253	383,310	983,447
TOTAL U.S.	5,855,000	3,426,900	59.	2,428,100	2,172,711	1,254,189	3,682,289

TABLE XXIV

Comparison of Latino and General Voter Turnout In Selected States

State	% State Voter Turnout	% Latino Voter Turnout
Arizona	80.	69.
California	74.	65.
Colorado	85.	73.
Florida	77.	78.
Illinois	85.	89.
Michigan	70.	46.
New Jersey	80.	66.
New Mexico	71.	68.
New York	—	—
Texas	68.	52.

TABLE XXV

Latino Voting in the 1980 Presidential Election by Selected States

State	% Latino Voter Turnout	% Latino Vote for Carter	% Latino Vote for Reagan
Arizona	69.	69.	24.
California	65.	70.	22.
Colorado	73.	71.	23.
Florida	78.	37.	59.
Illinois	89.	89.	8.
Michigan	46.	65.	30.
New Jersey	66.	63.	35.
New Mexico	68.	64.	30.
New York	—	85.	13.
Texas	52.	79.	19.

TABLE XXVI

Latino Voting in Selected Cities

	% Latino Turnout	% Carter	% Reagan	% Anderson	% Clark
ARIZONA					
Phoenix	66.8	68.7	25.2	4.6	1.5
Tucson	72.3	70.2	21.2	6.9	1.6
CALIFORNIA					Other [4]
East Los Angeles	63.5	77.7	16.4	4.3	1.5
Los Angeles	63.2	76.1	17.1	5.5	1.3
San Bernardino	67.7	57.8	33.9	6.1	2.2
San Francisco	56.0	64.8	16.9	8.8	9.5
Belvedere	67.2	79.5	13.7	4.8	1.9
San Diego	61.5	51.9	38.7	7.2	.2
Fresno	47.0	84.0	11.4	2.7	1.9
COLORADO					
Denver	73.2	78.8	12.1	6.6	2.5
Pueblo	80.1	81.1	9.8	7.6	1.5
Conejos	79.3	73.5	22.9	2.3	1.3
Alamosa	79.1	75.5	21.7	1.5	1.2
FLORIDA					
Tampa	76.7	67.7	28.4	3.0	.9
Miami	81.8	15.5	81.5	2.8	.2
ILLINOIS					
Chicago	89.1	89.0	8.2	.7	2.0
MICHIGAN					
Detroit	46.4	65.0	29.9	4.2	.9
NEW JERSEY					
Jersey City	65.5	66.6	34.8	2.2	.4

	% Latino Turnout	% Carter	% Reagan	% Anderson	% Clark
NEW MEXICO					
Albuquerque	66.9	66.9	26.7	5.0	1.4
Las Cruces	66.6	56.2	36.6	5.2	1.9
Carlsbad	73.7	76.1	21.6	.8	1.5
NEW YORK 5/					
Brooklyn	-	83.1	13.2	2.3	1.4
Manhattan	-	80.2	16.8	1.8	1.2
New York	-	90.0	7.9	1.5	.6
TEXAS					
San Antonio	50.7	86.7	11.2	1.5	.6
Corpus Christi	54.9	88.1	10.2	1.1	.4
El Paso	51.9	71.5	23.7	3.4	1.3
McAllen	48.0	77.6	20.1	1.6	.7
Dallas	59.9	52.1	39.6	5.4	2.9
Houston	45.3	78.7	20.0	1.0	.3
Eagle Pass	52.2	68.6	30.0	.8	.6
Kingsville	55.7	90.0	7.9	1.1	1.0

TABLE XXVII

Sample of Precincts Surveyed

	Precinct	Registered Voters	% Turnout	% Carter	% Reagan	% Anderson	% Clark
ARIZONA							
Phoenix							
	El Miraje	1022	54.2	72.9	20.2	5.2	1.7
	Guadalupe	1269	50.9	82.9	11.3	3.8	1.9
	Wilson	322	63.9	82.1	14.3	2.0	1.5
	Julian	567	73.5	92.3	5.8	1.3	.5
	Peoria	1814	78.9	35.3	57.3	5.6	1.8
Tucson	18	847	74.6	79.2	14.2	4.9	1.6
	25	830	78.4	71.4	20.8	6.3	1.4
Superior North	24A	830	75.4	68.4	22.5	6.5	2.5
CALIFORNIA							
Los Angeles							
	1855	518	61.8	80.9	14.2	3.9	.9
	1892	503	67.8	74.9	20.6	3.0	1.5
East Los Angeles							
	2	249	69.1	77.2	14.8	6.1	1.9
	26	315	73.0	79.1	17.3	3.2	.4
	42	346	63.6	84.5	12.7	2.3	.5
Belvedere							
	16	232	72.8	77.6	16.4	4.8	1.2
	23	317	70.4	81.2	13.7	3.7	1.4
San Francisco							
	6080	548	49.3	66.3	15.7	9.6	8.4
	6353	220	62.7	69.2	12.3	10.0	8.5
San Diego							
	39081	542	61.5	42.8	48.9	6.0	2.3
Fresno							
	7040	398	40.5	83.9	13.5	1.9	.6
	6620	458	42.8	90.6	4.9	1.7	2.8

	Precinct	Registered Voters	% Turnout	% Carter	% Reagan	% Anderson	% Clark
COLORADO							
Denver							
	517	243	66.3	80.5	10.7	5.6	3.1
	918	432	77.0	78.0	12.8	7.0	2.1
Pueblo							
	36	387	80.1	81.1	9.8	7.6	1.5
	19	489	78.3	75.5	19.0	4.5	.9
Conejos							
	6	250	78.8	68.0	27.0	4.5	.5
	4	205	81.4	89.2	8.6	.7	1.4
FLORIDA							
Tampa							
	9	1804	74.3	72.6	23.7	2.7	1.0
	48A	1125	80.0	62.1	35.1	1.9	.9
Miami							
	659	1605	80.1	18.2	79.0	2.7	.1
	504	1344	83.8	12.4	84.3	3.0	.3
	319	1681	76.4	22.1	74.7	3.0	.2
NEW JERSEY							
Jersey City							
	4	883	56.6	79.7	16.5	2.6	1.0
	5	585	50.4	71.7	22.9	4.8	.3
West New York							
	7	348	72.9	53.9	42.8	2.7	.3
ILLINOIS							
Chicago							
Ward 31	39	459	93.2	92.0	5.6	.0	2.3
Ward 31	28	452	84.9	85.7	11.0	1.5	1.5
Ward 1	9	510	71.1	92.8	6.0	1.1	.0
Ward 22	31	316	69.3	82.6	15.0	.9	1.4
NEW MEXICO							
Albuquerque							
	46	779	68.7	63.7	29.4	6.3	.6
	62	405	70.1	54.2	39.3	4.0	2.5
	105	447	67.8	80.9	15.1	3.7	.3

	Precinct	Registered Voters	% Turnout	% Carter	% Reagan	% Anderson	% Clark
NEW MEXICO							
Dona Ana	42	407	68.	64.	31.	3.	2.
	45	426	65.	62.	31.	6.	1.
Eddy	12	734	75.3	79.6	18.7	.2	1.5
MICHIGAN							
Detroit	7	598	47.0	74.3	22.1	3.6	.0
	10	374	37.7	62.4	28.4	8.5	.7
NEW YORK							
Brooklyn	25	405	-	77.4	8.8	8.1	5.7
	47	392	-	88.2	10.6	.3	.9
Manhattan	21	508	-	90.1	7.3	1.8	.8
	60	344	-	79.8	18.6	.4	1.2
Bronx	3	395	-	90.5	8.0	1.1	.4
	28	145	-	82.4	17.6	.0	.0
TEXAS							
Dallas	3303	2237	56.3	63.5	27.3	5.9	3.2
	3304	2310	63.3	42.3	50.1	5.0	2.6
El Paso	89	545	60.	77.8	17.9	2.9	1.3
	57	1124	53.	80.7	13.8	2.8	2.7
San Antonio	110	2196	61.6	80.5	17.9	1.3	.3
	213	2307	46.6	89.5	8.3	1.2	1.
	415	815	57.7	83.5	13.7	2.1	.7

	Precinct	Registered Voters	% Turnout	% Carter	% Reagan	% Anderson	% Clark
TEXAS							
Corpus Christi	45	874	55.7	84.8	13.3	1.3	.6
	75	1970	59.6	90.9	8.2	.5	.4
Laredo							
	4A	925	48.2	83.8	15.6	.5	.4
	14	941	61.6	68.7	29.2	1.7	.4
Harris							
	9	531	46.	82.2	16.1	1.5	.2
	46	1931	49.0	78.1	19.6	1.8	.5
	66	1316	47.1	75.0	22.5	1.5	1.0
Crystal City	3	804	67.2	78.9	20.4	.7	.0
	5	1326	63.9	81.3	15.7	2.3	.7

SURVEY OF CHICANO REPRESENTATION IN 361 TEXAS PUBLIC SCHOOL BOARDS 1979/80

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May, 1981

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INTRODUCTION

Although Chicanos comprise the largest minority group in Texas, they are not receiving adequate educational opportunities. In fact, Chicanos are receiving a dismally low return in educational benefits. A recent federal court decision declared that "the crippling educational deficiencies afflicting the main body of Mexican Americans in Texas presents an ongoing ethnic tragedy, catastrophic in degree and disturbing in its latency for civil unrest and economic dislocation."[1] The lack of Chicano representation in key educational decision-making positions contributes to the failure of Texas schools to provide adequate educational opportunities for Chicano students.

Texas' inability to provide educational opportunities for Chicano students is well documented.[2] School achievement, a measuring tool employed in determining if schools are successfully educating their students, is based on the following factors: school holding power, reading achievement, grade repetition, overageness, and involvement in extracurricular activities. Utilizing these factors the United States Commission on Civil Rights found that Texas has the poorest overall record of any Southwestern State in educating Chicano students.[3]

The Commission reports that nearly one-half or 47% of all Chicanos entering school in Texas will leave before graduating, while only 14.9% of all Anglo students will fail to complete high school. Thus, Texas' school holding power

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[1]United States of America v. State of Texas, No. 5281 (USDC), Eastern District of Texas, January, 1981), p. 16. Order signed January 9, 1981.

[2]See, U.S. Commission on Civil Rights, Mexican American Education Study, 6 vols. (Washington, D.C.: Government Printing Office, 1971-1974.

[3]U.S. Commission on Civil Rights, The Unfinished Education, Mexican American Educational Series, no. 2 (Washington, D.C.: U.S. Government Printing Office, 1971).

is extremely low among Chicano students. Another startling statistic involves reading achievement. Seventy-five percent of Chicano eighth graders are reading below grade level; moreover, most of these students are reading at two or more years below grade level.

In addition, Texas has the highest level of grade repetition of any State in the Southwest. According to the Commission on Civil Rights, 22% of entering Chicano first graders are retained in the same grade. Consequently, more than 16% of Chicano eighth graders are overage. In other words, one of every six Chicano students is two or more years overage, compared to one of every forty-eight Anglo students who is overage. Generally, Chicano students do not participate in extracurricular activities like their Anglo counterparts. Additionally, only 30.7% of Chicano students go on to college, compared to 62.2% of Anglo students who go on to college. In summary:

> The Mexican American has (a lower) educational level than either black or Anglo, the highest dropout rate; and the highest illiteracy rate. These truths stand as massive indictments against the present educational system. As well, they are indictments of either negligent or intended homicide against a minority group. In essence, what this system has done is to smother the soul and spirit of an entire people.[4]

In light of these facts, the importance of Chicanos elected to local school boards cannot be underestimated. Chicano representation on these boards is crucial if the educational needs of Chicanos are to be given proper consideration. Although many state and federal agencies establish policies affecting education, it is the local school boards which are responsible for establishing employment practices; school district policies, goals, and objectives; tax rates and tax ratios; and school budgets. Local school boards also approve core curricula,

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[4]Mario Obledo, Director, Mexican American Legal Defense Fund. Hearings before the Select Committee on Equal Education Opportunity of the U.S. Senate, Part 4: Mexican American Education. Washington, D.C., August, 1970, p. 2519.

federal program applications, and bilingual education programs.[5] Thus, these boards are key decision-making governmental units.

METHODOLOGY

Recent studies have depicted the dearth of minority elected officials on local school boards using aggregate data.[6] A recent study analyzed 26,383 school board positions for a ten year period and revealed that 6.6% (n=1,740) of these positions were occupied by Chicano board members.[7] While aggregate studies paint an overall picture, they do not permit inferences regarding individual units. The need for individual data prompted SVREP to survey individual school districts to examine minority representation statistically utilizing both aggregate and individual-level data.

During the 1979-80 academic year Texas student enrollment was 2,873,301. Of this, 26.6% (n=763,623) were Chicano students. Each school district with 20% and over Chicano student composition was examined for equitable Chicano representation: Does the ethnic composition of the school board reflect the ethnic composition of the student body?[8]

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[5]For a more detailed description of the responsibilities of local school boards, see Texas Advisory Committee to the U.S. Commission on Civil Rights, Working With Your School (February, 1977), p. 87.

[6]U.S. Commission on Civil Rights, Toward Quality Education for Mexican Americans, Mexican American Educational Series, no. 6 (Washington, D.C.: U.S. Government Printing Office, 1974), p. 10-16. Also, Texas Advisory Committee to the Commission on Civil Rights, Status of Civil Rights in Texas: A Report on the Participation of Mexican Americans, Blacks and Females in the Political Institutions and Processes in Texas 1968-1978, by Dr. Charles L. Cotrell, Volume I (Washington, D.C.: Government Printing Office, 1980), Chapter 7.

[7]Cotrell, Chapter 7.

[8]The ethnic student composition for each district was determined using, Texas Education Agency, "Texas Public School Membership by Ethnic Group (Fall Survey 1979-80 Academic Year)," June 9, 1980.

The school districts in the survey were divided into two categories. First, all school districts having 50% and over (n=163) Chicano student populations were ranked from highest to lowest Chicano student population percentages. (See Appendix A.) Secondly, those school districts with Chicano student populations between 20-49% (n=198) were grouped together and listed in alphabetical order by county. (See Appendix B.)

Once the school districts were identified, Chicano school board membership for each district was determined by manually counting the Spanish-surnamed persons whose names appear in the Texas School Directory.[9] The ethnicity of the student body was compared to the ethnicity of the school board to determine if Chicanos were equitably represented.

Equitable representation was determined using the following classification scheme: if the percentage of Chicano board members for each district was lower than the percentage of Chicano student enrollment, Chicanos were said to be under-represented. Likewise, if the percentage of Chicano school board members was higher than the percentage of Chicano students, then Chicanos were said to be over-represented. When the percentages of both groups were equal, Chicanos were said to be fairly represented.[10]

FINDINGS

The 361 school districts constituting the sample represent over 80% (n=617,388) of the State's 763,623 Chicano students. Thus, the school districts being examined contain a vast majority of the Chicano student population of the State. Ninety-six percent (n=459) of the State's 478 Chicano elected

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[9]Spanish surnamed persons were identified utilizing the U.S. Bureau of Census, "1980 Census List of Spanish Surnames," May 20, 1980 and Texas Education Agency, Texas School Directory 1970-80.

[10]This classification scheme was employed also in Richard Hudlin, et al., Survey of Black School Board Members in the South (Atlanta, GA.: Voter Education Project, 1981), p. 44-46.

board members are found in the school districts contained in this survey.[11]

Of the school districts included in this survey, 335 school districts are under-represented, while only 2 districts are over-represented. In other words, 92.8% of all the districts are under-represented, with 0.6% being over-represented. Only 6.6% (n=24) school districts had fair-representation. (See Table I below.)

Some of the school districts with under-representation do have Chicano representation on their respective boards. However, 54.6% (n=197) school districts with over 20% Chicano student populations have no Chicanos on their local boards. In their respective categories this breaks down as follows: 42 school districts in the 50% and above category have no representation, while 155 school districts in the 20-49% category have no representation by Chicano board members.

Findings in the fairly-represented category and the over-represented category were significant. Of the 6.6% (n=24) fairly represented school districts, the vast majority can be found in the South Texas area. In the two instances where school districts have Chicano over-representation, it is important to note that the Chicano student component in both cases was above 89.0%. (See Edinburgh ISD and Zapata ISD.)

Chicano school board member composition constitutes a majority on the school board in 14.1% (n=51) of the school districts. In these cases, the Chicano student component ranges from 71.4% to 100.0%. Thus, Chicano student composition must reach an average of 90.1% before Chicanos can constitute a majority on the school board. In the 20-49% grouping, Chicanos never constitute a majority on the school board.

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[11]Chicanos comprise 6.5% of Texas' 7,366 elected school board members. See, Southwest Voter Registration Education Project, "Texas Roster of Spanish Surname Elected Officials," July, 1980.

TABLE 1

TOTALS AND PERCENTAGES OF CHICANO SCHOOL BOARD MEMBERS BY CLASSIFICATION

Category	Under Representation	Fair Representation	Over Representation	Totals
Districts With 50% + Chicano Student Enrollment	142 (39.3%)	19 (5.3%)	2 (0.6%)	163 (45.2%)
Districts With 20-49% Chicano Student Enrollment	193 (53.5%)	5 (1.4%)	0 (0.0%)	198 (54.8%)
TOTALS	335 (92.8%)	24 (6.6%)	2 (0.6%)	361 (100.0%)

SUMMARY

The findings of this survey substantiate those of earlier reports on minority representation at the school board level: the boards are predominantly Anglo and Chicano representation remains below 7%. Given the dearth of minority elected officials, it is imperative to address ourselves to the more fundamental reason for this lack of representation.

No data has directly linked at-large election structures with the lack of minority representation on school districts. Yet, it appears that at-large elections preeminently figure in Chicano's inability to win school board elections. At-large elections

> . . . have the effect of preventing the election of minority group members . . . . (Although much progress has been made in recent years, there is still racial and ethnic prejudice among voters in Texas.) Minority group members suffer in . . . (at-large) elections when they campaign against Anglos.[12]

The existence of polarized voting (i.e., voting occurring along racial/ethnic lines) in conjunction with an at-large election structure precludes minority candidates from receiving community-wide support for their candidacy. An example of how this works can be evidenced in the Dimmit ISD. Carmen Cataño, the mother of two boys attending district schools, has run two unsuccessful campaigns for the school board. The school district is 54.8% Chicano; yet, there are no Chicano board members and no Chicano teachers. Mrs. Cataño is convinced that as long as the at-large election structure exists, the Dimmit ISD will not have minority board members. The Anglo community simply will not

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[12]Richard Kraemer, et al., Understanding Texas Politics (St. Paul, MN: West Publishing Co., 1975), pp. 393-394.

vote for a minority group candidate.'

As the school board is primarily responsible for many decisions affecting education, it is necessary to have Chicano representation on school boards. Unless there is some sensitivity to the special needs of Chicano students, "some one million members of this group will soon grow to maturity, unable to participate fully in or contribute meaningfully to this nation's society."[13]

It should not be misconstrued that Chicano representation on local school boards is the panacea for improving the educational opportunities of Chicano students. The State of Texas and its educational arm, the Texas Education Agency, must address themselves to their responsbility to provide educational opportunities for Chicano students. Still, Chicano membership on school boards enhances the possibility that Chicanos will receive a higher return on educational benefits.

The consequences of at-large election structures have devastating effects on minority group political participation. When minority candidates continue to lose elections, the minority community begins to feel alienated from the process. This alienation often manifests itself in lower voter registration rates, decreases in voter turnout, and difficulties in minority candidate recruitment. Thus, any election structure which precludes minorities from full and effective political participation cannot be tolerated. This is especially true at the local school board level.

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[13]United States of America v. State of Texas, No. 5281 (USDC), Eastern District of Texas, January, 1981), p. 16. Order signed January 9, 1981.

APPENDIX A

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
001	Victoria	McFaddin	15	15	100.0	3	0	0.0
002	Kenedy	Kenedy Co. Wide	50	50	100.0	2	0	0.0
003	Val Verde	Juno	6	6	100.0	2	0	0.0
004	Nueces	Santa Cruz	43	36	83.7	8	0	0.0
005	Refugio	Austwell-Tivoli	278	210	75.5	7	0	0.0
006	Floyd	South Plains	44	33	75.0	6	0	0.0
007	Edwards	Rocksprings	512	377	73.6	7	0	0.0
008	Karnes	Runge	401	268	66.8	7	0	0.0
009	Lynn	O'Donnell	564	364	64.5	6	0	0.0
010	Hale	Petersburg	637	408	64.1	7	0	0.0
011	Terry	Meadow	279	178	63.8	7	0	0.0
012	Hale	Cotton Center	198	125	63.1	7	0	0.0
013	Uvalde	Sabinal	596	372	62.4	7	0	0.0
014	Val Verde	Comstock	100	62	62.0	7	0	0.0
015	Runnels	Wingate	47	29	61.7	7	0	0.0

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
016	Crosby	Ralls	844	499	59.1	7	0	0.0
017	Bee	Beeville	4,096	2,406	58.7	7	0	0.0
018	Lamb	Olton	907	531	58.5	7	0	0.0
019	Floyd	Dougherty	26	15	57.7	7	0	0.0
020	Lynn	New Home	263	151	57.4	7	0	0.0
021	Martin	Grady	210	120	57.1	7	0	0.0
022	Lynn	Wilson	348	198	56.9	7	0	0.0
023	Concho	Eola	118	67	56.8	7	0	0.0
024	Crockett	Crockett	1,040	587	56.4	7	0	0.0
025	Floyd	Lockney	916	510	55.7	7	0	0.0
026	Gonzales	Smiley	235	131	55.7	7	0	0.0
027	Dawson	Lamesa	3,076	1,701	55.3	8	0	0.0
028	Castro	Dimmit	1,707	936	54.8	7	0	0.0
029	Garza	Southland	179	98	54.7	7	0	0.0
030	Karnes	Karnes City	1,184	645	54.5	8	0	0.0

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
046	Edwards	Carta Valley	5	4	80.0	7	1	14.3
047	Presidio	Marfa	631	456	72.3	7	1	14.3
048	Uvalde	Uvalde Cons.	4,676	3,338	71.4	7	1	14.3
049	Castro	Hart	665	475	71.4	7	1	14.3
050	Reeves	Pecos-Barstow-Toyah	4,133	2,924	70.7	7	1	14.3
051	Willacy	San Perlita	244	172	70.5	7	1	14.3
052	El Paso	Canutillo	2,152	1,510	70.2	7	1	14.3
053	Ochiltree	Waka	48	33	68.8	7	1	14.3
054	Brewster	Marathon	157	105	66.9	7	1	14.3
055	El Paso	Anthony	398	265	66.6	7	1	14.3
056	Medina	Hondo	1,770	1,158	65.4	7	1	14.3
057	Hays	San Marcos	4,593	2,950	64.2	7	1	14.3
058	Karnes	Kenedy	1,141	725	63.5	7	1	14.3
059	Nueces	Agua Dulce	415	253	61.0	7	1	14.3
060	Hall	Lakeview	105	63	60.0	7	1	14.3

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
031	Bee	Skidmore-Tynan	535	291	54.4	7	0	0.0
032	Hockley	Ropes	421	229	54.4	7	0	0.0
033	Parmer	Bovina	558	303	54.3	7	0	0.0
034	Mitchell	Loraine	331	179	54.1	7	0	0.0
035	Dewitt	Westhoff	69	37	53.6	7	0	0.0
036	Lamb	Spade	169	89	52.7	7	0	0.0
037	Gonzales	Nixon	771	404	52.4	7	0	0.0
038	Uvalde	Knippa	145	76	52.4	7	0	0.0
039	Terrell	Terrell Co.	345	179	51.9	7	0	0.0
040	Crosby	Lorenzo	579	296	51.1	7	0	0.0
041	Swisher	Kress	544	275	50.6	7	0	0.0
042	Floyd	Floydada	1,402	705	50.3	7	0	0.0
043	Reeves	Balmorhea	353	323	91.5	7	1	14.3
044	El Paso	Socorro	4,304	3,829	89.0	7	1	14.3
045	Bee	Pawnee	202	179	88.6	7	1	14.3

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
061	Bexar	Somerset	1,476	881	59.7	7	1	14.3
062	Nueces	Bishop Cons.	1,433	848	59.2	7	1	14.3
063	Wilson	Floresville	1,963	1,123	57.2	7	1	14.3
064	Kleberg	Riviera	537	305	56.8	7	1	14.3
065	Bexar	Southwest	5,043	2,809	55.7	7	1	14.3
066	Deaf Smith	Hereford	5,437	3,006	55.3	7	1	14.3
067	Caldwell	Lockhart	2,774	1,501	54.1	7	1	14.3
068	Hale	Hale Center	867	469	54.1	7	1	14.3
069	Brewster	Alpine	1,236	663	53.6	7	1	14.3
070	Martin	Stanton	854	442	51.8	7	1	14.3
071	Goliad	Goliad	1,218	610	50.1	7	1	14.3
072	La Salle	Cotulla	1,445	1,187	82.1	6	1	16.7
073	Cameron	Santa Rosa	906	841	92.8	7	2	28.6
074	El Paso	Fabens	1,594	1,443	90.5	7	2	28.6
075	El Paso	Tornillo	324	277	85.5	7	2	28.6

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
076	San Patricio	Mathis	2,404	1,909	79.4	7	2	28.6
077	Cameron	Harlingen	12,054	9,465	78.5	7	2	28.6
078	Hudspeth	Ft. Hancock	266	207	77.8	7	2	28.6
079	Zavala	La Pryor	512	377	73.6	7	2	28.6
080	El Paso	Ysleta	44,351	32,367	73.0	7	2	28.6
081	San Patricio	Sinton	2,325	1,685	72.5	7	2	28.6
082	Culberson	Culberson	948	687	72.5	7	2	28.6
083	Jeff Davis	Valentine	109	77	70.6	7	2	28.6
084	Kinney	Brackett	605	422	69.8	7	2	28.6
085	El Paso	El Paso	61,707	40,595	65.8	7	2	28.6
086	Hudspeth	Dell City	376	244	64.9	7	2	28.6
087	Nueces	Banquete	633	402	63.5	7	2	28.6
088	Hudspeth	Sierra Blanca	164	101	61.6	7	2	28.6
089	Jim Wells	Orange Grove	902	529	58.6	7	2	28.6
090	Medina	D'Hanis	237	135	57.0	7	2	28.6

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
091	Atascosa	Charlotte	539	423	78.5	6	2	33.3
092	Jim Wells	La Gloria	91	57	62.6	3	1	33.3
093	Brewster	San Vicente	30	16	53.3	3	1	33.3
094	Hidalgo	Weslaco	7,573	7,065	93.3	8	3	37.5
095	Maverick	Eagle Pass	7,574	7,187	94.9	7	3	42.9
096	Jim Hogg	Jim Hogg	1,322	1,243	94.0	7	3	42.9
097	Willacy	Raymondville	2,784	2,475	88.9	7	3	42.9
098	Webb	Miranda City	129	110	85.3	7	3	42.9
099	Cameron	La Feria	1,730	1,405	81.2	7	3	42.9
100	San Patricio	Taft	1,732	1,320	76.5	7	3	42.9
101	Frio	Dilley	901	677	75.1	7	3	42.9
102	Duval	Freer	988	739	74.8	7	3	42.9
103	Bexar	Southside	2,029	1,413	69.6	7	3	42.9
104	Hidalgo	Sharyland	1,604	1,085	67.6	7	3	42.9
105	Nueces	Corpus Christi	38,170	24,451	64.1	7	3	42.9

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
106	Pecos	Ft. Stockton	3,234	2,005	62.0	7	3	42.9
107	Victoria	Bloomington	842	517	61.4	7	3	42.9
108	Medina	Natalia	728	405	55.6	7	3	42.9
109	El Paso	Clint	920	500	54.3	7	3	42.9
110	Cameron	South Texas	278	251	90.3	20	9	45.0
111	Jim Wells	Premont	1,014	820	80.9	6	3	50.0
112	Atascosa	Lytle	669	339	50.7	6	3	50.0
113	Hidalgo	Mission	6,580	6,098	92.7	9	5	55.6
114	Cameron	Brownsville	25,245	23,303	92.3	7	4	57.1
115	Willacy	Lyford	1,421	1,296	91.2	7	4	57.1
116	Nueces	Driscoll	191	174	91.1	7	4	57.1
117	Cameron	Rio Hondo	1,266	1,120	88.5	7	4	57.1
118	Hidalgo	McAllen	16,140	13,581	84.1	7	4	57.1
119	Dimmit	Carrizo Springs	2,812	2,264	80.5	7	4	57.1
120	Bexar	South San Antonio	11,008	8,835	80.3	7	4	57.1

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School; Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
121	Nueces	West Oso	2,186	1,749	80.0	7	4	57.1
122	Cameron	Point Isabel	1,634	1,254	76.7	7	4	57.1
123	Webb	United	4,212	3,216	76.4	7	4	57.1
124	Jim Wells	Alice	6,187	4,542	73.4	7	4	57.1
125	Val Verde	San Felipe-Del Rio	9,193	6,635	72.2	7	4	57.1
126	Kleberg	Kingsville	6,099	3,887	63.7	7	4	57.1
127	Kleberg	Laureles	41	41	100.0	3	2	66.7
128	Bexar	San Antonio	61,816	44,800	72.5	6	4	66.7
129	Cameron	Santa Maria	299	299	100.0	7	5	71.4
130	Willacy	Lasara	232	224	96.6	7	5	71.4
131	Webb	Laredo	21,416	20,589	96.1	7	5	71.4
132	Duval	Benavides	803	746	92.9	7	5	71.4
133	Hidalgo	Donna	4,546	4,216	92.7	7	5	71.4
134	Cameron	San Benito Cons.	6,326	5,790	91.5	7	5	71.4
135	Frio	Pearsall	2,456	1,977	80.5	7	5	71.4

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
136	Cameron	Los Fresnos	2,743	2,157	78.6	7	5	71.4
137	Atascosa	Poteet	1,403	1,046	74.6	7	5	71.4
138	San Patricio	Odem	1,141	818	71.7	7	5	71.4
139	Brooks	Brooks	1,985	1,800	90.7	8	6	75.0
140	Hidalgo	Progreso	532	532	100.0	9	7	77.8
141	Hidalgo	La Villa	471	468	99.4	7	6	85.7
142	Hidalgo	Monte Alto	344	334	97.1	7	6	85.7
143	Hidalgo	Mercedes	3,949	3,823	96.8	7	6	85.7
144	El Paso	San Elizario	560	555	95.7	7	6	85.7
145	Webb	Webb Cons.	221	207	93.7	7	6	85.7
146	Jim Wells	Ben Bolt-Palito Blanco	436	397	91.1	7	6	85.7
147	Starr	Rio Grande	4,384	4,278	97.6	8	7	87.5
148	Duval	Ramirez	62	62	100.0	3	3	100.0
149	Hidalgo	Valley View	192	192	100.0	6	6	100.0
150	Duval	San Diego	1,643	1,638	99.7	7	7	100.0

APPENDIX A CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 50% AND OVER CHICANO STUDENT POPULATIONS

	County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number School Board Members	Total Number Chicano School Board Members	Percent Chicano Representation on Local School Boards
151	Zavala	Crystal City	2,347	2,333	99.4	7	7	100.0
152	Starr	Roma	3,171	3,148	99.3	6	6	100.0
153	Hidalgo	Hidalgo	1,538	1,525	99.2	7	7	100.0
154	Hidalgo	Edcouch-Elsa	3,199	3,123	97.6	7	7	100.0
155	Hidalgo	La Joya	3,134	3,058	97.6	7	7	100.0
156	Starr	San Isidro	392	380	96.9	8	8	100.0
157	Dimmit	Asherton	522	502	96.2	7	7	100.0
158	Nueces	Robstown	4,601	4,404	95.7	7	7	100.0
159	Hidalgo	Pharr-San Juan-Alamo	12,228	11,595	94.8	7	7	100.0
160	Presidio	Presidio	725	683	94.2	7	7	100.0
161	Bexar	Edgewood	18,090	17,005	94.0	7	7	100.0
162	Hidalgo	Edinburg	10,336	9,404	91.0	7	7	100.0
163	Zapata	Zapata	1,594	1,419	89.0	7	7	100.0

APPENDIX B

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
ANDREWS COUNTY	Andrews ISD	2,832	817	28.8%	0	7	0.0%
ANGELINA COUNTY	Diboll ISD	1,860	489	26.3%	0	6	0.0%
ARANSAS COUNTY	Aransas County ISD	2,439	746	30.6%	0	7	0.0%
ATASCOSA COUNTY	Jourdanton ISD	925	459	49.6%	1	7	14.3%
ATASCOSA COUNTY	Pleasanton ISD	2,324	1,144	49.2%	1	7	14.3%
AUSTIN COUNTY	Sealy ISD	1,552	82	21.1%	0	8	0.0%
BAILEY COUNTY	Muleshoe ISD	1,712	852	49.8%	0	7	0.0%
BAILEY COUNTY	Three Way ISD	205	96	46.8%	0	7	0.0%
BASTROP COUNTY	Elgin ISD	1,617	772	29.1%	0	7	0.0%
BEE COUNTY	Pettus ISD	492	206	41.9%	2	7	28.6%
BELL COUNTY	Bartlett ISD	438	122	27.9%	0	7	0.0%
BEXAR COUNTY	Alamo Heights	3,594	808	22.5%	0	7	0.0%
BEXAR COUNTY	East Central	4,469	1,166	26.1%	1	7	14.3%
BEXAR COUNTY	Northside ISD	32,692	11,546	35.3%	2	6	33.8%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
BOSQUE COUNTY	Morgan ISD	146	42	28.8%	0	7	0.0%
BRAZORIA COUNTY	Damon ISD	139	33	23.7%	0	7	0.0%
BREWSTER COUNTY	Terlingua CSD	35	8	22.9%	0	3	0.0%
BRISCOE COUNTY	Silverton ISD	306	67	21.9%	0	7	0.0%
BROWN COUNTY	Brownwood St. Hm. & School	*	*	33.1%	*	*	*******
BURLESON COUNTY	Somerville ISD	619	135	21.8%	1	7	14.3%
CALDWELL COUNTY	Luling ISD	1,265	384	30.4%	0	7	0.0%
CALDWELL COUNTY	Prairie Lea ISD	193	86	44.6%	1	7	14.3%
CALHOUN COUNTY	Calhoun Co. ISD	4,676	1,941	41.5%	0	7	0.0%
COCHRAN COUNTY	Morton ISD	927	450	48.5%	0	7	0.0%
COCHRAN COUNTY	Whiteface ISD	387	127	32.8%	0	7	0.0%
COCHRAN COUNTY	Bledsoe ISD	65	31	47.7%	1	7	14.3%
COKE COUNTY	Robert Lee ISD	278	78	28.1%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
COLEMAN COUNTY	Santa Ana ISD	354	93	26.3%	0	8	0.0%
COLLIN COUNTY	Frisco ISD	921	215	23.3%	0	7	0.0%
COLLINGSWORTH COUNTY	Wellington ISD	842	183	21.7%	0	7	0.0%
COLORADO COUNTY	Rice Consolidated ISD	1,559	474	30.4%	0	7	0.0%
COLORADO COUNTY	Weimer ISD	531	108	20.3%	0	7	0.0%
COMAL COUNTY	New Braunfels ISD	3,980	1,664	41.8%	0	7	0.0%
COMANCHE COUNTY	DeLeon ISD	758	164	21.6%	0	7	0.0%
CONCHO COUNTY	Eden ISD	323	157	48.6%	0	7	0.0%
CONCHO COUNTY	Paint Rock ISD	148	49	33.1%	0	7	0.0%
COOKE COUNTY	Gainesville St. SC	*	*	24.8%	*	*	*****
COTTLE COUNTY	Paducah ISD	521	108	20.7%	0	8	0.0%
CRANE COUNTY	Crane ISD	1,137	373	32.8%	0	7	0.0%
CROSBY COUNTY	Crosbyton ISD	691	332	48.0%	0	7	0.0%
DALLAS COUNTY	Grand Prairie ISD	14,104	2,866	20.3%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	total Number School Board Members	Percent Chicano Representation on Local School Boards
DAWSON COUNTY	Dawson ISD	206	92	44.7%	0	7	0.0%
DAWSON COUNTY	Klondike ISD	344	146	42.4%	0	7	0.0%
DAWSON COUNTY	Sands ISD	293	140	47.8%	0	7	0.0%
DEAF SMITH COUNTY	Walcott ISD	51	17	33.3%	0	7	0.0%
DEWITT COUNTY	Cuero ISD	1,841	606	32.9%	0	7	0.0%
DEWITT COUNTY	Nordheim ISD	117	57	48.7%	0	7	0.0%
DEWITT COUNTY	Yoakum ISD	1,603	385	24.0%	0	7	0.0%
DEWITT COUNTY	Yorktown !SD	763	298	39.1%	0	7	0.0%
DICKENS COUNTY	McAddo ISD	100	49	49.0%	2	5	40.0%
DICKENS COUNTY	Spur ISD	505	173	34.3%	0	7	0.0%
DICKENS COUNTY	Patton Springs ISD	124	34	27.4%	0	7	0.0%
ECTOR COUNTY	Ector County ISD	23,105	6,321	27.4%	1	7	14.3%
EDWARDS COUNTY	Nueces Canyon ISD	384	141	36.7%	1	7	14.3%
ELLIS COUNTY	Avalon ISD	153	56	36.6%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
ELLIS COUNTY	Ferris ISD	897	213	23.7%	0	7	0.0%
FALLS COUNTY	Chilton ISD	341	71	20.8%	1	7	14.3%
FAYETTE COUNTY	Flatonia ISD	409	93	22.7%	0	7	0.0%
FISHER COUNTY	Hobbs ISD	96	36	37.5%	0	6	0.0%
FISHER COUNTY	Roby ISD	325	72	22.2%	0	7	0.0%
FISHER COUNTY	Rotan ISD	572	219	38.3%	0	7	0.0%
FORT BEND COUNTY	Lamar Cons. ISD	8,517	3,510	41.2%	0	7	0.0%
GAINES COUNTY	Seagraves ISD	786	351	44.7%	0	7	0.0%
GAINES COUNTY	Loop ISD	172	81	47.1%	0	7	0.0%
GAINES COUNTY	Seminole ISD	2,014	804	39.9%	0	7	0.0%
GALVESTON COUNTY	Galveston ISD	9,709	2,208	22.7%	0	7	0.0%
GALVESTON COUNTY	Moody St. Sch. ISD	*	*	21.9%	*	*	*****
GARZA COUNTY	Post ISD	1,059	336	31.7%	0	7	0.0%
GLASSCOCK COUNTY	Glasscock ISD	374	164	43.9%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Number Percent Chicano Student Populaion	Total Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
GONZALES COUNTY	Gonzales ISD	2,312	802	34.7%	0	8	0.0%
GONZALES COUNTY	Waelder ISD	230	114	49.6%	1	7	14.3%
GUADALUPE COUNTY	Seguin ISD	5,576	2,402	43.1%	0	7	0.0%
GUADALUPE COUNTY	Navarro ISD	443	167	37.7%	0	7	0.0%
HALE COUNTY	Abernathy ISD	1,084	469	43.3%	0	7	0.0%
HALE COUNTY	Plainview ISD	6,132	2,703	44.1%	0	7	0.0%
HALL COUNTY	Memphis ISD	729	453	23.0%	0	7	0.0%
HALL COUNTY	Turkey-Quitague ISD	381	230	24.7%	0	7	0.0%
HARRIS COUNTY	Houston ISD	193,907	49,639	25.6%	0	7	0.0%
HARRIS COUNTY	Pasadena ISD	36,471	7,622	20.9%	0	7	0.0%
HARTLEY COUNTY	Hartley ISD	203	43	21.2%	0	7	0.0%
HASKELL COUNTY	Harkell ISD	770	201	26.1%	1	7	14.3%
HASKELL COUNTY	Rochester ISD	201	59	29.4%	0	7	0.0%
HASKELL COUNTY	Rule ISD	252	70	27.8%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
HASKELL COUNTY	Weinert ISD	88	28	31.8%	0	7	0.0%
HASKELL COUNTY	Paint Creek	61	20	32.8%	0	6	0.0%
HAYS COUNTY	Hays Cons. ISD	2,317	765	33.0%	0	7	0.0%
HOCKLEY COUNTY	Anton ISD	415	164	39.5%	1	7	14.3%
HOCKLEY COUNTY	Levelland ISD	3,346	1,118	33.4%	0	7	0.0%
HOCKLEY COUNTY	Smyer ISD	267	60	22.5%	0	7	0.0%
HOCKLEY COUNTY	Sundown ISD	418	144	34.4%	0	7	0.0%
HOCKLEY COUNTY	Whitharral ISD	188	81	43.1%	0	7	0.0%
HOUSTON COUNTY	Crockett State Sch.	*	*	28.2%	*	*	*****
HOWARD COUNTY	Big Spring ISD	5,026	1,765	35.1%	1	7	14.3%
HUDSPETH COUNTY	Allamore CSD	7	2	28.6%	0	3	0.0%
IRION COUNTY	Irion County ISD	299	75	25.1%	1	7	14.3%
JACKSON COUNTY	Edna ISD	1,800	413	22.9%	0	7	0.0%
JACKSON COUNTY	Ganado ISD	669	193	28.8%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
JEFF DAVIS COUNTY	Ft. Davis ISD	223	108	46.4%	1	7	14.3%
JONES COUNTY	Anson ISD	862	273	31.7%	1	6	16.7%
JONES COUNTY	Hamlin ISD	803	203	25.3%	0	7	0.0%
JONES COUNTY	Stamford ISD	999	322	32.2%	0	7	0.0%
KENDALL COUNTY	Comfort ISD	631	179	28.4%	0	7	0.0%
KENT COUNTY	Jayton-Gerard	210	47	22.4%	0	7	0.0%
KERR COUNTY	Divide CSD	7	3	42.9%	3	9	0.0%
KERR COUNTY	Kerrville ISD	3,326	784	23.6%	0	7	0.0%
KIMBLE COUNTY	Junction ISD	819	219	26.7%	0	7	0.0%
KLEBERG COUNTY	Ricardo ISD	273	132	48.4%	1	8	12.5%
KNOX COUNTY	Goree ISD	152	70	46.1%	0	7	0.0%
KNOX COUNTY	Knox City-O'Brien	402	136	33.8%	0	7	0.0%
KNOX COUNTY	Munday ISD	471	124	26.3%	0	7	0.0%
LAMB COUNTY	Amherst ISD	306	110	35.9%	0	8	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
LAMB COUNTY	Littlefield ISD	1,827	785	43.0%	0	8	0.0%
LAMB COUNTY	Springlake Earth ISD	689	339	49.2%	0	7	0.0%
LAMB COUNTY	Sudan ISD	415	114	27.5%	0	7	0.0%
LEE COUNTY	Giddings St. Hm. and Sch.	*	*	33.8%	*	*	*****
LIVE OAK COUNTY	George West ISD	1,191	495	41.6%	1	7	14.3%
LIVE OAK COUNTY	Three Rivers ISD	718	332	46.2%	0	7	0.0%
LUBBOCK COUNTY	Lubbock ISD	30,340	9,019	29.7%	1	7	14.3%
LUBBOCK COUNTY	New Deal ISD	533	171	32.1%	0	7	0.0%
LUBBOCK COUNTY	Slaton ISD	1,827	711	38.9%	1	7	14.3%
LUBBOCK COUNTY	Lubbock-Cooper ISD	1,205	329	27.3%	0	7	0.0%
LUBBOCK COUNTY	Frenship ISD	2,415	1,591	26.6%	0	7	0.0%
LUBBOCK COUNTY	Roosevelt ISD	1,212	274	22.6%	0	7	0.0%
LUBBOCK COUNTY	Shallowater ISD	824	189	22.9%	0	7	0.0%
LUBBOCK COUNTY	Idalou ISD	1,038	461	44.4%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
LUBBOCK COUNTY	Lubbock St. Sch.	*	*	23.5%	*	*	*****
LYNN COUNTY	Tahoka ISD	942	439	46.6%	0	7	0.0%
MASON COUNTY	Mason ISD	692	217	31.4%	0	7	0.0%
MATAGORDA COUNTY	Bay City ISD	4,269	1,119	26.2%	0	7	0.0%
MATAGORDA COUNTY	Tidehaven ISD	890	275	30.9%	0	7	0.0%
MATAGORDA COUNTY	Palacios ISD	1,392	567	40.7%	1	7	14.3%
MCCULLOCH COUNTY	Brady ISD	1,489	534	35.9%	0	7	0.0%
MCCULLOUCH COUNTY	Lohn ISD	73	25	34.2%	0	7	0.0%
MCMULLEN COUNTY	McMullen ISD	147	72	49.0%	1	7	14.3%
MEDINA COUNTY	Devine ISD	1,416	646	45.6%	1	7	14.3%
MEDINA COUNTY	Medina Valley ISD	1,601	706	44.1%	0	7	0.0%
MENARD COUNTY	Menard ISD	508	246	48.4%	2	7	28.6%
MIDLAND COUNTY	Midland ISD	15,108	3,262	21.6%	0	7	0.0%
MILAN COUNTY	Buckholts ISD	151	46	30.5%	0	7	0.0%
MITCHELL COUNTY	Colorado ISD	1,415	551	38.9%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
MITCHELL COUNTY	Westbrook ISD	164	36	22.0%	0	6	0.0%
MONTAGUE COUNTY	Montague ISD	85	19	22.4%	0	7	0.0%
MOORE COUNTY	Dumas ISD	3,306	895	27.1%	0	7	0.0%
NOLAN COUNTY	Roscoe ISD	500	220	44.0%	0	7	0.0%
NOLAN COUNTY	Sweetwater ISD	2,970	794	26.7%	0	7	0.0%
NOLAN COUNTY	Divide ISD	84	18	21.4%	0	6	0.0%
NUECES COUNTY	Calallen ISD	2,688	617	23.0%	0	7	0.0%
NUECES COUNTY	London ISD	165	61	37.0%	0	7	0.0%
NUECES COUNTY	Tuloso-Midway	2,549	994	39.0%	1	7	14.3%
PARMER COUNTY	Farwell ISD	534	149	27.9%	0	7	0.0%
PARMER COUNTY	Friona ISD	1,343	591	44.0%	0	7	0.0%
PARMER COUNTY	Lazbuddie	286	123	43.0%	0	7	0.0%
PECOS COUNTY	Buena Vista ISD	188	92	48.9%	1	7	14.3%
PECOS COUNTY	Iraan-Sheffield ISD	447	140	31.3%	1	7	14.3%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
REAGAN COUNTY	Reagan ISD	959	386	40.3%	0	7	0.0%
REFUGIO COUNTY	Woodsboro ISD	750	338	45.1%	1	7	14.3%
REFUGIO COUNTY	Refugio ISD	1,058	473	44.7%	0	7	0.0%
ROBERTSON COUNTY	Mumford ISD	83	33	39.8%	0	7	0.0%
RUNNELS COUNTY	Ballinger ISD	1,166	344	29.5%	0	7	0.0%
RUNNELS COUNTY	Miles ISD	417	113	27.1%	0	7	0.0%
RUNNELS COUNTY	Winters ISD	790	248	31.4%	0	7	0.0%
SAN PATRICIO COUNTY	Aransas Pass ISD	2,046	705	34.5%	0	6	0.0%
SAN PATRICIO COUNTY	Gregory-Portland	4,361	1,463	33.5%	2	7	28.6%
SAN PATRICIO COUNTY	Ingleside ISD	1,579	420	26.6%	0	7	0.0%
SAN SABA COUNTY	San Saba ISD	844	260	30.8%	0	7	0.0%
SCHLEICHER COUNTY	Schleicher ISD	591	188	31.8%	0	7	0.0%
SCURRY COUNTY	Heimleigh ISD	188	75	39.8%	0	7	0.0%
SCURRY COUNTY	Snyder ISD	3,410	952	27.9%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Number Total Chicano School Board Members	Total Number School Board Members	Percent Representation on Local School Boards
STERLING COUNTY	Sterling City ISD	286	116	40.6%	0	7	0.0%
SUTTON COUNTY	Sonora ISD	1,195	554	46.4%	1	7	14.3%
SWISHER COUNTY	Tulia ISD	1,552	579	37.3%	0	7	0.0%
TAYLOR COUNTY	Abilene State Sch.	*	*	21.2%	*	*	*****
TERRY COUNTY	Brownfield ISD	2,843	1,377	48.4%	0	7	0.0%
TERRY COUNTY	Union ISD	111	50	45.0%	0	7	0.0%
TERRY COUNTY	Wellman ISD	224	79	35.3%	0	7	0.0%
TOM GREEN COUNTY	Christoval ISD	191	58	30.4%	0	7	0.0%
TOM GREEN COUNTY	San Angelo ISD	14,124	4,571	32.4%	1	7	14.3%
TRAVIS COUNTY	Austin ISD	57,082	14,738	25.8%	1	7	14.3%
TRAVIS COUNTY	Austin State Sch.	*	*	28.6%	*	*	*****
TRAVIS COUNTY	Texas Sch. for the Blind	206	50	24.3%	1	5	20.0%
TRAVIS COUNTY	Manor ISD	830	224	27.0%	1	7	14.3%
TRAVIS COUNTY	Del Valle ISD	3,929	1,314	33.4%	0	8	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
UPTON COUNTY	McCamey ISD	681	285	41.9%	0	9	0.0%
UPTON COUNTY	Rankin ISD	441	139	31.5%	0	7	0.0%
VICTORIA COUNTY	Victoria Cons. ISD	13,023	4,970	38.2%	1	7	14.3%
VICTORIA COUNTY	Nursery ISD	69	14	20.3%	0	3	0.0%
WALKER COUNTY	Windham Schools	9,121	2,232	24.5%	1	8	12.5%
WARD COUNTY	Monahans-Wickett-Pyote	2,471	889	32.4%	0	7	0.0%
WARD COUNTY	Grandfalls-Royalty	240	108	45.0%	1	7	14.3%
WARD COUNTY	W. Tx. Childrens Home ISD	*	*	42.9%	*	*	*****
WHARTON COUNTY	Boling ISD	948	223	23.5%	0	7	0.0%
WHARTON COUNTY	El Campo ISD	3,564	1,223	34.3%	0	7	0.0%
WHARTON COUNTY	Wharton ISD	2,828	762	26.9%	0	7	0.0%
WHARTON COUNTY	Louise ISD	417	110	26.4%	0	7	0.0%
WILBARGER COUNTY	Northside ISD	126	26	20.6%	0	7	0.0%
WILLIAMSON COUNTY	Georgetown ISD	3,466	753	21.7%	0	7	0.0%

APPENDIX B CONTINUED

CHICANO REPRESENTATION ON LOCAL SCHOOL BOARDS IN TEXAS: SCHOOL DISTRICTS HAVING 20.0% - 49.9% CHICANO STUDENT POPULATIONS

County	School District	Total Student Population	Total Chicano Student Population	Percent Chicano Student Population	Total Number Chicano School Board Members	Total Number School Board Members	Percent Chicano Representation on Local School Boards
WILLIAMSON COUNTY	Granger ISD	280	71	25.4%	0	7	0.0%
WILLIAMSON COUNTY	Hutto ISD	337	106	31.5%	0	7	0.0%
WILLIAMSON COUNTY	Taylor ISD	2,232	679	30.4%	1	7	14.3%
WILLIAMSON COUNTY	Thrall ISD	420	104	24.8%	0	7	0.0%
WILLIAMSON COUNTY	Coupland ISD	50	11	22.0%	0	7	0.0%
WILSON COUNTY	Poth ISD	665	242	36.4%	1	7	14.3%
WILSON COUNTY	Stockdale ISD	518	204	39.4%	0	7	0.0%
WINKLER COUNTY	Kermit ISD	1,825	641	35.1%	0	7	0.0%
WINKLER COUNTY	Wink-Loving ISD	375	89	23.7%	0	7	0.0%
YOAKUM COUNTY	Denver County ISD	1,455	508	34.9%	0	7	0.0%
YOAKUM COUNTY	Plains ISD	534	204	38.2%	0	7	0.0%

BIBLIOGRAPHY

Hudlin, Richard; Lewis, Shelby; Ellis, Kenneth; and Fisher, Michael. Survey of Black School Board Members in the South. Atlanta, Georgia: Voter Education Project, 1981.

Kraemer, Richard; Crain, Ernest; and Maxwell, William. Understanding Texas Politics. St. Paul, Minnesota: West Publishing Company, 1975.

Obeldo, Mario. Director, Mexican American Legal Defense Fund. Hearings before the Select Committee on Equal Education Opportunity of the U.S. Senate. Part 4: Mexican American Education. Washington, D.C. August, 1980.

Southwest Voter Registration Education Project. "Texas Roster of Spanish Surname Elected Officials." San Antonio: Southwest Voter Registration Education Project, July, 1980.

Texas Education Agency. "Texas Public School Membership by Ethnic Group (Fall Survey 1979-80 Academic Year)." Austin, Texas: Texas Education Agency. October, 1979.

_____. Texas School Directory. Austin, Texas: Texas Education Agency. October, 1979.

U.S. Bureau of Census. "1980 Census List of Spanish Surnames." May 20, 1980.

U.S. Commission on Civil Rights. Mexican American Education Study. 6 Vols. Washington, D.C.: Government Printing Office, 1971-74.

_____. Texas Advisory Committee. Status of Civil Rights in Texas: A Report on the Participation of Mexican Americans, Blacks and Females in the Political Institutions and Processes of Texas, 1968-1978. By Dr. Charles L. Cotrell Vol. I Washington, D.C.: U.S. Government Printing Office, 1980.

_____. Working with Your School. Washington, D.C.: U.S. Government Printing Office, 1977.

United States of America v. State of Texas. No. 5281 (U.S.D.C.) Eastern District of of Texas, January 9, 1981.

Senator HATCH. We will recess until the next day of hearings.

[Whereupon, the subcommittee recessed, to reconvene at 9:30 a.m., on Thursday, February 11, 1982, in room 2228, Dirksen Senate Office Building.]

VOTING RIGHTS ACT

THURSDAY, FEBRUARY 11, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:44 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Metzenbaum.

Staff present: Stephen Markman, chief counsel; William Lucius, counsel; Claire Greif, clerk; and Prof. Laurens Walker.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the sixth day of hearings on the Voting Rights Act by the Subcommittee on the Constitution.

Today we are scheduled to focus upon the bailout provisions, although I am sure we will not totally avoid further discussion on the proposed changes in section 2 of the act. I can assure everyone that there will be continuing discussion on section 2 over the next several months.

At this point I would like to explore briefly several misconceptions relating to the proposed bailout provisions in the House-approved voting rights legislation.

If the Judiciary Committee is going to be able to draft a reasonable bailout provision, I believe that it is important to understand the implications of the House legislation.

The first, and perhaps the most basic, misconception is that the Voting Rights Act is scheduled to expire in August of this year. This simply is not the case. The Voting Rights Act is a permanent piece of legislation that has no expiration date.

Rather, what is significant about August 1982 is that a number of jurisdictions that are "covered" by the preclearance mechanism will have finally satisfied their obligations under the Voting Rights Act and will then be able to petition the district court in the District of Columbia to bail out of further preclearance. That is after 17 years of coverage.

The preclearance mechanism was established in section 5 of the original Voting Rights Act and effected a major transformation in Federal-State relations by requiring certain covered jurisdictions—primarily in the southern United States—to secure approval by the

Justice Department for all proposed changes in electoral and voting laws and procedures. Jurisdictions were covered on the basis of a formula that looked to voter registration and participation figures, as well as the existence of certain electoral devices such as literacy tests.

Under the original Voting Rights Act, covered jurisdictions—and these include States, counties, school districts, and utility districts—were required to abolish all discriminatory electoral devices for a period of 5 years. After 5 years of "clean hands," such a jurisdiction could petition the district court here in Washington to bail out of further preclearance obligations.

In 1970, however, when a number of covered jurisdictions were on the verge of satisfying this requirement, Congress enacted new voting rights legislation that extended this "clean hands" period to 10 years; thus, preventing the jurisdictions from satisfying the basic bailout requirement.

In 1975, again when a number of covered jurisdictions were on the verge of satisfying the new requirement, Congress enacted new voting rights legislation to allow a bailout petition only after 17 years of clean hands. Now, in 1982, when many of these jurisdictions are on the verge of satisfying the latest requirement, it is again proposed to change the bailout requirement for at least another 10 years.

In other words, what is significant about August 1982 is not that the Voting Rights Act will expire—indeed, most of its provisions will remain in perpetuity—but that some covered jurisdictions will, after 17 years of clean hands, finally be able to petition the courts to bail out. They will have satisfied the obligations imposed upon them by Congress in 1965, 1970, and 1975. Thus, the new issue is not whether or not the Voting Rights Act will be extended, but whether or not Congress will again change the bailout requirements for jurisdictions that again are on the verge of having satisfied earlier-stated requirements, some of which have done so repeatedly each time this has been extended.

The second misconception is that the bailout criteria in the House bill represent a relaxation of the present bailout requirements. This, again, is simply not true. To repeat, the present bailout requirement for covered jurisdictions is that they be able to demonstrate to the district court in Washington that they have gone for a 17-year period without having employed a discriminatory test or device, along the lines of a literacy test, a poll tax, a morals requirement, or an ability to interpret things such as the Constitution. That is the sole bailout requirement for covered jurisdictions. Under the House legislation, a new laundry list of obligations would be established.

While I would emphasize that I do not personally oppose each of these new bailout requirements, and believe that some of them can be justified, I do think that it is important that we understand that the House bailout does not represent a liberalized bailout. It is precisely the opposite.

The third misconception relating to the House bailout is that this provision represents simply another temporary postponement in the possibility of bailout for covered jurisdictions. This is emphatically not the case. Rather, the House bill is not a 5-year or a 10-

year postponement in the bailout possibility; instead, it represents a permanent extension of the preclearance obligation by covered jurisdictions. Jurisdictions will be required to preclear changes in voting laws and procedures through the Justice Department in perpetuity until they can satisfy the new bailout criteria established in the House bill.

The fourth misconception relating to bailout is that the preclearance procedures are of clear constitutionality, whatever form they take. This, again, is not the case.

The constitutionality of section 5 has, in fact, been upheld in two major decisions since 1965—in the case of *South Carolina* v. *Katzenbach* in 1966 and in *City of Rome* v. *United States* in 1980. In both of these cases, the constitutional propriety of the preclearance mechanism was affirmed subject, first, to a recognition of their temporary nature and, second, subject to a recognition that such a requirement was permissible only to address the "exceptional" conditions then existing in the South. Whether or not such "exceptional" circumstances continue to exist is a question that I hope will be addressed during the next several days of testimony.

The fifth and final misconception that I would like to address this morning is the most subjective of these misconceptions. That is, that the House bailout provision is a reasonable bailout provision. The implications of this determination are enormous. If the House bailout is not reasonable, and will not afford a reasonable opportunity for jurisdictions with clean hands to bail out from coverage, then, because of the permanent nature of the House preclearance obligation, covered jurisdictions will be required to preclear in perpetuity. The "exceptional" and "temporary" remedy of preclearance will become a permanent part of our constitutional landscape.

What are these bailout criteria in the House bill? In order to become eligible for bailout under this legislation, a covered State and all jurisdictions within it must demonstrate that for the previous 10 years prior to filing a bailout provision:

First, it has not used a discriminatory test or device. This is essentially the present bailout requirement.

Second, no final judgment has been issued by a Federal court finding statutory or constitutional violations of voting rights. While this strikes me as a reasonable requirement, I am concerned nevertheless that bailout can be stayed under this provision by the simple expedient of an individual or group filing a voting discrimination suit immediately prior to bailout. Under this provision, bailout may not proceed if there is any pending discrimination suit filed against a jurisdiction. Of course, it takes as long as 5 years, or longer, to get to the Supreme Court. That extends it simply for at least that period of time.

Third, no consent agreement may have been entered into resulting in an alteration of voting practices by the jurisdiction. This strikes me as an extremely ill-advised provision totally discouraging what has traditionally been encouraged in our judicial system—out-of-court settlements.

The premise of this provision is that consent decrees are implicit admissions of guilt by a responding party. I do not believe that anyone really believes this to be the case. In any event, the upshot

of this requirement will be that more and more voting rights suits will be litigated indefinitely since jurisdictions will recognize that consent decrees will prevent them from petitioning for bailout for at least another 10-year period.

Fourth, in order to bail out, the jurisdiction must not have been assigned Federal voting examiners during the pevious 10-year period. The problem here is that there are virtually no criteria for dispatching Federal voting examiners into a jurisdiction. They can literally, be dispatched at the total discretion of the Justice Department. There is absolutely no review of this decision.

I am concerned that a bailout effort could be frustrated at the total and unchecked discretion of the Justice Department. There is absolutely no requirement that the examiners sent to the jurisdiction in fact identify voting rights violations.

Fifth, the jurisdiction and all jurisdictions within it must have complied fully with the preclearance obligations of section 5. While they may seem reasonable at first blush, I would suggest that the scope of the present preclearance obligation is so broad and all encompassing that even the most conscientious of jurisdictions may have inadvertently failed to make all requirement submissions under section 5. Even the movement of a polling booth from one floor of a building to another floor of that same building must be precleared, which is the height of absurdity in my opinion.

As the Supreme Court has stated, everything must be precleared that affects voting "in even a minor way," and however indirectly. To the extent that this new bailout criteria is retained, failures to submit that were trivial in the past will suddenly loom large. Bailout opponents will always be able to identify some failures to submit. Even under present circumstances, there have been nearly 20,000 submissions to the Justice Department under section 5.

Sixth, no objections may have been raised to changes submitted for preclearance by the covered jurisdiction. Again, while this may seem outwardly reasonable, it should be recognized that countless technical objections are raised by the Attorney General to submissions on a regular basis.

In addition, it should be remembered that preclearing jurisdictions have the burden of proof to carry that submissions not only do not have a discriminatory purpose, but that they will not have a discriminatory effect as well. Neither the Justice Department, much less covered towns and counties, have much understanding as to what this standard requires. I have yet to hear a witness testify before us who can define that standard.

Seventh, and perhaps most dubious, jurisditions must have eliminated voting procedures and election methods which "inhibit or dilute" equal access to the electoral process, whatever that means; must have "expanded" opportunities for "convenient" registration, whatever that means; and must have engaged in other "constructive" efforts encouraging minorities to "participate" in the electoral process, whatever that means.

What this last requirement means to me is that the "results" definition of discrimination, proportional representation by race in my view, is going to become a standard that will be evaluated in determining bailout. I don't care how much proponents of this language try to obfuscate this fact.

Finally, it should be noted that the House bill would establish an additional 2-year parole period during which even allegations of violations of any of these bailout criteria would work to prohibit bailout.

Ladies and gentlemen, whether or not the sum of these bailout requirements is reasonable will have to be decided by 100 separate individuals in this body. I do not believe that they are reasonable; rather, I believe that in combination with the permanent extension of preclearance in this legislation, covered jurisdictions will likely be subject to indefinite coverage. I would hope that we would carefully consider the implications of doing this.

I look forward to the testimony of our outstanding witnesses today and welcome each of them to the committee.

Senator Metzenbaum?

OPENING STATEMENT OF HON. HOWARD METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Mr. Chairman, I do not have a lengthy opening statement.

First, I commend you for your persistence and your patience in proceeding forward with these hearings. With all your other commitments, I know it is very difficult; it certainly is difficult for the rest of us.

I want to repeat again my own concern about bringing the hearings to a conclusion at a prompt time so that Congress may deal with this matter without having the pressure of adjournment, recesses, or whatever. Therefore, I hope we can keep moving forward and bring this to a prompt conclusion. If it means one less hearing day, so be it.

I think the important thing is to get this to a vote by the members of the committee since, in all honesty, I doubt very much that you are being persuaded, that I am being persuaded, or that anyone else is being persuaded, or even that the hearing record is going to persuade many people to change their position. It probably should, but I doubt that it will.

I would like to include in the record at this point the letter that the Leadership Conference on Civil Rights addressed to the Attorney General on February 9, 1982, because I think it clarifies the matter. When the Attorney General was present before this committee, he indicated that the Leadership Conference on Civil Rights and the various civil rights groups who had been in to see him had not been in favor of anything other than a simple extension of the Voting Rights Act.

The letter begins with the following paragraph:

> DEAR MR. ATTORNEY GENERAL:
> Recently, before the Senate Subcommittee on the Constitution, you stated that the civil rights groups had supported a "simple" 10-year extension of the Voting Rights Act of 1965. In light of the events of 1981 in the House of Representatives and in the Senate, this statement defies comprehension. Indeed, throughout the past year, civil rights groups could not have been clearer or more explicit in their opposition to such a position. Let us briefly summarize the record.

The letter then goes on to summarize the record and concludes with the following statement:

In sum, the record makes it exceedingly clear that the Leadership Conference has never supported a simple extension of the Voting Rights Act. From the very beginning, we advocated strongly the section 2 amendment. We have never wavered from this position.

Frankly, Mr. Attorney General, we find it inconceivable, given the comprehensive record in the House of Representatives, the ample coverage in the print and electronic media, and the innumerable meetings with congressional and administration representatives, that anyone, at any time during the past year, could not fully understand the unified position of the civil rights community regarding the extension legislation.

Signed, "Sincerely, Benjamin L. Hooks, Chairperson" and "Ralph G. Neas, Executive Director."

Mr. Chairman, at this time I will include the entire letter in the record.

I might say that I think it is important that it be in the record because, as late as this week, the Justice Department was still telling Senators that civil rights groups only wanted a simple extension. It is bad enough for the administration to be opposed to the language that has been included by the overwhelming majority of the Members of the House and supported by 63 Members of the Senate; it is much worse for them to be misrepresenting the facts as to the position of the civil rights groups in this country.

I include in the record, Mr. Chairman, the entire letter at this point.

Senator HATCH. Without objection, it will be admitted into the record at this point. Thank you, Senator Metzenbaum.

[Material follows:]

Leadership Conference on Civil Rights

2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
202/667-1780

February 9, 1982

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PUBLIC AFFAIRS DIRECTOR
Natalie P. Shear
OFFICE MANAGER
Pamela Y. Wheaton
*Deceased

Honorable William French Smith
Attorney General
Department of Justice, Room 5111
Washington, D.C. 20530

Dear Mr. Attorney General:

Recently, before the Senate Subcommittee on the Constitution, you stated that the civil rights groups had supported a "simple" ten year extension of the Voting Rights Act of 1965. In light of the events of 1981 in the House of Representatives and in the Senate, this statement defies comprehension. Indeed, throughout the past year, civil rights groups could not have been clearer or more explicit in their opposition to such a position. Let us briefly summarize the record.

Beginning in January of 1981, representatives of the Leadership Conference on Civil Rights, a coalition of 157 national organizations, commenced discussions with Senators Charles Mathias and Edward Kennedy and Representatives Peter Rodino and Don Edwards regarding the extension of the Voting Rights Act. These meetings led to the introduction of S. 895 and H.R. 3112 on April 7, 1981. On that day the Leadership Conference wholeheartedly and publicly endorsed both measures and asked members of Congress to support them. These companion bills:

1. provide for a continuation of Section 5;
2. amend Section 2 to include the "discriminatory result" standard of proof; and
3. extend the bilingual provisions until 1992.

The written materials sent to members of Congress by the Leadership Conference and its member organizations all noted the proposed amendment to Section 2.

On May 6, 1981, we testified before the House Subcommittee on Civil and Constitutional Rights in support of H.R. 3112. From May 6 through July 13 many other representatives of the Leadership Conference and others committed to a strong extension measure appeared on behalf of H.R. 3112.

In order to make our position as clear as possible and to gain the support of the Administration, we began meeting in May with officials in the White House and in the Justice Department. Indeed, 15-20 representatives of the Leadership Conference met with you twice, once in June and once in July. In addition to the discussions, we submitted written memoranda detailing our position in support of H.R. 3112, which noted the amendment of Section 2 as a major item.

Subsequent to the House hearings and our meetings with you and your staff, political and substantive developments in the House of Representatives caused us to modify our position with respect to the original H.R. 3112 on two points.

First, because one of our principal goals has always been the strongest possible bipartisan measure, we supported a new bail out provision which will allow covered jurisdictions that no longer discriminate to bail out, either as entire states, or even separately as counties. This provision, a major compromise, was agreed to by civil rights supporters as an incentive for covered jurisdictions, even though the thorough House hearings did not demonstrate any basis for changing the bail out provision that is currently in law.

Second, we supported the amendment authored by Representative James Sensenbrenner (R-Wisc.) which expressly disavows any test of proportional representation in the amendment to Section 2 of the Voting Rights Act.

On July 31, the House Judiciary Committee reported out H.R. 3112, as amended, by a vote of 25-1. For the next ten weeks, the member organizations of the Leadership Conference and other civil rights organizations campaigned vigorously across the country on behalf of H.R. 3112. We met with virtually every member of the House of Representatives, numerous officials in the Administration, and certainly made known our position to the press and the general public. On October 5, the House passed H.R. 3112 by the overwhelming vote of 389-24 and rejected all weakening amendments by margins of at least 2-1 and 3-1.

Since the House passage, we have been duplicating in the Senate the effort we made in the House of Representatives. Thus far 63 Senators have cosponsored the measure as passed by the House.

In sum, the record makes it exceedingly clear that the Leadership Conference has never supported a simple extension of the Voting Rights Act. From the very beginning, we advocated strongly the Section 2 Amendment. We have never wavered from this position.

Frankly, Mr. Attorney General, we find it inconceivable, given the comprehensive record in the House of Representatives, the ample coverage in the print and electronic media, and the innumerable meetings with congressional and Administration representatives, that anyone, at any time during the past year, could not fully understand the unified position of the civil rights community regarding the extension legislation.

Sincerely,

Ben Hooks

Benjamin L. Hooks
Chairperson

Ralph G. Neas

Ralph G. Neas
Executive Director

BLH/RGN/pw

Senator HATCH. Before introducing our first witness, I would like to submit a prepared statement submitted by Senator DeConcini.

[The statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Thank you, Mr. Chairman. Today, the subject matter of this extensive series of hearings shifts to a review of the "exceptional circumstances" which justify the remedies, including preclearance, which the Voting Rights Act provides. There is some consensus on the fact that preclearance continues to be necessary. I certainly hope that today's witnesses will provide the subcommittee with some information regarding the effectiveness of preclearance in the past, and any recommendations for its administration in the future. There are considerable differences, however, over what standards should be met in order to bail out from the preclearance provisions.

My home state of Arizona is greatly affected by this discussion, since each of Arizona's fourteen counties has been under the preclearance requirements since 1975. In my consultations with state and local officials in Arizona, I have consistently met with the straightforward opinion that an area which has complied with the law in good faith should be given the opportunity to exempt itself from the remedial aspects of the law. We must carefully decide how best to determine when a jurisdiction has, in fact, complied with the law; I certainly hope that today's witnesses will be able to shed some light on the various alternative standards which might be applied to determine when a jurisdiction would be eligible to bail out.

I welcome our distinguished witnesses.

Senator HATCH. Our first witness today will be Mr. Robert Brinson, who is a practicing attorney from Rome, Ga. Mr. Brinson is the attorney for the city of Rome, Ga., and represented the city in the Supreme Court case of *City of Rome* v. *United States.*

We are happy to have you with us, Mr. Brinson. We look forward to taking your testimony.

STATEMENT OF ROBERT M. BRINSON, ATTORNEY, ROME, GA.

Mr. BRINSON. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before this distinguished subcommittee.

I am Bob Brinson. I am a practicing lawyer in Rome, Ga., and a partner in the firm of Brinson, Askew and Berry. I represent the city of Rome, which has a population of approximately 35,000 people.

Senator HATCH. Mr. Brinson, let me make one point before we proceed. We are limiting witnesses to 10 minutes so that we can have some time for questions. We will have a 10-minute rule for those who are questioning, too. When the yellow light goes on, you have 1 minute left. When the red light goes on, you should stop.

Mr. BRINSON. I understand. Thank you.

As attorney for the city, I have lived with the Voting Rights Act for many years. I have practiced its preclearance procedure from A to Z—from initial submissions of changes to the Attorney General through practice in the U.S. District Court for the District of Columbia and on to argument before the Supreme Court of the United States. The case of *City of Rome* v. *United States* was decided on the same day as the *City of Mobile* case.

Because of the exemplary record of my city government in its responsiveness to its inhabitants of all races, I also attempted on its behalf the bailout procedure, relief which was held to be unavailable to Rome in spite of its innocence.

It has been suggested that these experiences might be of some value to this body as it considers the extension and possible modifi-

cation of the Voting Rights Act. I appear today as a private citizen and a practitioner of local government law to testify in opposition to some of the provisions of the Voting Rights Act.

No one denies the initial need for, and success of, the Voting Rights Act of 1965. This is totally accepted in Rome, Ga., and among officials throughout Georgia and other covered States. Although it is distasteful to me for Georgia still to be considered a "covered State" and for Rome, therefore, still to be considered a "covered unit," I have determined that the less I engage in rhetoric on that point, the more help I may be to this body. The failure to elaborate on my aversion, however, should not be taken as a lack thereof.

My experience with the act is largely practical, and I do not profess to be a constitutional scholar. However, in my preparation for argument of *City of Rome,* I studied the history of the act in some depth. I must agree with both proponents and opponents that section 5, the preclearance provision, is, indeed, an uncommon exercise of congressional power. I would also observe with regret that apparently the same coverage formula will obtain in any extension of the act, and I believe that fails to recognize that if the South, or the covered States, are still guilty of discrimination which justifies the act, then so is the rest of the Nation.

I readily agree that the general protections in the act should be extended because I believe that universal voting on the part of all citizens everywhere is certainly a desirable national goal and that any violation of that principle should be against Federal law. The abolition of the poll tax, the elimination of literacy tests, and other discriminatory voting devices, the provisions for Federal examiners and inspectors, should all be maintained and, indeed, strengthened, if necessary. On the other hand, I would like to discuss the wisdom of at least three proposals now before the Congress, not necessarily in any order.

The first, of course, is section 5, the preclearance provision. You are all familiar with the extraordinary nature of section 5. It has been characterized by the Justice Department itself as severe and a radical departure from traditional notions of constitutional federalism.

Section 5, designed as a mechanism to provide covered jurisdictions with a "rapid method" of preclearance, is not functioning in this manner. Although the statutory language of section 5 and the regulations of the Attorney General require the Attorney General to act on a submission within 60 days, "catch 22's" abound and the 60-day timeframe is seldom adhered to.

Moreover, the administrative preclearance process is actually not a process at all but rather an imposition of the will of the Attorney General, or his staff, by administrative fiat. There is no provision for a hearing and there are no written standards of review. There is a confidential file unavailable to submitting jurisdictions. There is no requirement of findings of fact. The Attorney General does not have to make findings of dilutive elements. Indeed, he does not even have to conclude that the submitted changes are discriminatory. Notwithstanding the breadth of the power of the Attorney General, neither his discretion nor the very constitutionality of his actions is subject to judicial review.

These objections as to the basic unfairness and burden of the administrative preclearance mechanism are countered with the argument that a jurisdiction can always go to the District Court for the District of Columbia for relief by way of a de novo proceeding.

Aside from the fact that the de novo nature of the judicial proceeding is questionable, it is expensive; it is time-consuming; it can cause long and bewildering disenfranchisement of majority and minorities; it can freeze in office officials who are said to be unresponsive; it can cause loss of interest and participation amongst those it is supposed to protect.

Nevertheless, if Congress still finds existing extraordinary conditions that justify this particular provision, then surely it can lend an ear to the cries for modification of probably its most criticized and most irritating aspect, and that is exclusive jurisdiction in Washington.

From the outset, a principal objection consistently voiced has been not only the necessity of submitting a State's legislation for advance review, but also the States' and local governments' having to send "their agents to the city of Washington to plead to Federal officials for their advance approval."

Congress' approval of a change in the jurisdictional requirements for preclearance so as to allow local court action would go far to alleviate some of the frustration of the covered jurisdictions, and, indeed, perhaps even of the minorities sought to be protected.

The second matter which I would like to address is section 4, bailout, which presently provides a mechanism for exemption from the act's prohibitions. This bailout provision has been recognized as an amelioration of the severity of the section 5 preclearance requirement and, thus, a necessity to the constitutional underpinnings of the act.

If nondiscriminating jurisdictions like Rome must continue to be subject to the preclearance requirement, then the bailout option, with a realistic burden of proof, must be made available.

Failure now to provide for realistic bailout will mean that numerous cities, towns, and local boards, which have for many years performed commendably in providing access to their political processes to all citizens, will not have even the opportunity to cleanse themselves of the stigma, frustration, and expense of section 5.

Likewise, for reasons stated later, these political units should not be made to attempt to carry their burden only in Washington. To legislate otherwise would be to "vitiate the incentive for any local government in a State covered by the act to meet diligently the act's requirements.

The third matter is jurisdiction, which applies to both sections 4 and 5. It is, of course, true that *South Carolina* v. *Katzenbach* approved of Congress power to limit litigation of both preclearance actions and bailout actions to the U.S. District Court for the District of Columbia. From inception, these provisions caused great frustration and, indeed, outrage because of the unfairness to litigants other than the Federal Government. In 1965, such objections were treated rather cavalierly.

In view of the evolution of the concepts of voting discrimination and vote dilution and of the enforcement of the act, I submit that it should be recognized that the traditional notions said to justify

limitation of section 4 and section 5 actions to the district court in Washington are no longer valid.

First of all, it surely cannot be said that the expertise in voting discrimination cases is concentrated only in that court. Indeed, many, if not most, of the cases most often cited originated in the fifth circuit. Moreover, courts all over the Nation hear and decide racial discrimination cases of all kinds.

Second, I would hope that the Congress and Federal officials could give a vote of confidence to the Federal judiciary and its ability to handle the issues.

Third, local Federal courts have the recognized benefit of their "own special vantage point[s]" to give an "intensely local appraisal" of the circumstances, as aided by better notice to the public of the ongoing proceedings, more input from affected parties, and greater availability of evidence of history and impact.

Fourth, there is great practical significance. Because section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions," and even to governmental units with no authority over any electoral process, there are thousands of townships, school boards, and other small, local units which must preclear. If they are to have a realistic option to proceed with judicial preclearance, then a local Federal court should be available.

Section 2 and the question of quotas is the other matter which I would like to address to this body. Under section 5 the burden of proof for a covered jurisdiction has proven to be impossible. For instance, Rome proved its innocence of potential discrimination but, because no black had been elected there, it was irrebuttably presumed to be guilty.

Thus, the predicament in which governing bodies find themselves is kafkaesque. The covered jurisdiction may disprove invidious purpose, as Rome did, but such proof is to no avail because Congress supposedly has said that where disproportionate impact exists purpose cannot be disproved. So also a covered jurisdiction may meet the so-called *Zimmer* standard and yet be deemed to have enacted changes with discriminatory effect. The burden of proof under section 5 is thus in reality insurmountable, and Federal restructuring of local government is inevitable.

The interpretation of the effect rule would certainly be applied to an amended section 2. Section 2 of the act should be extended as presently written. If it is amended to substitute an effect or impact test for the present intentional discrimination rule, it will, I submit, revolutionalize the very basis of democratic government. It will institutionalize the already distorted means of the concepts of political participation, representation, voting strength, and candidate of one's choice. It will, in short, require a quota of racial political success. From a practical standpoint, it will render the mechanisms of bailout, preclearance, and coverage formula meaningless and will spawn literally a flood of litigation.

To me, the real tragedy of this seeming march toward government according to a numerical function is the loss of sight of what true representative government is all about. Somehow the perceived intrinsic value of electing proportionally outweighs the desirable goals of government, which are service, protection, and re-

sponsiveness regardless of race. A desirable objective would be to guarantee representative government and not proportional government. The desirable objection is, according to the Supreme Court, a a constitutional objective. While equal access to governmental s .vices is guaranteed, the election of officials of a minority group in proportion to its voting potential is not.

Steering the concept of political equality for racial and ethnic groups on any other course is to presume that fair representation can only be proportional representation and that candidate of one's choice necessarily means candidate of one's race. The Supreme Court has clearly discounted the notion that white officials represent their race and not the electorate as a whole and that they cannot represent black citizens.

While the proposed amendment to section 2 may be perceived as an effort to achieve proportional representation aimed at aiding a group's participation in the political processes, in reality it may very well frustrate the group's potentially successful efforts at coalition building across racial lines. The requirement of a quota of racial political success would tend strongly to stigmatize minorities, departmentalize the electorate, reinforce any arguable block voting syndrome, and prevent minority members from exercising influence on the political system beyond the bounds of their quota.

Members of the black community would not be able to determine the outcome of many, if not most, contests as they do in many cities, but instead would remain forever a minority in their representative influence.

In many covered jurisdictions there would be "no device more destructive to the notion of equality than the numerus clausus—the quota."

In conclusion, I respectfully submit that Congress should preserve the provisions of the Voting Rights Act providing for examiners, inspectors, and observers and the nationwide ban on literacy tests; that section 2 of the Voting Rights Act should be extended unaltered; that, if section 5 is to be retained at all, in a form not modified according to the proposal of Representative Hyde, it should be modified to allow the filing of declaratory judgment preclearance actions in local Federal courts; that if section 5 is retained, section 4 should be amended to provide for local court bailout by cities and counties which can meet a realistic bailout standard.

I have discussed other aspects of voting rights enforcement in the appendices which I have attached to my written statement, Mr. Chairman. I would ask that the statement be entered in the record.

Senator HATCH. Thank you, Mr. Brinson. Thank you for finishing within the 10-minute time limit as well—in fact, right on the dot.

Speaking from the point of view of a city attorney, please tell us exactly how a jurisdiction goes about seeking preclearance of a voting law change.

Mr. BRINSON. Mr. Chairman, first of all, naturally jurisdictions which are covered seek the route which they would consider to be the least troublesome and, quite frankly, the least expensive, as they necessarily would do. That is the administrative route, by making submissions to the Attorney General.

However, there is a definite feeling of frustration because you do not really know where the Attorney General is coming from. You do not know what he is hearing. You do not know what his evidence is. You do not know what his position is or whether you have opposition. As a practical matter, you do not really get a rapid method of preclearance.

That leaves you with the route of going to the District Court of the District of Columbia which has its concomitant expenses and, likewise, a feeling of frustration.

Senator HATCH. Please expand upon your assertion on page 4 of your written statement that "de novo proceedings in the District of Columbia District Court are questionable."

Mr. BRINSON. It seems to me, Mr. Chairman, first of all, when you criticize the fact that there really is not due process in going to the Attorney General by the administrative route—that is, there is no hearing, there are no findings of fact, and you really do not know what you are being accused of, if there is an objection—the answer that is always given to that is: Well, you can always go to the District Court of the District of Columbia. You do not have to go to the Attorney General. That gives you the opportunity for a hearing.

However, there is a rule of law that has been applied by the district court. That is, where an administrator contemporaneously construes either his regulations or a statute, then the courts defer to the administrator's own interpretation of his own rule. In fact, if Congress acts on that subsequently—that is, on his construction—then the courts are deemed bound by that construction.

My point is if the Attorney General already has ruled and objected to your change, then the courts are going to have the tendency, if not the requirement, to defer to what he already has found with the lack of appropriate input.

Senator HATCH. Describe, if you will, the annexations that the city of Rome carried on at the time.

Mr. BRINSON. No. 1, at the time of our first submission there was an annexation that actually was imposed on the city itself. It was done by the general assembly of Georgia over the objections of the city of Rome.

The purpose was to bring an unincorporated island in the middle of a city into the city of Rome for the purpose of obtaining city services. When that was submitted, the Attorney General wrote back and said he needed all the various demographic information, the electoral information, the electoral history of the city, which was provided, and also some 60 annexations which had taken place since 1965. Many of these annexations were purely vacant land. There was industrial property where there was no electorate.

The Attorney General ultimately, before any court action, did preclear 47 of those annexations when it was shown to him that they were industrial, commercial, or vacant land. However, he continued his objection to 13 of them because it was said that they had the potential of being white subdivisions and, therefore, would dilute the minority vote.

Senator HATCH. In appendix F of your written statement you have an article from the Wall Street Journal. I shall quote one sec-

tion of the article dealing with the municipal problems of Gary, Ind.

Nowhere are these problems more evident than in the steel city of Gary, where Mayor Richard Hatcher has spent his 13 years in office trying to stem civic decay caused by a faltering local economy. He admits that beyond some small achievements, his efforts haven't succeeded.

Mayor Hatcher puts most of the blame for that failure on the State government, which he says has blocked Gary's attempts to expand its tax base and issue bonds to help it woo new business and industry to replace its considerable losses over the past two decades.

He said that the most serious blow the State delivered came in the early seventies when it exempted an area around Gary from a law that prohibits incorporation of a new city within three miles of an existing one. That exemption enabled an area of white homes and businesses, which Gary had coveted for tax revenue, to incorporate as Merrillville, thus escaping possible annexation by Gary.

If this had occurred in a jurisdiction covered by section 5, how would it have been dealt with? If the proposed amendment to section 2 becomes law, could the annexation have taken place despite Gary's economic problems?

Mr. BRINSON. First of all, you asked about section 5. Aside from the problem of not permitting the annexation—that is, the State's not permitting it by legislation—if Gary were in a covered jurisdiction and it wanted to annex a white community for expansion of its tax base, then it probably would not have been able to do so because that would have diluted the position of the minority in the city.

Senator HATCH. At least that is what the House version of section 5 says.

Mr. BRINSON. That is right. If section 2 is applied, then I would daresay that a section 2 suit would be filed if the annexation were attempted.

Senator HATCH. That is present law as well, is it not?

Mr. BRINSON. It is, but of course it requires intentional discrimination.

Senator HATCH. What lessons can be drawn from section 5 for the new results test proposed for section 2?

Mr. BRINSON. We know, especially after the city of Rome case has been decided, that the effects test is applied under section 5. It has been my experience—and I think the *City of Rome* case stands for this proposition—that the section 5 effects test is enforced in a way to require proportional representation. I can give you a personal experience.

When I began the submission process of the changes through the Attorney General's office, on one of my 23 visits to Washington in that effort, I had an interview with one of the gentlemen in the Attorney General's office

Senator HATCH. Are you referring to the Civil Rights Division?

Mr. BRINSON. Yes, in the voting section.

He asked me, "How many councilmen do you have on your city council?" I said, "Nine." He said, "What is the percentage of blacks in the city of Rome?" I said, "20 to 22 percent." He said, "Fine. Then what we need to do is devise a plan to assure that two blacks will get on the city commission."

I find that is true in talking to city attorneys all over the State. They encounter that attitude. From an administrative standpoint, that is the way it is enforced.

If you will read the factual situation in the *City of Rome* case out of the District of Columbia, you will see also that was the objective there. There was a finding in the city of Rome of which I am quite proud. I have quoted the various findings of the court in one of the appendices to my statement.

It found, indeed, No. 1, that blacks often hold the balance of power in any election in Rome; No. 2, that they are extremely influential in the political community, and that the government always has responded well to the interest of minorities in the community. This was a finding not by a local court, but by the court in the District of Columbia.

Nevertheless, the key reason for finding that the changes involved did have the effect was that no black had been elected in the city of Rome. To me, that just means that the objective is proportional representation, which I think is undesirable.

Senator HATCH. Could you elaborate upon your remarks that the effects test is "Kafkaesque?"

Mr. BRINSON. Yes, my experience makes me feel that way, for this reason: I think the theory you must look at is not so much who is in government as what government does. I expect any representative of mine, whatever his color may be, to represent me. I think all citizens feel that way.

Therefore, you should look at what comes out of government. What is government all about? Government serves the people. Government responds to the people. It is supposed to.

We proved that in the *City of Rome* case. The district court found that in some 18 separate findings, which are attached to my paper, there are a number of things that showed the responsiveness of the government and the government service provided to the minority element of the community. Yet, we were deemed to have the effect or potential effect of discrimination, simply because no minority member had been elected.

To me, first of all, we showed also that none of the changes that were made were purposeful or intentional discrimination. That also was found by the court. Then we showed the effect of the legislation has been to provide these services and to provide this response. Nevertheless, we were still deemed to have had a discriminatory effect. To me, that is Kafkaesque.

Senator HATCH. You seem to indicate in your remarks that you believe the effects test, which is called the results test in section 2, may actually stigmatize minorities. Could you expand on that?

Mr. BRINSON. Yes.

Senator HATCH. What do you mean by that?

Mr. BRINSON. One of the reasons that some of our electoral changes were objected to was because it was determined they would prevent the single-shot vote technique by the minority in our jurisdiction. If you will expand what single-shot voting means, I suggest to you that it may have a very definite retrogressive effect on the effectiveness of a minority member who may be elected to a multimember board for this reason.

If you assume racial bloc voting, which I do not think is as widespread as one would believe, but assume there is a condition of severe, polarized racial bloc vote. Assume that a minority member seeks, campaigns, and urges that the blacks single-shot vote and vote him into office. Assume that is done and he is elected, and he is one of a five-member board, let's say.

Under the theory we are accused of—that is, there is racial bloc voting—if that obtains, then what would be the motivation of any of the other four white members of the governing body to campaign to the minority or to respond to the minority? They would say, "You are not going to vote for me anyway. You are going to single-shot vote. You did single-shot vote. Why should I respond? Why should I campaign to you, because you are not going to vote for me?" I say that is a counterproductive measure.

The minority member who has achieved the board, who has been elected and risen to the board, sits there as a minority preserved, and that is that. That is empirically shown in the article from the Wall Street Journal which I have attached to my paper. There is a definite feeling of frustration of minority members who have been elected. They say, "I can't get anything done." I say that is the logical result of enforcing such techniques as single-shot vote.

Senator HATCH. Do you think the results test might further encourage racial political ghettoization in this country?

Mr. BRINSON. Absolutely. I think it is at war with the old melding pot theory.

Senator HATCH. If my contention is correct, that this will lead to proportional representation, then it means that you are going to have all-black districts and all-white districts; and, instead of having influence across the whole spectrum in these at-large voting districts, you are going to have segregated minority representatives on the city or county commissions or councils.

Mr. BRINSON. I absolutely agree with you.

Senator HATCH. Do you have any doubt that that would be the case?

Mr. BRINSON. I beg your pardon?

Senator HATCH. Do you have any doubt that that would be the case?

Mr. BRINSON. I really do not. I think that is the natural fallout of the way both section 5 is being enforced and section 2 would be enforced.

Senator HATCH. We have had a lot of witnesses on the other side of this issue come in and say that they can see no way that this will lead to proportional representation. I believe it can lead to nothing but proportional representation. Do you see any way that, if section 2 passes in its present form, it will not lead to proportional representation?

Mr. BRINSON. No, I don't. I think that is the objective; that is the only way to meet the effects standard as it has been interpreted by the Attorney General.

Senator HATCH. Let's be honest about this. One of the arguments that is made by the proponents of section 2 in the House bill is that they cannot prove their case easily enough against discriminators because of the requisite intent standard. They argue that they would have to go back into the minds of the State legislators who

set up the at-large district to begin with to determine whether or not there was a discriminatory intent.

Mr. BRINSON. I disagree with that. I am a trial lawyer. There are comparable principles in other areas of the law now. For instance, in the law there is a rule on negligent entrustment of an automobile in Georgia. The requirement is that you show actual knowledge of the incompetence of the driver to whom you entrust your automobile in order to be negligent. Everybody says, "Well, you can't show actual knowledge. The man will deny it." However, you can show actual knowledge by circumstantial evidence. Certainly it can be done. Sometimes it is a larger burden of proof, but it is not an impossible burden of proof.

Senator HATCH. You say it is a different burden of proof but not impossible. Is it too difficult, in your opinion?

Mr. BRINSON. No, it is not. In fact, in my opinion the *City of Mobile* case is misconstrued. I think the law is that, while the *Zimmer* factors do not in and of themselves show discrimination, they are evidence from which the inference can be made that there is purposeful discrimination. The one requirement is that the fact-finder or the judge takes it one step further and says, "I have looked at all these things and, from that, I infer that there was intentional discrimination." I think that is what *Mobile* says.

Senator HATCH. If you take the section 2 language as it presently is written in the House bill, would you agree with me that it would seem impossible to defend yourself, even though there may never have existed any intent nor any proof of discrimination in any way, shape, or form, circumstantially or otherwise? It may be difficult to defend yourself against the accusations?

Mr. BRINSON. It was impossible for Rome to defend itself. I think the same thing would apply if the effects standard is amended in section 2. It was impossible for Rome to win its case because no black ever had been elected.

Senator HATCH. You are not arguing that we should have an intent test which requires just direct evidence?

Mr. BRINSON. Absolutely not.

Senator HATCH. You are saying circumstantial evidence, as well as direct evidence, including the use of disparate impact evidence, is present law?

Mr. BRINSON. Including inferences that may be drawn from that.

Senator HATCH. Certainly, if there was an inference of discrimination it would be presented to the jury.

Mr. BRINSON. That is right.

Senator HATCH. Under the section 2 provision as presently written in the House bill, however, where there is any so-called "objective factor of discrimination" plus lack of proportional representation, the issue is cut and dried, isn't it?

Mr. BRINSON. It is cut and dried. It is Kafkaesque.

Senator HATCH. In fact, it is true that you do not even need inferences of discrimination is it not?

Mr. BRINSON. No, not if there is an effects case.

Senator HATCH. In other words, the city, the county, the municipality, or the State may as well accept its fate, because there is no effective way to defend yourself under this test?

Mr. BRINSON. That is exactly right. If there is any inclination toward finding that there is racial block vote and no black has ever been elected, then you have lost your case. That appears to be regardless of whether or not any black has ever run in an election.

I might add, if I may, Mr. Chairman, that I have looked at all the tables and all the studies. I think there is a sorely lacking piece of information before this committee; that is, some statistical evidence as to how many elections there have been in which members of a minority race ran and were defeated. I do not think there is any empirical compilation along those lines. It would be revealing to the committee. It is an important piece of information that is needed by the committee.

Senator HATCH. Let me ask a question from Senator Grassley. He asks, "What will be the impact of the results amendment to section 2 on a city or county already subject to preclearance under section 5?"

Mr. BRINSON. That is a good question because, if section 2 is amended, I think it is absolutely going to absorb and overwhelm section 4 and section 5 matters, anyway, for this reason:

Let's assume that the city of Rome passes some electoral change, applies to the Attorney General, and gets preclearance. If there is opposition to it, if you get preclearance and come back and try to institute it, you are going to get a section 2 suit immediately. You will never know what is stable government. Section 2 can be filed at any time on existing or changed electoral procedures.

Senator HATCH. Thank you, Mr. Brinson. Your testimony certainly has been interesting. We appreciate the backup materials you are giving to the committee as well. We will incorporate your full statement and all attachments into the record at this point.

Mr. BRINSON. Thank you, Senator.

[The prepared statement of Mr. Brinson follows:]

PREPARED STATEMENT OF ROBERT M. BRINSON

Mr. Chairman, I appreciate the opportunity to appear before this distinguished subcommittee.

I am Bob Brinson. I am a practicing lawyer in Rome, Georgia, and a partner of the firm of Brinson, Askew & Berry. I represent the City of Rome which has a population of approximately 35,000 people. As attorney for the city, I have lived with the Voting Rights Act for many years. I have practiced its preclearance procedure from A to Z - from initial submissions of changes to the Attorney General through practice in the United States District Court for the District of Columbia and on to argument before the Supreme Court of the United States. The case of City of Rome v. United States, 446 U. S. 156 (1980), was decided on the same day as the City of Mobile case. Because of the exemplary record of my city government in its responsiveness to its inhabitants of all races,[1] I also attempted on its behalf the "bailout" procedure, relief held to be unavailable to Rome in spite of its innocence.

It has been suggested that these experiences might be of some value to this body as it considers the extension and possible modification of the Voting Rights Act. I appear today as a private citizen and a practitioner of local government law to testify in opposition to some of the provisions of the Voting Rights Act.

No one denies the initial need for, and success of, the Voting Rights Act of 1965. This is totally accepted in Rome, Georgia, and among officials throughout Georgia and other covered states. Although it is distasteful to me for Georgia still to be considered a "covered state" and for Rome, therefore, still to be considered a "covered unit", I have determined that the less I engage in rhetoric on that point, the more help I may be to this body. The failure to elaborate on my aversion, however, should not be taken as a lack thereof.[2]

My experience with the Act is largely practical, and I do not profess to be a constitutional scholar. However, in my preparation for argument of City of Rome, I studied the history of the Act in some depth. I must agree with both proponents and opponents that Section 5, the preclearance provision, is, indeed, an uncommon exercise of congressional power. I would also observe with regret that apparently the same coverage formula will obtain in any extension of the Act, and I believe that that fails to recognize that if the South, or the covered states, are still guilty of discrimination which justifies the Act, then so is the rest of the Nation.

I readily agree that the general protections in the Act should be extended because I believe that universal voting on the part of all citizens everywhere is certainly a desirable national goal and that any violation of that principle should be against federal law. The abolition of the poll tax, the elimination of literacy tests and other discriminatory voting devices, the provisions for federal examiners and inspectors, (etc.) should all be maintained and, indeed, strengthened, if necessary. On the other hand, I would like to discuss the wisdom of at least three proposals now before the Congress... not necessarily in any order.

SECTION 5

(PRECLEARANCE)

You are all familiar with the extraordinary nature of Section 5. It has been characterized by the Justice Department itself as severe and a radical departure from traditional notions of constitutional federalism. Congress is said to have adopted measures designed to mitigate what it recognized long ago to be the potentially harsh operation of Section 5, to-wit: bailout and the administrative preclearance mechanism. City of Rome, Georgia v. United States, 472 F. Supp. 221, 242, aff'd 446 U. S. 156. Because Congress recognized the onerousness involved in the declaratory judgment procedure,

it provided what was to be a "rapid method" for covered jurisdictions to obtain preclearance of electoral changes. Allen v. State Board of Elections, 393, US. 544, 549. Yet, with the expanded interpretation which the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," has received, the volume of submissions required from states, counties, cities, towns, and even organizations such as school boards which have no responsibility whatever for voting has reached significant proportions.

Section 5, designed as a mechanism to provide covered jurisdictions with a "rapid method" of preclearance, is not functioning in this matter. Although the statutory language of Section 5 and the regulations of the Attorney General require the Attorney General to act on a submission within sixty days, "catch 22's" abound and the sixty-day time frame is seldom adhered to.[3]

Moreover, the administrative preclearance process is actually not a process at all but rather an imposition of the will of the Attorney General, or his staff, by administrative fiat. There is no provision for a hearing and there are no written standards of review; there is a confidential file unavailable to submitting jurisdictions; there is no requirement of findings of fact. The Attorney General does not have to make findings of dilutive elements. Indeed, he does not even have to conclude that the submitted changes are discriminatory. Georgia v. United States, 411 U. S. 526 at 543-544. Notwithstanding the breadth of the power of the Attorney General, neither his discretion nor the very constitutionality of his actions is subject to judicial review. Morris v. Gressett, 432 U. S. 491, 507.

These objections as to the basic unfairness and burden of the administrative preclearance mechanism are countered with the argument that a jurisdiction can always go to the District Court for the District of Columbia for relief by

way of a de novo proceeding. City of Rome v. United States, 450 F. Supp. 378 (D.D.C. 1978).

Aside from the fact that the "de novo" nature of the judicial proceeding is questionable,[4] it is expensive;[5] it is time-consuming; it can cause long and bewildering disenfranchisement of majority and minorities; it can freeze in office officials who are said to be unresponsive; it can cause loss of interest and participation amongst those it is supposed to protect.[6]

Nevertheless, if Congress still finds existing extraordinary conditions that justify this particular provision, then surely it can lend an ear to the cries for modification of probably its most critized and most irritating aspect - (and that is) exclusive jurisdiction in Washington. From the outset, a principal objection consistently voiced has been not only the necessity of submitting a state's legislation for advance review, but also the states' and local governments' having to send "their agents to the City of Washington to plead to federal officials for their advance approval." South Carolina v. Katzenbach, 383 U.S. 301, 361, (Black, J., dissenting).

Congress' approval of a change in the jurisdictional requirements for preclearance so as to allow local court action would go far to alleviate some of the frustration of the covered jurisdictions, and, indeed, perhaps even of the minorities sought to be protected.[7]

Section 4 of the Act presently provides a mechanism for exemption from the Act's prohibitions. This bailout provision has been recognized as an amelioration of the severity of the Section 5 preclearance requirement, Briscoe v. Bell, 432 U. S. 404, and, thus, a necessity to the constitutional underpinnings of the Act. See South Carolina v. Katzenbach, 383 U. S. 301, 331 (1966). Curiously, the district court in City of Rome readily pointed out this mitigation of what Congress "recognized to be the potentially harsh operation

of Section 5," 472 F. Supp. at 242, and then held that Rome, although it had satisfied both the letter and the spirit of Section 4, could not bailout. The court conceded the "abstract force" of Rome's argument that a city could exempt itself, but it refused to use "logic as a means of subverting congressional intent." Id. at 231. The Court held that Congress did not intend to allow a political unit which had not been separately designated to exempt itself from coverage, even if entirely innocent. I submit that the intent of Congress should now be clarified or restated.

The Report of the House Judiciary Committee on the Voting Rights Act of 1965 noted that bailout was designed to provide relief to covered political subdivisions where there has been "no racial discrimination violating the Fifteenth Amendment." The Committee noted further that this "provides assurances that no...subdivision will be treated unfairly and that the suppression of tests and devices will be applied only to areas where it is necessary to enforce the rights guaranteed under the Fifteenth Amendment." H. R. Rep. No. 439, 89th Cong. 1st Sess. 14-15 (June 1, 1965).

If nondiscriminating jurisdictions like Rome must continue to be subject to the preclearance requirement, then the bailout option, with a realistic burden of proof, must be made available. That burden, originally, was to be "quite bearable":

> "An area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then to refute whatever evidence to the contrary may be adduced by the Federal Government." South Carolina v. Katzenbach at 332.

Failure now to provide for realistic bailout will mean that numerous cities, towns and local boards, which have for

many years performed commendably in providing access to their political processes to all citizens, will not have even the opportunity to cleanse themselves of the stigma, frustration and expense of Section 5. Likewise, for reasons stated later, these political units should not be made to attempt to carry their burden only in Washington. To legislate otherwise would be to "vitiate the incentive for any local government in a state covered by the Act to meet diligently the Act's requirements." City of Rome v. United States, 446 U. S. at 206. (Powell, J., dissenting).

SECTIONS 4 and 5

(JURISDICTION)

It is, of course, true that South Carolina v. Katzenbach approved of Congress' power to limit litigation of both preclearance actions and bailout actions to the United States District Court for the District of Columbia. From inception these provisions caused great frustration and, indeed, outrage because of the unfairness to litigants other than the federal government. In 1965, such objections were treated rather cavalierly. As one Senator remarkably argued:

> "We are not dealing with litigants who might find travel difficult or legal proceedings or appearances expensive. We are dealing with political subdivisions and States, which have county attorneys or State attorneys general who come to Washington, D. C., for many things, and they would not be required to come to Washington merely to participate in litigation that might arise under the bill." 111 Cong. Rec. 10363 (1965).

In view of the evolution of the concepts of voting discrimination and vote dilution and of the enforcement of the Act, I submit that it should be recognized that the traditional notions said to justify limitation of Section 4 and Section 5 actions to the District Court in Washington are no longer valid. First of all, it surely cannot be said

that the expertise in voting discrimination cases is concentrated only in that court. Indeed, many, if not most, of the cases most often cited originated in the Fifth Circuit. Moreover, courts all over the nation hear and decide racial discimination cases of all kinds.

Second, I would hope that the Congress and federal officials could give a vote of confidence to the federal judiciary and its ability to handle the issues.

Third, local federal courts have the recognized benefit of their "own special vantage point[s]" to give an "intensely local appraisal"[8] of the circumstances, as aided by better notice to the public of the ongoing proceedings, more input from affected parties, and greater availability of evidence of history and impact.

Fourth, there is great practical significance. Because Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions," United States v. Board of Commissioners, 435 U. S. 110 (1978), and even to governmental units with no authority over any electoral process, Dougherty County Board of Education v. White, 439 U. S. 32 (1978), there are thousands of townships, school boards and other small, local units which must preclear. If they are to have a realistic option to proceed with judicial preclearance, then a local federal court should be available.

SECTION 2
AND
QUOTAS

Section 2 of the Act should be extended as presently written. If it is amended to substitute an "effect" or "impact" test for the present intentional discrimination rule, it will, I submit, revolutionize the very basis of democratic government. It will institutionalize the already distorted meanings of the concepts "political participation", "representation", "voting strength" and "candidate of one's

choice". It will, in short, require a quota of racial political success. From a practical standpoint, it will render the mechanisms of bailout, preclearance and coverage formulae meaningless, and will spawn, literally, a flood of litigation.

To me, the real tragedy of this seeming march toward government according to a numerical function is loss of sight of what true representative government is all about. Somehow, the perceived intrinsic value of electing proportionally outweighs the desirable goals of government, to-wit: service, protection and responsiveness, regardless of race.

Early voting cases seemed to focus more clearly. "The right to exercise the franchise in a free and unimpaired manner is preservative of otherwise basic civil and political rights." Reynolds v. Sims, 377 U. S. 533, 561-2 (1964). See also Yick W. v. Hopkins, 118 U. S. 356 (1886). (Emphasis added).

Early cases held that the equal protection clause encompasses equal access to governmental services. Turner v. City of Memphis, 369 U. S. 350 (1962); Brown v. Bd. of Educ., 347 U. S. 483 (1954). Then, in 1966, in Katzenbach v. Morgan, 384 U. S. 641 (1966), a nexus between the importance of voting and governmental response was established. The first rationale for the decision was that Congress found that the state of New York had intentionally discriminated against Spanish-speaking citizens in the furnishing of governmental services, and that the prohibition of a discriminatory literacy test was an appropriate remedy for that constitutional violation, Id. at 652-53. The Court, therefore, held that the prohibition of the literacy test was appropriate legislation to enforce the right to governmental services.

More recently, in the oft-cited case of Zimmer v. McKeithen, 485 F. 2nd 1297 (1973), one of the indicia which may afford some evidence of a discriminatory purpose is the

"unresponsiveness of legislators to [a minority's] particularized interests." Id. at 1305.

The desirable objective, then, would be to guarantee representative government, not proportional government. This desirable objective is, according to the Supreme Court, also a constitutional objective, for while equal access to governmental services is guaranteed, Brown v. Bd. of Educ., supra, the election of officials of a minority group "in proportion to its voting potential" is not. Mobile v. Bolden, 446 U. S. 55; Beer v. United States, 425 U. S. 130; White v. Register, 412 U. S. 755; Whitcomb v. Chavis, 403 U. S. 124.

Steering the concept of political equality for racial and ethnic groups on any other course is to presume that "fair representation " can only be proportional representation and that "candidate of one's choice" necessarily means "candidate of one's race". The Supreme Court has clearly discounted the notion that white officials represent their race and not the electorate as a whole and that they cannot represent black citizens. Dallas County v. Reese, 421 U. S. 477; Dusch v. Davis, 387 U. S. 112; Accord, Vollin v. Kimbel, 519 F. 2nd 790, 791 (4th Cir.), cert.denied, 423 U. S. 936 (1976).

If Section 2 is amended (or if Section 5 is permitted to be enforced by a result standard), then the concept of political equality for racial and ethnic groups will have been radically redefined. The Act will have evolved into a federal guaranty of a right to maximum political effectiveness, or, indeed, a quota of political success. The "effect" proscribed by the Act will be deemed to be the disproportionate result of political processes, rather than disproportionate access to those processes. But, racial quotas are less justifiable in the political context than in any other aspect of society. It has been observed that none of the

reasons customarily given for the use of racial and ethnic quotas in education apply to the realm of voting:

> Can quotas be justified as part of an effort to create articially that mix which would have evolved naturally under more auspicious circumstances? In the schools, perhaps, but not in government. Political offices are not equivalent to seats in a classroom. Groups in our society have never been politically represented in proportion to their size. The Irish have been "overrepresented," Jews were long "underderrepresented." Culture and experience - not simply discrimination - have accounted for such differences. Nor does proportional racial representation in voting have anything in common with admissions to desirable education programs. There is no barrier set to voting, as there is by selective admissions. And one vote has the same value as any other. Thernstrom, The odd evolution of the Voting Rights Act, The Public Interest 49, 61-62 (Spring 1979).

And what of the cost? Ms. Thernstrom continues:

> Neither the D. C. Court nor the Justice Department, in other words, can be certain that one electoral arrangement is superior to the other. And the cost of judicial and executive interference into local electoral arrangements is considerable. When the Federal government intervenes in local electoral arrangements - when it attempts not simply to augment political opportunities but also to shape electoral results - it deprives the citizens of their right to achieve through conflict and conciliation those electoral arrangements most suited to their needs. Thernstrom, supra at 64-65.

The practical problems of determining groups to protect have long been recognized. See Whitcomb v. Chavis, supra at 156-7. Nowhere, however, have they been more forcefully illustrated than in Mr. Justice Stewart's litany in Mobile:

"It is difficult to perceive how the implications of the dissenting opinion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a 'political group'? How large must a 'group' be to be a 'political group'? Can any 'group' call itself a 'political group'? If not, who is to say which 'groups' are 'political groups'? Can a qualified voter belong to more than one 'political group'? Can there be more than one 'political group' among white voters (e. g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one 'political group' among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the total size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself." (446 U. S. at 78, n. 26).

In the same case, Mr. Justice Stevens, in his concurring opinion, illustrates why group-thinking is improper:

In the long run, there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics. Id. at 88.

> One thing is clear:
>
> Political theorists can readily differ on the advantages inherent in different governmental structures. As Mr. Justice Harlan noted in his dissent in Fairley v. Patterson, decided together with Allen v. State Board of Elections, 393 U. S. 544 (1969):
>
> '[I]t is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers." Id. at 586 (emphasis deleted).

City of Rome v. United States, 446 U. S. at 219 (Rehnquist, Stewart, J. J. , dissenting). And as Ms. Thernstrom observes, "Neither the D. C. Court nor the Justice Department...can be certain that one electoral arrangement is superior to the other." Thernstrom at 64. Compare the foregoing with the argument of Mr. Justice Marshall advocating the use of single-shot voting.[9] City of Rome v. United States, 446 U. S. at 186; Mobile v. Bolden, 446 U. S. at 105.

Perhaps herein lies the true, regrettable cost. While most of what you read about effective governing is theoretical and argumentative, indeed, there may be some empirical evidence of a predictable, but unwanted, lack of effectiveness of some minority officials because of result oriented enforcement. They may be successful at the polls but not in officialdom. An October, 1980 Wall Street Journal article[10] records some of the frustrations felt by black officials nationwide:

> [I]n most state legislatures blacks make up too small a faction to be counted as a bloc. And in these cost-conscious times, they increasingly are seeing their normal ideological allies flee when they seek legislation to help their constituents.

The article also suggests, empirically, that representation according to racial proportion is not the answer:

> [S]ome people ask whether, aside from symbolism and some patronage jobs, it really matters if black voters choose a black candidate over a like-minded white. George Sternlleb, professor of political science at Rutgers University, thinks not. He has studied the policies and effectiveness of black and white municipal executives in a number of cities with large black populations, and concludes: "The fact is that race hasn't made any difference."

It would appear that, at least sometimes, the requirement of proportional numbers of representatives is counterproductive and, indeed, paradoxically causes a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U. S. 130, 141.

Where blacks often hold the balance of power in elections, as they do in Rome, it would appear that black voters then have more than "political power". They would appear to have "voting power," which has been "defined as the ability to cast votes that change election outcomes." L. Tribe, A Treatise on American Constitutional Law 750 (1978). In any event:

> A minority, even in a fair apportionment scheme, would probably lack the power to insure that the policies it favors are adopted by the legislature. It is, after all, a minority. But it would have a voice in the formulation of policy, and this voice has value independent of its ability to cast a deciding ballot, first because minority spokesmen might persuade the majority on any given occasion and second, because such spokesmen might alter the long-run character of political thought by the participation in legislative deliberations. Moreover,

the situation is vastly oversimplified by assuming that there are cognizable, mutually exclusive, and exhaustive "minorities" and "majorities." Id. n. 2 (emphasis original). See also Lubin v. Panish, 415 U. S. 709, 716 (1974).

While the proposed amendment to Section 2 may be perceived as an "effort to achieve proportional representation... aimed at aiding a group's participation in the political processes," United Jewish Organizations v. Carey, 430 U. S. 144, 172 (1977) (Brennan, J., concurring), in reality it may very well frustrate the group's "potentially successful efforts at coalition building across racial lines." Id. at 172-73.

The requirement of a quota of racial political success would tend strongly to stigmatize minorities, to compartmentalize the electorate, to reinforce any arguable bloc voting syndrome,[11] and to prevent minority members from exercising influence on the political system beyond the bounds of their quota. Members of the black community would not be able to determine the outcome of many if not most contests, as they do in many cities, but, instead, would remain forever a minority in their representative influence. In many covered jurisdictions, there would be "no device more destructive to the notion of equality than the numerus clausus - the quota." United Steelworkers v. Weber, 443 U. S. 193, 254 (Burger, C. J., and Rehnquist, J., dissenting).

CONCLUSION

I respectfully submit that Congress should preserve the provisions of the Voting Rights Act providing for examiners and inspectors and the nationwide ban on literacy tests; that Section 2 of the Voting Rights Act should be extended unaltered; that, if Section 5 is to be retained at all (in a form not modified according to the proposal of Representative Hyde), it should be modified to allow the filing of declaratory

judgment preclearance actions in local federal courts; that if Section 5 is retained, Section 4 should be amended to provide for local court bailout by cities and counties which can meet a realistic bailout standard.

Thank you.

1. See Appendix A

2. See Appendix B

3. See Appendix C

4. It is questionable because of the practice of the courts to defer to the interpretations of the Attorney General. See Blanding v. DuBose, 50 U. S. L. W. 3543, 3544 (U. S. January 12, 1982); Perkins v. Matthews, 400 U. S. 379, 290-391 (1971). Accord: City of Petersburg, Virginia v. United States, 354 F. Supp, 1021 (1972). Indeed in some cases, the courts are bound to defer. United States v. Board of Commissioners, 435 U. S. 110, 131-135.

5. In spite of the Senator's remark, see p. 8, infra, local government attorneys do not make frequent trips to Washington. Moreover, a declaratory judgment suit in Washington requires the hiring or association of a Washington attorney. Rules of the United States District Court for the District of Columbia, Rule 1-4. See also Appendix D.

6. See Appendix D

7. See pp. 8-9, infra.

8. White v. Regester, 412 U. S. 755, 770-1 (1973); Mobile v. Bolden, 446 U. S. 55, 102-3 (1980) (White, J., dissenting).

9. See Appendix E

10. See Appendix F

11. Another serious objection which covered jurisdictions frequently, and justifiably (see Charlton County Board of Education v. United States, 459 F. Supp. 530), articulate is the Attorney General's and the courts' ready acceptance, or, indeed, presumption "that Americans vote in firm blocs [which notion] has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white." United Jewish Organizations v. Carey, 430 U. S. 144, 187 (1977) (Burger, C. J. dissenting). See also Conner v. Finch, 431 U. S. 407, 427 n.2 (1977) (Burger, C. J. and Blackman, J. concurring in part and concurring in the judgment). See Appendix G.

APPENDIX A

In the United States District Court for the District of Columbia, Rome proved, and the court found, that Rome's electoral changes were enacted without a racially discriminatory

purpose; the United States had admitted the absence of any racially discriminatory purpose for the city's annexations. Supporting these two central determinations by the court were eighteen subsidiary findings of fact describing the City's history and behavior: (1) "no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years;" (2) "the City has not employed other barriers to registration with respect to time and place, registration personnel, purging, or reregistration;" (3) "there have been no other direct barriers to black voting in Rome;" (4) "[i]ndeed whites, including City officials, have encouraged blacks to run for elective posts in Rome;" (5) "white elected officials of Rome, together with the white appointed City Manager, are responsive to the needs and interests of the black community;" (6) "[t]he City has not discriminated against blacks in the provision of services; '(7) "[the City] has made an effort to upgrade some black neighborhoods;" (8) "the City transit department, with a predominantly black ridership, is operated through a continuing City subsidy;" (9) "the racial composition of the City workforce approximates that of the population, with a number of blacks employed in skilled or supervisory positions;" (10) "[i]n Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many, if not most, contests;" (11) "blacks often hold the balance of power in Rome elections;" (12) "[t]hus many white candidates vigorously pursue the support of black voters;" (13) "[blacks] are situated to assert considerable influence over many elected officials, not simply those representing an exclusive black constituency;" (14) "[a]lso probative of the lack of discrimination in registration is the fact that black registration remained at a relatively high level throughout the period 1963-74;" (15) "[b]lacks have not been denied access to the ballot through the location

of polling places, the actions of election officials, the treatment of illiterate voters or similar means;" (16) "a black...was appointed to the Board of Education when a vacancy occurred in that body;" (17) "[s]everal present Commissioners testified that they spent proportionately more time campaigning in the black community;" and (18) "[n]or is there any evidence of obstacles to black candidacy with respect to slating of candidates, filing fees, obstacles to qualifying, access [of] voters [to] polling places, or the like."

Rome proved its innocence of discrimination, but because no black had been elected there, it was irrebutably presumed to be guilty. Thus the predicament in which governing bodies find themselves is kafkaesque: a covered jurisdiction may disprove invidious purpose, as Rome did, but such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose cannot be disproved; so also, a covered jurisdiction may meet the Zimmer standards and yet be deemed to have enacted changes with discriminatory effect. The burden of proof under Section 5 is thus, in reality, insurmountable, and federal restructuring of local government is inevitable.

APPENDIX B

The method of enforcement of Section 5 - and, Section 2, if amended - frequently, if not most often, results in a restructuring of governmental entities and the mandate of a particular method of local election, often in the absence of any finding of unconstitutionality with respect to the system that the entities wish to utilize. The entity is thus penalized for having a different, but not unconstitutional, view than that of the Attorney General.

In the hearings on the earlier extensions of the Act, there were expressions of many feelings of ignominy, bewilderment and frustration shared by all the covered jurisdictions in their wrestling, not with the Voting Rights Act and its

accomplishments, but with Section 5 thereof. Those feelings include: lack of incentive in the states "to get out from under the indignity" (Hearings on the extension of the Voting Rights Act before the Sub-committee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives, 94th Cong., 1st Sess., Sec. 1, pt. 1* at page 304); embarrassment because a state consitutional amendment had to be subjected to federal scrutiny and veto (Hearings at page 143); confusion about statewide election results (Hearings at page 143, 300-301); difficulty in dealing with the concept altogether (Hearings at page 349); concern about trouble and cost to some (but not all) the states (Hearings at page 589-590); and perhaps most profound of all, desperation at being disenfranchised (Hearings at pages 732-733).

Texas, which studied the effects of Section 5 when it came under its coverage in 1975, recognized still another counterproductive aspect:

> This "freezing effect", which some had feared in advance, is, in our opinion, the most disheartening aspect of the entire VRA controversy as, if it holds up, it may well mean that a law designed to protect voters has had the effect of denying them the opportunity to enjoy the effects of needed changes in local governmental systems and procedures.

The State of Texas computed that one year's compliance with the Voting Rights Act "cost Texas' taxpayers at least $190,000 and required more than 35,000 manhours." Exhibit 1 to this Appendix. Other figures with respect to specific covered jurisdictions are both unavailable and beyond this speaker's means of acquiring; however, extrapolation would reveal that the total cost to the covered jurisdictions in time and money is staggering.

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*Hereinafter in this paper (and appendices) as "Hearings".

Perhaps the single most offensive attitude toward the covered jurisdictions in the record is revealed in the officially recognized instructions to those who would contact the Justice Department about their particular jurisdiction:

> If there is no hard evidence that it is discriminatory in some still undiscovered way, or even if you just have a hunch based on past experience that "they are up to something," this also should be explained to the Department. "Federal Review of Voting Changes" by David H. Hunter, Hearings at pages 1467, 1491.

To suggest that "they are up to something" throughout the covered jurisdictions not only fails to recognize that the states themselves are ever correcting voter abuses but also insultingly ignores the presumption of the propriety of public officials' actions.

APPENDIX C

The sixty day period does not begin until the Justice Department has received a "complete" submission, and "completeness" is wholly within the Department's unreviewable discretion. Morris v. Gressette, 432 U. S. 491, 507 (1977). The sixty-day period does not begin until the submission is received by the Justice Department, and the Justice Department may want until the sixtieth day to mail an objection. A determination that a submission is "inadequate," and the consequent suspension of the sixty-day limitation, is a "frequent" occurrence. Hearings at 302. Indeed, it would appear that declination of a submission as inadequate may be used to gain additional time. See Justice Department inter-office memo ("Attachment B") attached to this Appendix. In short, the sixty-day limitation is not, in fact, a protection to the covered jurisdictions. The undependability of the sixty-day period continues to be a frequent complaint of submitting attorneys.

Mr. Justice Powell has perceived these difficulties, and he also questions the care with which the Attorney General receives and reviews submissions:

> It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States.[5] The need to bring a measure of common sense to its application is underscored further by the fact that state and local officials now are supplicants for the Attorney General's dispensation of approval under § 5 "at the rate of over 1,000 per year, and this rate is by no means indicative of the number of submissions involved if all covered States and political units fully complied with the preclearance requirement, as interpreted by the Attorney General." United States v. Sheffield Board of Comm'rs 435 U. S. 110, 147, 55 L Ed 2d 148, 98 S Ct. 965 (1978) (Stevens, Jr., dissenting) (foot-note omitted). When a change is submitted, the Attorney General may block its implementation simply by stating, within 60 days, that he is unable to conclude that it does not have discriminatory purpose or effect. Georgia v. United States, 411 U. S. 526, 537, 36 L Ed 2d 472, 93 S Ct. 1702 (1973). As a result, "the State may be left more or less at sea," id., at 544, 36 L Ed 2d 472, 93 S Ct. 1702 (White, J., dissenting), unable to put into effect such routine and trivial changes as the movement of a polling place or a precinct boundary line.[6]

[Footnote 5 omitted]

[6] One would like to assume that the Attorney General exercises this unprecedented power to veto state and local legislation personally and with the most thoughtful deliberation. But, as previously noted, applications for his dispensation flow to Washington at a rate of over 1,000 per year - almost 4 per business day. Even if the Attorney General had no duties other than those imposed upon him by § 5 one might doubt whether it would be possible for him to pass judgment, with care and sensitivity, upon each change in election laws or procedure submitted for his approval.

Berry v. Doles, 438 U. S. 190, 200-01 (Powell, J. dissenting).

TO : All Attorneys
Voting & Public Accommodations

DATE: November 19, 1970

FROM : Gerald W. Jones, Chief
Voting & Public Accommodations

SUBJECT: Preliminary Review of Section 5 Submissions

In the past few weeks several situations have arisen with respect to Section 5 submissions wherein we have been faced, on the eve of the expiration of the 60-day submission period, with the necessity of sending letters to the submitting party advising of some defect which prevents our responding in a substantive way. In order to alleviate this situation recurring, each of you should follow the following procedures when a Section 5 matter is assigned to you.

As soon as you receive the submission, you should give it a preliminary review and analysis to determine whether such things as basic additional and supporting documents are necessary to a proper analysis of the submission, whether or not the submission involves a final enactment if it is legislation, and generally whether the submission is in a form which makes it ripe for the Attorney General's consideration. In Mississippi for instance where state enabling legislation allowing at-large elections for county supervisors was objected to by the Attorney General, the only operable legislation in the state at present authorizes district-by-district elections only. Therefore, should a submission be received from a Mississippi county which seeks to authorize at-large elections, this should be detected promptly and a proper response to the submitting authority should be prepared without waiting until all or most of the 60-day period has run. Also in Mississippi the enabling legislation on redistricting requires an unanimous vote by the county governing body (Board of Supervisors). Here, too, if less than all five of the county's supervisors has voted for the redistricting plan as submitted, this should be detected right away and responded to. In those instances where the submission as initially submitted is completely inadequate for us to consider because of failure on the part of the submitting party to send appropriate supporting documents and information, this should be detected right away so that they can be asked for and the submitting party can be advised that the 60-day period will not begin to run until such time as the submission is complete. Needless to say it is very embarrassing to have to write a letter of this nature after we have had the submission for 45 or more days.

In view of the foregoing, each of you should confer with either Mr. Gorman or myself within one week of the date you receive a submission with respect to your preliminary review so that we may be advised of any problems which should be taken care of preliminarily.

APPENDIX D

The anomalous freezing effect on the electoral process which often results from the enforcement of Section 5 probably cannot be better described and exemplified than in a March 2, 1977, Washington Post article describing the City of Richmond's experience with the "unusual procedure":

> Virginia capital city elected its first City Council in seven years today....
>
> ***
>
> The Richmond City Council apportionment plan grew out of a long entangled court fight, laced with racial divisiveness and ironies in which a black civil rights activist with a fragmentary following set out to fight city hall and won--after a fashion. But the cost of his battle was $763,559 in legal fees, a six-year disenfranchisement for both blacks and whites in Richmond, the freezing in power of a City Council he was trying to evict and the near atrophy of the Richmond Crusade for Voters, the most powerful black political organization in the State.

The citizens of Richmond and the Virginia State Senate had earlier pleaded with the Congressional Committee studying the proposed 1975 Extension of the Voting Rights Act to end their disenfranchisement. Hearings, pp. 732-733.

New Orleans had a similar experience:

> "As a result [of the refusal to preclear a reaportionment plan] there have been no councilmanic elections in New Orleans since 1970 and the councilmen elected at that time (or their appointed successors) have remained in office ever since." Beer v. United States, 425 U. S. 130, 138 (1976).

More recently, of course, Rome, Houston, and New York City have joined the ranks experiencing this unrepublican holding pattern.

Remarkably, in City of Rome, 472 F. Supp. 211, the district court observed that "a five year suspension of elections during Section 5 litigation is by no means unusual." Id. at 241 n. 77. The court characterized the infeasibility of elections in Rome as "technical". Id. It was, however, no less real, and such an attitude demonstrates several inevitable results of the enforcement concept of Section 5: a failure to appreciate the sanctity and seriousness of state laws; a failure to acknowledge the evolution of Section 5 and the history of its enforcement; a failure to recognize the practicalities, hardships, and, most important, the time required to change state laws; the understandable bewilderment of all citizens of localities like Rome at not having elections.

Although "deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial," Rosario v. Rockefeller, 410 U. S. 752 at 766 (Powell, J., dissenting), in the process of Section 5 administration, in Richmond, New Orleans, Rome, Houston, and now New York and other jurisdictions, the electorates have literally been disenfranchised altogether: they could not be candidates, offer candidates, support candidates, associate to advance ideas or vote, and those in office (usually under the very law objected to) remained in office beyond their terms. Not having elections, thought since high school civics to be as inevitable as death and taxes, is bound to cause nothing short of bewilderment amongst those citizens who cannot reap the benefits of government improvements, let alone be able to "vote 'em out!"

APPENDIX E

In drawing on the City of Rome experience, it is nothing less than frustrating to perceive the tacit announcement that bloc voting by whites is considered a racial act while bloc voting by blacks in a single shot is to be encouraged

as an "opportunity." City of Rome v. United States, 446 U. S. at 184. All the logical corollaries of the Court's single shot prediction should be examined. Consider Rome's nine council members over whom black voters "are situated to exert considerable influence." See 422 F. Supp. at 248. Under the theory of single-shot voting, a black candidate runs under the pre-1966 system, "with the votes of the whites split among [several white candidates], and...with all the blacks [20.6%] voting for [the black candidate] and no one else." The black candidate is elected but if racial bloc voting exists and the single shot vote by blacks is encouraged, why should the white candidates "vigorously pursue" those who vote for "no one else"? In Rome's nine-man council, the blacks could have one member "representing an exclusively black constituency," 427 F. Supp. at 248, and no "considerable influence" over the others. Then, again given the arguable bloc voting syndrome and lack of reason to respond, blacks might truly become "politically powerless". City of Mobile, 436 U. S. at 104.

Persistent engagement in the technique of single-shot voting by blacks would tend to cause a retrogression in blacks' present ability to "determine the outcome of many if not most contests," 472 F. Supp. at 225, and, thus, to receive the responsiveness of those elected. The electorate would truly be compartmentalized and the community divided.

There is no more realistic perception of what the encouragement of single-shot bloc voting means than that stated by Mr. Justice Stevens in Mobile v. Bolden, 446 U. S. 55, especially in his quote of Mr. Justice Douglas:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated;

communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here. 376 U. S. 52, 66-67."

Id. at 88 n. 10. The encouragement of single-shot voting along racial lines is just as separatist as electoral registers and gerrymanders, "[a]nd surely there is no national interest in creating an incentive to define political groups by racial characteristics." (Stevens, J., concurring in the judgment). Id. at 88.

APPENDIX F

The Attorney General's and the courts' continued presumption of the existence of racial bloc voting tends "to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." Los Angeles Dep't of Water and Power v. Manhard, 435 U. S. 702, 709 (1978). The entire preoccupation with the concept of racial bloc voting, whether in its hypothesis, proof, remedying, or reinforcement, seems to go wide of the mark in the context of the right sought to be protected.* When the courts first addressed voting rights the focus was on individual voter weight. "The rights allegedly impaired are individual and personal in nature." Reynolds v. Sims, 377 U. S. 533, 561 (1964). See also South v. Peters, 339 U. S. 276, 280 (1950) (Douglas, J., dissenting). Protection of the individual vote appears to have been the

*In Rome, there was no evidence that voting along racial lines "regularly happens", United Jewish Organizations, v. Carey, 430 U. S. 144, 166, (1977) nor that any group was "fenced out of the political process and their voting strength invidiously minimized," Gaffney v. Cummings, 412 U. S. 735, 754 (1973). Indeed the contrary was true. See Appendix A. The presumption engaged in by the district court in City of Rome v. United States, 472 F. Supp. 221, 247, constitutes hyperbole contrary to the realities recognized by Chief Justice Burger in United Jewish Organization v. Carey, supra at 187 (Burger, C. J., dissenting), and it epitomizes the "questionable[ness]" of the assumption as recognized by the Chief Justice and Justice Blackmun. See Connor v. Finch, 431 U. S. 407, 427 n. 2 (1977) (Burger, C. J. and Blackmum, J. concurring in part and concurring in the judgment). The finding fails to recognize and respect the realities of groups of voters and their voting inclinations perceived by Mr. Justice Stevens in City of Mobile. See 446 U. S. 55, 88. (Stevens, Jr., concurring in the judgment).

goal of the Voting Rights Act when it was enacted. Now the focus has seemingly faded to group power, away from individual rights. Language in Bakke suggests that this original understanding should receive renewed attention:

> Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice the principle of individual equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose.

Regents of the Univ. of Cal. v. Bakke, 438 U. S. 265, 416 n. 19 (1978) (Stevens, J., concurring in part and dissenting in part) (emphasis original).

One commentator has observed that "consistent and persistent racial bloc voting" can disadvantage a political minority but:

> In situations which are politically fluid, disadvantage voters are not considered disenfranchised. Democrats in a Republican community, for example, are free to join the Republican Party and bore from within. Candidates can choose to emphasize certain issues at the expense of others in an effort to win votes. But in a situation of true racial bloc voting, there is no vying for votes across racial lines. Between two candidates of different races, there is no contest at all. Campaigning is unneccessary; a racial count will do. Color becomes the sole determinant of political effectiveness. Such a situation must be distinguished from one in which black, white, and other citizens belong to political interest groups that cross racial lines.

Thernstrom, supra at 57-58 (emphasis added).

Where a government (whether racially proportional or not) is responsive to its constituencies, there is no racial bloc voting because there is no impulse for it: all the people have been responded to.

[From the Wall Street Journal, Oct. 29, 1980]

Black Politicians Fear They Can't Do Much To Help Their People; They Often Lack Influence, and When They Have It Conditions Thwart Them; Is It Better to Elect a White?

(By David J. Blum)

Jackie Vaughn, a 42-year-old black Michigan state senator from Detroit, sees himself as an important political force for the black people he represents—"the poor, the unemployed, the welfare recipients," as he describes them.

"I have a sensitivity towards poor people's problems," he says. "Blacks are No. 1." But when asked to cite specific ways that he uses his position to help black people, he points to his authorship of a bill, passed four years ago, that made the late Rev. Martin Luther King Jr.'s birthday a legal holiday in his state.

"There isn't too much more I can do," he says.

Many of the 4,600 black elected officials in the U.S. share Mr. Vaughn's feeling of helplessness. Perhaps more than others, they understand the size and complexity of the problems facing black Americans. They know the symbolic value of their leadership positions, but they also know it hasn't gone far toward improving the lives of their constituents.

"*Problems* don't go away when you elect a black," says Harold Washington, a black Illinois state senator from Chicago. "Even the most powerful black leaders can't change very much."

The frustrations of elected black leaders begin with their numbers. The federal Voting Rights Act of 1965 gave the vote to blacks who had been disenfranchised by discriminatory local laws, thus opening the door for blacks to gain power where they make up a majority. But this pertains in so few places that while their number has more than tripled in the last 16 years, black officials still account for less than 1 percent of the U.S. total even though blacks account for about 13 percent of the nation's population.

Frustrations continue with the type of jobs blacks gain when they do win election. According to the Joint Center for Political Studies, a public-policy research organization based in Washington, about 50 percent of black officeholders occupy municipal-level positions, mostly in small or medium-sized towns, and 25 percent more sit on local school boards. The center points out that while such posts aren't without influence, their power has been declining in recent years as tax dollars and problem-solving authority have increasingly shifted to the federal and state governments.

URBAN DECAY

And when they do win election to important posts such as congressional seats or big-city mayoralties, it usually is in places where urban decay is so far advanced that any real progress toward reversing it seems all but impossible.

"By the time blacks move into the political mainstream, they've got too much work ahead to them to get it done," declares U.S. Rep. Shirley Chisholm, one of 17 blacks in Congress. Her district includes the run-down Bedford-Stuyvesant section of Brooklyn, a place she says is typical of the "shells white leaders leave behind when they abandon an area politically to blacks."

Compounding all these problems, black leaders say, is white racism at the polls. Without it, they say, Southern cities such as Mobile, Ala., wouldn't cling to at-large municipal election systems that have the effect of depriving blacks of local political representation when they constitute a sizable minority of the population, and more than the current tiny handful of blacks would hold statewide offices.

MISSISSIPPI EXPERIENCE

Mississippi, for example, contains the highest proportion of blacks of any state—37 percent—but no black has come close to winning statewide office there since Reconstruction. "Every time we put up a candidate, whites vote in a bloc against us," contends Charles Evers, the black mayor of Fayette, who is in 1978 ran unsuccessfully for the U.S. Senate as an independent. "We've tried all we can, but we just can't do it."

Only one black Congressman—Ronald Dellums of Berkeley, Calif.—represents a district that isn't predominantly black. Only two big-city mayors—Tom Bradley of Los Angeles and J. Kenneth Blackwell of Cincinnati—head cities where blacks are a distinct minority.

Nationally, the annual rate of increase of black elected officials, which hit a peak of 27 percent in 1971, has slowed considerably and is expected to rise by less than 2% this election year, according to the Joint Center for Political Studies.

"We've got almost all the easy positions—the offices in places where blacks are a majority and vote," says John Conyers, a black Congressman from Detroit. He suggests that it will be harder for blacks to show gains in the future.

Blacks aren't without influence in Congress and in the state legislatures where they sit. Most are Democrats and liberals, and over the years they have joined with white colleagues of similar persuasion to pass a wide variety of legislation in such areas of mutual interest as welfare, health care, job training and prison reform.

Furthermore, blacks have engaged in the time-honored parliamentary practices of block voting and vote swapping to win approval of measures they support. A few years back, a relatively small group of black legislators was able to prevent the election of a speaker of the Illinois House of Representatives until they were promised legislative concessions by their fellow Democrats.

But in most state legislatures blacks make up too small a faction to be counted as a bloc. And in these cost-conscious times, they increasingly are seeing their normal ideological allies flee when they seek legislation to help their constituents.

"Mostly, I'm busy hanging on to what we (black people) have got," says Regis Groff, a black Colorado state senator from Denver.

Mr. Groff might well be typical of black state-level politicians. A social worker and teacher, he moved to Denver from Chicago in 1963 and quickly became active in the civil-rights movement there. He then took a path common to many civil-rights activists: into politics. In 1974, he was elected to the Colorado House of Representatives from a black-dominated Denver district, and in 1976 he won election to the state senate. He is currently the only black in that 35-member body; two blacks are among the 65 members of the state's lower house. Blacks make up about 3% of Colorado's population.

SOME SUCCESS AT FIRST

Mr. Groff says that at first he had some "small success" as a legislator, particularly in his advocacy of an affirmative-action program for state government hiring. But he notes that parts of that program have lapsed without being renewed, and he is making little headway in persuading his colleagues to back new social-action initiatives in fields such as medical care.

He believes that white support for issues seen as benefitting mostly blacks has hit a plateau, and that the legislative demands of other population groups, especially women, have been taking precedence.

"People today are concerned about the economy, and the cost of everything," he says. "Blacks have been pushed aside for now."

Black political progress over the last 15 years has been most striking on the municipal level: Blacks today sit as mayors of such large cities as Detroit, Atlanta, Washington, Newark, N.J., Oakland, Dayton, Ohio, and Gary, Ind. But for the black mayor, the situation can be even more frustrating than for the black legislator. He is chief executive of his city, with the apparent power to make a wide variety of decisions that might help the people who elected him, but he often finds himself handcuffed by a shrinking local tax base and the necessity to court higher levels of government for financial aid.

Nowhere are these problems more evident than in the steel city of Gary, where Mayor Richard Hatcher has spent his 13 years in office trying to stem civic decay caused by a faltering local economy. He admits that beyond some small achievements, his efforts haven't succeeded.

Mayor Hatcher puts most of the blame for that failure on the state government, which he says has blocked Gary's attempts to expand its tax base and issue bonds to help it woo new business and industry to replace its considerable losses over the past two decades.

He says that the most serious blow the state delivered came in the early '70s when it exempted an area around Gary from a law that prohibits incorporation of a new city within three miles of an existing one. That exemption enabled an area of white homes and businesses, which Gary had coveted for tax revenue, to incorporate as Merrillville, thus escaping possible annexation by Gary.

Mayor Hatcher charges that the legislature won't help Gary "because I'm black, and because most people in Gary are black."

In light of such situations, some people, ask whether, aside from symbolism and some patronage jobs, it really matters if black voters choose a black candidate over a like-minded white. George Sternlieb, professor of political science at Rutgers Uni-

versity, thinks not. He has studied the policies and effectiveness of black and white municipal executives in a number of cities with large black populations, and concludes:

"The fact is that race hasn't made any difference."

U.S. Rep. Fred Richmond agrees. This isn't surprising, because he is white and represents a district in Brooklyn where the population is largely black. "I vote the same way a black would, and the way blacks in Congress generally do," says Mr. Richmond, a three-term Democrat who earlier this year defeated a black in his party's primary.

"Since I'm white, I have to work harder to satisfy my black constituents," Mr. Richmond contends. "If I were black I could get more votes without even trying, and my district would suffer."

Senator HATCH. Our next witness will be Mr. Thomas McCain, chairman of the Democratic Party of Edgefield County, S.C. He presently is working on a doctorate degree at Ohio University in Athens, Ohio.

Mr. McCain, we are happy to have you come to testify at this time.

STATEMENT OF THOMAS C. McCAIN, CHAIRMAN, DEMOCRATIC PARTY, EDGEFIELD, S.C.

Mr. MCCAIN. Mr. Chairman, I have a prepared statement. I do not plan to read all of it, but I would like the entire statement to be included in the record.

Senator HATCH. Without objection, it will be placed in the record immediately following your oral presentation.

Mr. MCCAIN. In addition, I will discuss our court case. Therefore, I would like to give to you two copies of Judge Chapman's orders in the case of *McCain* v. *Lybrand*. One of the court orders is marked April 17, 1980 and the other one is dated August 11, 1980. I hope that these court orders can also be put into the record.

I also have a copy of a story about my county from the Atlanta Constitution. I hope this also can be put into the record.

Senator HATCH. Without objection, so ordered.

Mr. MCCAIN. Mr. Chairman and members of the Senate subcommittee, my name is Thomas C. McCain, and I am from Edgefield County, S.C. where I serve as chairman of the Edgefield County Democratic Party. I have been employed as a college teacher of mathematics, and am presently completing my doctorate in education administration at the Ohio State University in Columbus, Ohio.

Thank you for giving me this opportunity to appear before your committee. I wish that I could say that I am happy to come before you today, but deep in my heart I am sad because it is still necessary, 119 years after the "Emancipation Proclamation" and in America, for me to be pleading to you for my voting rights.

When you look at conditions in Edgefield County, S.C., and the history, right up until today, of whites depriving blacks of their rights to participate in the political process, you can clearly see that it is necessary to extend the Voting Rights Act as proposed in S. 1992.

Perhaps when I talk to you about the things with which I am familiar, it may give you a better perspective on why I believe this bill is needed. I want to talk to you about the political way of life in Edgefield County and about the ways in which racial discrimination still plays a big part in the political way of life there.

Of course, since the Voting Rights Act was passed we have the right to register and vote, which was denied to many of us before that. You may ask, if there is a right to register and vote, doesn't that mean that voting discrimination has ended? The answer is "No".

First of all, there have continued to be interferences in a variety of ways with the right to register and vote. I have mentioned some of these ways in my prepared statement.

Even though many of us have overcome this resistance, there are many other black people in the county who have been deterred because they have received the message that they are not welcome in the political process.

Even more important than these lingering pieces of resistance to the right to register and vote, there is a host of other ways in which whites keep blacks out of the electoral process in my county. If anyone says that voting discrimination simply is a question of whether blacks are able to cast their ballots freely, I would have to disagree very strongly. My experience in Edgefield County tells me that, because of things like our election system, voting by black people simply is not worth as much and not counted as much as the votes of white people.

One of the reasons I believe S. 1992 is so important is because the amendment to section 2 which deals with the *Mobile* case of the Supreme Court—that case has directly hurt us in Edgefield County because it took a case we had won and turned the case around. This is the case of *McCain* v. *Lybrand,* which I have given to you. I would like to talk about it a bit.

I am not a lawyer. I will not talk about legal questions. However, my lawyer is here, and I am sure he can answer legal questions you may have.

In *McCain* v. *Lybrand* we were in court for 6 years before we finally won it before Judge Chapman. Judge Chapman is known as quite a conservative judge. You know that, if he ruled in our favor, the proof of discrimination must have been overwhelming, and it was.

His decision was issued on April 17, 1980. Then suddenly the *Mobile* case came along, and Judge Chapman was forced to take back his decision.

The discrimination was not any different but he said he could not find any proof that their intention was to discriminate. I would like to read to you several portions of that opinion, so that you can see how completely blacks have been locked out of the political system in Edgefield County. As I read, I will refer to the page I am on.

First, the opinion begins with some historical information, and then it gets right to the proof about the political process.

On page 8, No. 18, from the judge's order:

> No black has ever received a Democratic nomination or been elected to public office in a contested election in Edgefield.

On page 9, the first paragraph,

> By analyzing these elections, it was possible to get a clear picture of how elections take place in Edgefield County. The court's overall finding is that blacks were virtually totally excluded up to 1970, and that since that time they have progressed to minimal tokenism.

On page 11, No. 28,

Examination of the election results shows an extraordinarily high correlation in every election between the votes received by a black candidate and the racial composition of the precinct. This is true for all precincts, but is especially clear in the precincts which are virtually all white. In these precincts, in each election, the votes cast for black candidates ranged from zero to just a handful.

On page 12, No. 31,

The nearly identical votes cast for the two black candidates in 1974 were the more striking because of the evidence about the differences between them. T. C. McCain has long been known as an "activist" and has been engaged in many controversies with county officials. George Brightharp has not been engaged in controversial issues and has had a relatively close relationship with county officials and other white people. The evidence shows that these differences were wholly outweighted by the one common characteristic shared by McCain and Brightharp—their race.

No. 32,

The testimony of plaintiffs' witness Brightharp and defendants' witness H. Sam Crouch shows that blacks do not have equal access to the election process and the present system dilutes their strength. Brightharp testified that he had decided to run for office in the hope that voters would decide on the basis of issues or the merits of the candidates and in the hope that racial politics was a thing of the past. After analyzing the election and the returns, he concluded, sadly, that racial politics is ever present in Edgefield County, and that because of it, blacks are not able to participate fairly as Edgefield County voters.

Mr. Crouch, secretary of the Edgefield County Democratic Party, testified that blacks do not participate as equals in the electoral process of Edgefield County, and that the present system is the legacy of a long history of racial segregation. He said that there has been some improvement but it must come slowly, and indicated that no greater speed would be possible voluntarily—that it would take a court order.

Now that is the end of Judge Chapman's decision. However, even despite that, the *Mobile* case made him take his decision back.

In his opinion on August 11, 1980, which you have, it shows how damaging the *Mobile* case is. I do not believe anyone could try to justify the election in my county. Yet, the *Mobile* decision forced the judge to say that there was not enough evidence.

Senator HATCH. Mr. McCain, your 10 minutes has expired. We will put your full statement in the record immediately following your oral presentation.

Let me ask you just one question and then I will turn to Senator Metzenbaum's staff member for questions.

With respect to Edgefield County, you state in your testimony that it has used every trick possible to keep blacks from participating in the community. Examples of this are: its schools are segregated; there is a history of voting rights violations; church burnings occurred amidst an atmosphere of intimidation; blacks were unlawfully prohibited from registering; precinct lines were gerrymandered for racial purposes; blacks were excluded from jury service; there were racially segregated chain gangs until recent years, and so forth.

I have to admit that I do not know much about Edgefield County and cannot comment upon any of those allegations myself, but are you telling me that none of these fine attorneys who have testified here or the fine attorneys in your State who represent minority voters can find some demonstration of purposeful discrimination in all of this?

I guess my question really is, What precisely is your recommendation as far as changing the Voting Rights Act to address all this?

With all of the examples you have cited are you saying that there is no civil rights attorney, of any ability whatsoever, who could not show some purposeful discrimination in all of these allegations you have made?

Mr. McCAIN. If I understand correctly what you are asking, we have made some progress but we need S. 1992 in order to be given an opportunity to have a chance to elect persons to represent people of various segments in the community.

Senator HATCH. What is the percentage of blacks in Edgefield County?

Mr. McCAIN. Edgefield County is about 52-percent black.

Senator HATCH. Do you have an at-large voting system there?

Mr. McCAIN. Yes, we do.

Senator HATCH. How many county commissioners are elected at large?

Mr. McCAIN. There are five.

Senator HATCH. How many of them are black?

Mr. McCAIN. None of them are black.

Senator HATCH. Would you prefer that at least 50 percent of them be black?

Mr. McCAIN. No, not necessarily, but I would prefer that we have a plan for election so that blacks could at least have a chance of electing someone. At present blacks do not have a chance of electing anyone.

Senator HATCH. With 52 percent of the vote, it appears to me that they should have a chance.

Mr. McCAIN. We do not have 52 percent of the vote. We have 52 percent of the population. We only have 42 percent of the vote.

Senator HATCH. You state that there is only one black on the school board in Edgefield County and that he is "obviously serving at the pleasure of the white power structure." You also indicate that blacks in appointed positions in Edgefield are "tokens or window dressing."

Could you please tell this committee how the Voting Rights Act should define which blacks serve "at the pleasure of the white power structure," to use your quote, and which do not, and how it should define which blacks are "tokens or window dressing" and which are not? What really is the legal significance of those concepts.

Mr. McCAIN. There is only one black serving on the school board, who is obviously serving at the pleasure of the white power structure.

Senator HATCH. Why is it obvious that he is serving at the pleasure of the white power structure?

Mr. McCAIN. Because of the means by which he was placed on the board. He initially was appointed by the white county council.

Senator HATCH. How do you tell which blacks holding office are tokens and which ones are just serving at the pleasure of the white power structure? Would the fact that the white power structure chooses a black to serve on a commission, on a school board, or on some other committee, be sufficient to support such a claim?

Mr. McCAIN. The reason why I feel he is serving at the pleasure of the white power structure is that initially he was appointed to the school board by the white power structure and in his reelection

he had no opposition. That is why I feel they purposely saw to it that he had no opposition.

Senator HATCH. Let me ask you this: You say you would like to see the voting rights law enforced so that blacks will have a good chance to serve as county commissioners. How would you change it? What would you do to give blacks greater opportunity to serve in Edgefield County?

Mr. MCCAIN. If you notice from the case that I have given you, the reason why we are unable to elect anyone to serve is because of the at-large election.

Senator HATCH. Is the at-large election system the sole reason why, in your estimation, that you are unable to elect anyone.

Mr. MCCAIN. That is the sole reason why, in my estimation. You will notice from my testimony that I ran at large on two different occasions.

Senator HATCH. Right, and you lost on both occasions you are saying.

Mr. MCCAIN. I lost countywide but I won in my district.

Senator HATCH. I see. In other words, you won where there was a concentration of black people but you lost countywide.

Mr. MCCAIN. I won in the district from which I ran and from which, according to the plan, I was to represent the constituents of that district.

Senator HATCH. You are saying that if that district were made into a single-member district you would be serving today?

Mr. MCCAIN. I would have served 4 years by now.

Senator HATCH. Is that what you are saying?

Mr. MCCAIN. No, I am not after that. I am after changes in the Voting Rights Act to have districts or to have a plan where all persons in the community can have an opportunity of electing someone. If you look at this particular plan, black people do not have an opportunity to elect; there is no chance.

Senator HATCH. Why is that so? You can run for election like anybody else. You have 52 percent of the population. You have a heavily black-concentrated, complete, at-large district. You have a right to work within the whole district to try to convince people that you would serve better than, say, some white counterpart or Hispanic counterpart. How would this act make it any easier than it is today, for you to run in an at-large district and to get elected?

Mr. MCCAIN. The problem is we do not have 52 percent of the vote; we only have 42 percent of the vote.

Senator HATCH. I understand, but 42 percent is a high percentage of a vote with which to start, if you assume that they are going to vote for you.

Mr. MCCAIN. If you will notice, according to my testimony, with the attitudes of whites in the county, with the racial block voting, it is not possible in a county where whites have a majority of the registered voters, and where whites vote only for whites, for minorities to have an opportunity to be elected.

Senator HATCH. You are saying is that the only way that minorities are going to be elected is to allow minorities to vote separately for minority candidates.

Mr. MCCAIN. That is not the only way to allow a minority to be elected.

Senator HATCH. What other way would there be? If the whites are not going to vote for you and you are correct in your assertion that they actually represent a higher proportion of the votes in that at-large district, what possible way could this act help you to get elected unless it calls for proportional representation?

Mr. MCCAIN. If you would just take the situation in Edgefield alone, where some of the districts have a higher concentration of whites than others and some of the districts have a higher concentration of blacks than others, because of the at-large election, even those districts which are majority black cannot have anybody elected—not to have 50 percent of the elected officials, but cannot get one representative from the black community.

Senator HATCH. What I am missing here is this: If section 2 as amended by the House bill, which has the results test, does not lead to proportional representation and does not knock out at-large districts, then how is it going to help you to be able to get sufficient votes? If what you are describing is correct, how is it going to help you in your effort to be elected?

Mr. MCCAIN. It may not help me to get elected.

Senator HATCH. Or any other black for that matter? We do not have to limit it to your case, in particular.

Mr. MCCAIN. It may not help any black to get elected. That is not what we really are after—just to have blacks elected.

Senator HATCH. Then what are you after?

Mr. MCCAIN. We are after persons in their districts having an opportunity to elect whomever they choose.

Senator HATCH. They have that now. I have not heard testimony about many jurisdictions where those extraordinary conditions that caused the Voting Rights Act to be enacted actually still continue, or do they? If they do, we ought to stamp those out under present law. Do those extraordinary conditions—literacy tests, poll taxes, exclusions, intimidation—do they still exist there?

Mr. MCCAIN. Some.

Senator HATCH. Some?

Mr. MCCAIN. Yes.

Senator HATCH. I guess what you seem to be saying is that, if you have an intent test, you cannot prove that they exist?

Mr. MCCAIN. I do not know how we could.

Senator HATCH. OK. I think I will call on Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Senator THURMOND. Mr. Chairman, during the course of debate on the proposed amendments to the Voting Rights Act much has been said about Edgefield County, S.C., both before this subcommittee and during the House committee hearings. I have repeatedly heard Edgefield County referred to as the "home of Senator Thurmond." While it is true that I was born in Edgefield, I have not lived there in 35 years. My home is Aiken, S.C., and has been for almost four decades. Of course, I make this point as a matter of clarification for the record, not to cast aspersion in any way on the people who live in Edgefield, of whom I am very proud.

Many people may have been given the wrong impression of Edgefield because of the way its name has been bandied about during discussion on the Voting Rights Act. I feel that it is unfair to those who live in Edgefield County to allow the record to reflect anything less than a full and accurate picture.

Edgefield County, S.C., has a long and illustrious history of achievement and achievers. The noted historian, W. W. Ball, has written:

> Edgefield should have a book of its own. It has had more dashing, brilliant, romantic figures, statesmen, orators, soldiers, adventurers, daredevils than any county of South Carolina, if not of any rural county in America.
>
> James Bonham and William Barrett Travis, leaders of the Texan defenders of the Alamo, the American Thermopylae that "had no messenger to tell its story," were all born on its soil. Edmund Bacon, the "Ned Brace" of Judge A. B. Longstreet's "Georgia Scenes," was one of the earliest of a family of brilliant Edgefieldians. The Brookses, Simkinses, Pickenses, Butlers were Edgefield families. All of these were by blood or marriage, and they and other related families gave to their village and county a character that was South Carolinian, more intense, more fiery than was found elsewhere.
>
> Not less cultivated and colder than the men of Camden or the "old Cheraws," they seemed to be, if they were not, harder riders, bolder hunters, more enterprising and masterly politicians. Their virtues were shining; their vices flamed. They were not careful reckoners of the future, sometimes they spoke too quickly and so acted, yet, in crises an audacity that might have been called imprudence by milder men made them indispensable to the State.

Other historic figures from Edgefield include Andrew Pickens Butler, who served as chairman of the U.S. Senate Judiciary Committee; Brady Holmes, the noted poet who is remembered for his volume entitled "Idol Hour"; Pierce Mason Butler, who led the palmetto regiment during the Mexican War; Alexander Bettis, an outstanding pastor and educator; Florence Adams Mims, long remembered for her work with the temperance movement; and Alfred W. Nicholson, whose life was devoted to improving educational opportunity, just to name a few. Additionally, Edgefield has provided 10 Governors and dozens of Congressmen and judges for the State of South Carolina. I happen to have been the 10th judge and the 10th Governor.

Recently there has been a lawsuit entitled *McCain* v. *Lybrand*, in Edgefield which is based on claims arising under the Voting Rights Act. Some people have lifted various statements from that case to create an unfavorable impression of the citizens of Edgefield. Unfortunately, this effort misrepresents the real conditions in Edgefield.

To understand the true situation in Edgefield, we need to review the *McCain* v. *Lybrand* case in its proper context. First, this case represents an action brought by an unsuccessful candidate. If that candidate has been affected by governmental decisions made on the basis of race, he should be granted appropriate relief. I trust no one would claim otherwise.

Second, the judge in the case has admitted that he initially applied the wrong legal standard and, in fact, has rescinded his own order. Although we might all wish otherwise, it is simply an indisputable fact that trial judges sometimes make errors, such as using the wrong legal standard. That is why we have a system of appeals courts. We realize that occasionally judges make errors, as happened in this case. This error is no indictment of the judge, and

certainly this erroneous decision should not be the basis of claims about the people of Edgefield.

Third, even if the suit were to result in a finding of prohibited activity, that certainly is no indictment of all the people of Edgefield any more than a school discrimination case in Boston or Detroit or Cleveland or Baltimore or Denver is a comment on all of the citizens who live in these cities.

As I have noted, I have not lived in Edgefield for almost four decades. However, I do know the kind of people who live there. Those people are good and fair people. It is unfair to the overwhelming majority of them to allow others to impute bad motives or bad actions to them. If claims of such actions come before this committee, I am sure that Senator Hatch, in his usual fair manner, will allow representatives from Edgefield to respond to these charges. We must not let these hearings become a public forum for unanswered allegations and assertions.

I must admit that I am a bit surprised that allegations about Edgefield went unchallenged during the House debate. I was disappointed that the Congressman representing the citizens of Edgefield in the House of Representatives did not challenge these claims or try to do something about this alleged illegal activity, if it exists. I believe that we, as representatives elected by the people, owe them the duty to either challenge these serious and far-reaching claims against them or work to correct these problems if they really do exist. The trust of our office demands that we take such a course, no matter how unpopular either of these steps might be.

Mr. Chairman, I wish to thank you for letting me make this statement.

At this time, as chairman of the Judiciary Committee, I am needed on the floor where the judiciary authorization bill is now up for consideration. Therefore, I will ask you to excuse me, Mr. Chairman.

Senator HATCH. Thank you, Mr. Chairman. We are happy to have you here, especially with your knowledge.

I share some, if not all, of Senator Thurmond's feelings. If these conditions exist as you have outlined them in your statement, everybody ought to be pushing to get rid of them.

I still have some difficulties with your testimony with regard to what you really are driving for and what you would like to have in the Voting Rights Act. Be that as it may, let's turn to Senator Metzenbaum's staff person.

Ms. BAKER. Mr. McCain, I have just a few questions for you.

One thing I thought we ought to clear up is this: Do you or others in Edgefield wish to see quotas for elected office or proportional representation? Is that what you are after? Are you after quotas or proportional representation?

Mr. MCCAIN. No, we are not. We are not after quotas. We are not after proportional representation. We are after a chance to have the opportunity. Right now we do not have the opportunity.

Ms. BAKER. Second, do you think that amending section 2 as proposed in S. 1992 would stir up racial strife, as it has been alleged?

Mr. MCCAIN. No, I do not.

Ms. BAKER. Could you elaborate?

Mr. MCCAIN. One condition I can mention in order to point to that fact is this: I serve as chairman of the executive committee of the Democratic Party. Prior to my becoming chairman, blacks were excluded even in participation on the committee or working as precinct election officials. However, since I have become chairman, there are more blacks participating; blacks and whites are working together. They put on the Democratic primary together. Even whites are saying today that they know more about the party and they really appreciate the kind of information that we have been providing as chairman of the executive committee.

Ms. BAKER. Then it really is your position that amending section 2 will not stir up racial strife but in fact will do the opposite?

Mr. MCCAIN. Sure. I believe that.

Ms. BAKER. Thank you.

Senator HATCH. Thank you so much.

Mr. MCCAIN. Mr. Chairman, I would just like to say one final thing.

The Senator made reference to the Congressman's not challenging the House testimony, but I have the highest regard for my Congressman from South Carolina, who is originally from Edgefield. We do not intend to indicate that persons in Edgefield County are racists, but we just have not gotten the opportunity to participate.

Senator HATCH. You have made some very strong statements here. I would think that your Congressman would either want to come in and back you up on those statements or rebut them.

If I were a Member of Congress and I sat in a district where allegations like that were being made, I would be appalled, regardless of the merit, or lack thereof, of the allegations. I would be horrified to learn that such conditions exist and I would want to publicly condemn their continued existance. If they do not exist, then I should think the Congressman from Edgefield County ought to be here to defend his county and his constituency.

Mr. MCCAIN. Sure.

Senator HATCH. I am not passing any judgment one way or the other. The only question that I continue to raise is this: If all these things exist, certainly even a half-baked lawyer—with a minimum understanding of civil rights law could go in and prove purposeful discrimination.

I do not know whether anybody has tried to do that in Edgefield County, but they ought to be able to if these conditions exist as you have outlined them in your statement here today.

There is no question that a good civil rights lawyer, like some of those who have testified here, could easily prove purposeful discrimination if they put forth a minimum of effort to do so. At least I cannot believe they could not do that. That is one of the issues here. I would just make those comments within that framework. I think Senator Thurmond's position was right in that particular interchange that he has had.

Thank you for coming. We appreciate having your testimony.

Mr. MCCAIN. Thank you very much.

[The prepared statement of Mr. Cain and additional material follow:]

PREPARED STATEMENT OF THOMAS C. MCCAIN

Mr. Chairman, and members of the Senate Subcommittee, my name is Thomas C. McCain, and I am from Edgefield County, S.C., where I serve as chairman of the Edgefield County Democratic Party. I have been employed as a college teacher of mathematics, and am presently completing my doctorate in education administration at the University of Ohio.

Thank you for giving me this opportunity to appear before your committee. I wish that I could say that I am elated to come before you today, but deep in my heart I am sad because it is still necessary, 118 years after the Emancipation Proclamation and in America, for me to be pleading for my voting rights.

When you look at conditions in Edgefield County, S.C., and the history of whites depriving blacks of their rights to participate in the political process, you can clearly see that it is necessary to extend the Voting Rights Act as proposed in S. 1992.

The Edgefield County power structure has used every trick possible to keep blacks from participating in the political process. These range from offering bribes to an outright refusal to abide by the law. In 1966, the form of county government was changed from a three-member appointed county council to a three-member elected at-large form without getting preclearance from the U.S. Justice Department, as required by section 5 of the 1965 Voting Rights Act. The net effect of this change was the dilution of black voting strength.

In 1970, blacks organized in Edgefield County to demand participation in the development of a school desegregation plan for a unitary school system. The county school district was 65 percent black, but the county school board had no black representation. The group was organized in January on a Monday night and was known as Community Action for Full Citizenship (CAFC), with myself as its chairman.

The local weekly newspaper carried the story of the organization and its purpose the following Thursday. The Carey

Hill Baptist Church was burned to the ground before daybreak the next Monday. The church had a membership of about 75 percent McCains and had long been known in the community as the McCains' church. The members of the church were too afraid to talk about this other than among themselves.

In planning for a voter registration drive, CAFC made a request to the local registration board for black deputy registrars to be given permission to register persons at different locations in the community. It took 2 years for the registration board to grant CAFC's request. During the voter registration drive, some blacks were not permitted to register because they could not write their names. The registration board drew a precinct line beside my house and used that line to move my registration to another precinct to satisfy the wishes of a white precinct president. The registration of my sister, who lived at the same residence as I, was not disturbed.

Also in 1970, Strom Thurmond High, a formerly white school, was designated the high school for all students. It kept "Confederate Rebel" and "Dixie" as the school nickname and school song, and kept the use of the Confederate flag as the school symbol at athletic and other events. Black citizens complained that Strom Thurmond High was being maintained as an essentially segregated school, and that the school symbols were badges of slavery, white racism and were degrading signals of second-class citizenship for blacks. The school board promptly resolved that, "the existing traditions now in force in all schools of the system will continue," and CAFC had to get a federal court order to resolve these issues.

Blacks were traditionally excluded from jury service in Edgefield County. As late as 1968 and 1970, the grand jury had no blacks at all. It was not until suit was brought in 1971 that the jury list was reconstituted to include blacks fairly. The Edgefield County Council historically kept the county chain gang segregated by race, until a suit was brought in 1971.

Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible, although the percentage of registered voters who were black ranged from 33 percent in 1970 to 40 percent in 1974. For 3 years, 1970, 1972, and 1974, the total number of precinct workers appointed in the 17 precincts of Edgefield County by race is as follows:

	Whites	Blacks	Percentage
All primaries.....	192	17	8.1
All general elections.....	281	33	15.4
School board elections.....	34	4	10.5
Total (all elections).....	507	54	9.6

The race of those appointed to serve as precinct election officials has traditionally been regarded as an important barometer of the degree of minority participation in the voting process.

In 1972, I qualified as the first black since Reconstruction to run for a county council seat in the Democratic primary. The county attorney had the registration board remove my name from the registration books to prevent me from running as a candidate in the Democratic primary. In 1974 and 1976, I was finally able to run for county council. Each time I would have won a seat on the council had there not been at-large elections. At-large elections combined with racial bloc voting makes it nearly impossible for any black candidate to win in Edgefield County.

In 1975, I wrote an open letter to the community criticizing the board of education policies for being in violation of federal regulations. The school board sued me personally for libel for $245,000. And when the school board was under pressure from the Office of Civil Rights (OCR) in Atlanta, the board asked me to write a letter to OCR asking that more time be given for the school board to comply with federal regulations and the board offered as a favor to me to withdraw the libel suit. I refused the request. The libel suits were later dismissed prior to trial.

Another incident illustrates the determination of Edgefield County officials to resist change at all costs. In 1976, while litigation seeking to declare the at-large system racially discriminatory was pending, a State home rule law was passed which allows at-large counties to shift to single-member districts by referendum, if a referendum was called either by the county council or by petition of 10 percent of the registered voters.

In Edgefield County, of course, the county council made no move to call a referendum, so the citizens started circulating petitions. We needed 650 signatures because there were 6,494 registered voters in the county. On May 13, several weeks before the deadline, we submitted 57 petition pages, marked pages 1-57, 715 signatures, and 6 days later submitted 16 more pages, marked pages 58-73, with another 113 signatures. When they were all counted, and after striking out the names of those that were not properly registered, there were over 700 valid signatures, more than enough to require a referendum. Yet, local officials refused to call a referendum, claiming we had submitted the signatures too late to be acted upon.

The county officials also said that since these petitions were given in on different days, they were separate petitions and could not be added together. This is what they said even though the petitions had the same heading and even though the first set was numbered pages 1-57 and the second set was numbered 58-73. We went to court to enforce our rights, but by then the time allowed under the State home rule law ran out and the referendum could not be held.

Now it is true that there were two black members on the registration board, but when those two women asked to be able to come in to help certify names in order to speed up the process, they were turned away.

Anyway, we have never had the referendum.

That experience taught me a number of things: first, there is little to which officials in my county will not resort in order

to maintain total control of the county. Second, they are not even willing to trust the democratic process of allowing the voters to have a referendum. Third, ordinary resort to the courts will not work as a way of protecting the right to vote. And last, the so-called progress that has been made in appointing blacks to official positions is tokenism, or window dressing.

The power structure in Edgefield County has a history of systematically excluding blacks from participating in the political process and the situation is not much improved today. At present in Edgefield County, there is only one black serving on the school board who is obviously serving at the pleasure of the white power structure. There are no blacks serving on the county council, although blacks make up 54 percent and 44 percent of the registered voters.

Without the extension of the Voting Rights Act, there is no hope of ever getting a black elected to county government in Edgefield; there is no hope, in fact, of blacks in my county ever achieving true racial equality.

ENTERED
8-12-80 mh

FILED
AUG 11 1980
MILLER C. FOSTER, JR., CLERK
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

Thomas C. McCain, et al.,
Plaintiff,

vs

Charles E. Lybrand, et al,
Defendant.

Civil Action No. 74-281

O R D E R

This matter is before the Court as a result of a motion filed by defendant pursuant to Rules 59(e) and 60(b) asking the Court to alter, amend, or vacate its Order and Judgment entered April 17, 1980, and April 22, 1980, respectively. This Court's Order of April 17 invalidated and declared unconstitutional the method by which members of the Edgefield County Council are elected and the judgment enjoined the defendants from holding any elections pursuant to the present plan.

The present motion to alter, amend or vacate is made upon the authority of a decision of the United States Supreme Court issued April 22, 1980, City of Mobile, Alabama v. Bolden, et al, _____ U. S. _____, No. 77-1844, decided April 22, 1980. The Mobile case decided that an action by the State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by discriminatory purpose. The Court went on to hold that to prove such discriminatory purpose it is not enough to show that a minority group has not elected representatives in proportion to its number, but must prove that the disputed plan was "conceived or operated as a purposeful device to further racial discrimination."

In this Court's Order of April 17, 1980 it relied heavily upon the standard set forth by the Fifth Circuit in

Zimmer v. McKeithen, 485 F.2d 1297. In Mobile the Court referring to Zimmer stated:

> That case, coming before Washington v. Davis, 426 U.S. 229, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause - that proof of a discriminatory effect was sufficient.

The Mobile court pointed out that there had been a finding in the Mobile case that no Negro had ever been elected to City Commission because of the pervasiveness of racially polarized voting, and the trial court further found that city officials had not been as responsive to the interest of Negroes as to whites and concluded that the political processes in Mobile were not equally open to blacks, even though they registered and voted without an appearance. The Court further found that a proof of an "aggregate" of the Zimmer factors does not prove discriminatory intent or unconstitutional discriminatory purpose.

As to past discrimination the Court stated:

> But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case.

As to the at-large electoral system and the majority vote requirement, the Court stated:

> But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in White v. Regester, supra. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.

A careful reading of Mobile and a reconsideration of the evidence in the present Edgefield County case convinced the Court that the plaintiffs have not proved that the voting plan for election of members of County Council in Edgefield County was either conceived or is operated as a purposeful device to further racial discrimination nor was it intended to invidiously

discriminate against blacks in violation of the Equal Protection Clause. Therefore, the Court's Order entered April 17, 1980 and the judgment entered thereon entered April 22, 1980 must be vacated. Since circumstances have changed since the evidence was originally taken in this case the parties may wish to submit additional evidence on the point that is now the crux of the case - whether the at-large system was conceived or operated as a purposeful device to further racial discrimination.

The Court will allow additional evidence to be submitted on this point and schedules the matter for a further hearing and the taking of any necessary testimony on Thursday, September 4, 1980 at 10:00 a.m. in the Federal Courthouse in Columbia, South Carolina.

AND IT IS SO ORDERED.

Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

August 8th, 1980
Columbia, South Carolina

TRUE COPY:
TEST:
MILLER C. FOSTER, JR., CLERK
Mary Lynn Phipps
BY: DEPUTY CLERK

APR 21 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENWOOD DIVISION

ORIGINAL FILED

APR 17 1980

MILLER C. FOSTER, JR., CLERK
U. S. DISTRICT COURT

Thomas C. McCain, Ernest Williams and William Spencer, Individually and on behalf of all those similarly situated,

Plaintiffs,

vs

Charles E. Lybrand, Gene Huiet, Henry M. Herlong, Roy A. Harling, and W. T. Timmerman, Individually and as members of the County Council of Edgefield County; Norman Dorn, John S. Edwards and Richard A. Beals, Individually and as members of the Board of Election Commissioners of Edgefield County, S. C.; and J. M. Pendarvis, Individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

Defendants.

Civil Action No. 74-281

O R D E R

This action challenges the method by which members of the Edgefield County Council are elected. Plaintiffs are certain black, adult citizens of Edgefield County and allege that the present method of election violates the one man - one vote principle of Wesberry v. Sanders, 376 U.S. 1 (1964), and that such system also dilutes the voting strength of the black citizens of Edgefield County in violation of the principles set forth in Whitcomb v. Chavis, 403 U.S. 124 (1971), and White v. Regester, 412 U.S. 755 (1973).

RLG #1.

The defendants are the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners and the president of the executive committee of the Edgefield County Democratic Party. Each defendant is sued individually and in his official capacity.

The complaint raises two issues. The first alleges that the present apportionment of the Edgefield County Council dilutes the relative strength of the voters living in Districts One and Three to such an extent as to violate the rights of plaintiffs, and other voters similarly situated, under the First and Fourteenth Amendments to the Constitution of the United States.

The second claim asserts the present apportionment of Edgefield County Council, including holding elections at-large, dilutes the relative strength of the class of black voters of Edgefield County in violation of their rights and the rights of other blacks similarly situated guaranteed by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The complaint prays for a declaratory judgment that the Edgefield County plan violates the plaintiffs' constitutional rights; for an injunction prohibiting the defendants from holding further elections under the plan; and for an Order requiring Edgefield County Council to reapportion itself in a constitutional manner.

Defendants deny that the Edgefield County Council is unconstitutionally composed or elected and asks that the complaint be dismissed.

RHe #2.

On May 16, 1974, the Court[1] granted a motion for summary judgment by the plaintiffs holding that because of the unequal apportion of certain of the districts within the county that the one man - one vote principle had been violated. On appeal this matter was heard and decided with Lytle v. Commissioners Election of Union County, 509 F.2d 1049 (4th Cir. 1974). The Circuit Court found that the Edgefield County plan did not have such a variance or disparity in population among the districts as to require the deletion on constitutional grounds of the resident requirements

[1] Honorable Sol Blatt, Jr.

imposed by the statute. Page 1054. Just prior to the trial of this cause this Court granted defendants' motion for summary judgment based upon the finding of the Appellate Court which states:

> We are of the opinion that the Edgefield County plan, as presently provided by statute, represents a proper balancing of interest and without such population variances among the districts as to require the deletion on constitutional grounds of the residence requirements imposed by the statute under attack. There is not the wide disparity in population among the districts as was the case in Union County. It is not obvious that a minority, either in numbers or in territorial or economical interest, can dominate the Board. The several districts are of sufficient size and numbers that a residence requirement does not appear to be an irrational method of achieving a form of county government, elected by all voters of the county but, through its residence requirement, assuming some attention to territorial interest. We conclude, therefore, that the District Court was in error in invalidating the statutory election procedure for the members of the Edgefield County Board.
> 509 F.2d at 1054

The issue remaining is whether the apportionment of the Edgefield County Council, which includes at-large election of the council members and requires that each of the five members of council reside in a separate residency district, dilutes the voting strength of the black citizens of Edgefield County in violation of their constitutional right.

RLC #3.

After extensive pretrial discovery this matter was tried before the Court on November 24 and 25, 1975. Thereafter extensive briefs and proposed findings of fact and conclusions of law were submitted by the parties. The matter was then delayed a long time because the Court was advised the South Carolina Legislature would adopt a new plan for Edgefield County After considering the testimony and over 100 exhibits, as well as studying the applicable Law, the Court makes the following findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. That the plaintiffs are black citizens of Edgefield County, South Carolina. They are duly registered to vote in that county. Plaintiff McCain lives in District Two of Edgefield County, plaintiff Williams lives in District Three and plaintiff Sepencer lives in District One.

2. That the defendants Charles E. Lybrand, Gene Huiet, Henry M. Herlong, Roy A. Harling, and W. T. Timmerman are or were at the time this action was commenced the duly elected and acting members of the County Council of Edgefield.

3. That Norman Dorn, John S. Edwards and Richard A. Beals are or were at the time this action was commenced the acting members of the Board of Election Commissioners of Edgefield County.

4. That J. M. Pendarvis is or was at the time this action was commenced the President of the Executive Committee of the Democratic Party of Edgefield County.

5. That prior to 1966 the county government of Edgefield County consisted of a Board of County Commissioners which was composed of a county supervisor, elected at large in the county, and two commissioners, who were appointed by the governor upon recommendation of the County Legislative Delegation. These two commissioners ran at large for the office and the winners were recommended by the County Delegation to the Governor for appointment. The supervisor had general jurisdiction in the county over roads, bridges, ferries and paupers and in matters relating to taxes, disbursement of public funds for county purposes and in other matters necessary for the internal improvement and local concerns of the county. This County Board of Commissioners did not have power to tax, incur bonded indebtedness, or appoint members of county boards, commissions and agencies or the right of eminent domain nor the right to prescribe procedures for budgeting and accounting. These aforementioned powers belong to the local legislative delegation which

at that time consisted of one senator and one or more members of the House of Representatives, all of whom were residents of Edgefield County. These elected officials exercised their powers through the enactment of local bills in the General Assembly.

6. Prior to 1966, the state senator from Edgefield County and the members of the House of Representatives were elected at-large by the voters of Edgefield County. In that year O'Shields v. McNair, 254 F.Supp. 708 (D.C.S.C. 1966) required the reapportionment of the State Senate and it became obvious that Edgefield County with such a small population would probably lose its resident senator. Therefore, on June 1, 1966 Act No. 1,104 of 1966 was passed creating Edgefield County Council, which had three members and was elected from the county at-large from each of three residency districts set forth in the Act. Section 4 of the Act vested in Council the power to recommend appointments with the approval of the Edgefield County members of the House of Representatives and the powers of Council were set forth and included the rights: to exercise the powers of eminent domain; to make apportionments and levy taxes, to incur indebtedness, to issue bonds, to order the levy and execution of ad valorem taxes; to prescribe methods for accounting for county offices and departments and supervise and regulate the various departments of the county.

7. By Act No. 521 of 1971 the number of members of county council was increased to five and the residency districts were also increased from three to five.[2]

8. Prior to 1966 county governments in South Carolina had been controlled by the members of the General Assembly and particularly the state senator. Since local acts, "known as Supply Bills" were required to be passed each year to levy taxes and appropriate monies for the operation of the counties, and since these bills required passage by both the House of Representativ and the State Senate, the state senator exercised great control (actually a veto) over the operation of his county. The purpose

[2] These five members are elected for four-year terms at staggered two-year intervals.

of Act 1104 of 1966 was to create a strong county government with proper representation from the urban and rural areas. By requiring the candidates for county council to run at-large rather that in single member districts, it was hoped that council members would be responsive to all voters in the county and reduce factionalism or sectionalism. By requiring the candidates to reside in a certain district, one area of the county could not dominate council membership. The at-large feature of the election process was in keeping with the prior election plan for county commissioners and almost all other county officers in South Carolina.

8. The increase in membership from three to five passed in 1971 was made as an effort to provide wider representation on council and to provide rural areas with a greater voice in county government.

9. There was no evidence that either Act 1104 creating county council or Act 521 expanding its membership were enacted for the purpose of diluting black voting strength. But this does not mean that they do not have the effect. The residence districts established by both 1104 and 521 are based upon voting precinct lines of long standing and which anti-date the creation of county council.

10. The South Carolina Attorney General submitted to the Attorney General of the United States the changes made under Act No. 521. After review pursuant to Section 5 of the Voting Rights Act of 1965 the Attorney General of the United States on November 24, 1971 informed South Carolina Attorney General that he interposed no objection to the implementation of Act No. 521.

11. At the time of the Attorney General's letter (November 24, 1971) South Carolina had a "full slate" voting law. (§23-357 S.C. Code 1962). This is no longer the law[3] of South Carolina and minorities, both of race and of party, can increase their effective voting strength by "single-shot" voting, rather

[3] This change resulted from a black challenge in Stevenson v. West, C.A. 72-45 (D.S.C. unreported case 4/7/72). S.C. Republicans had failed in their suit eight years earlier. Boineau v. Thornton, 235 F.Supp. 175 (D.S.C. 1964), aff'd 379 U.S. 15 (1964).

than being required to vote for candidates equal in number to the offices to be filled.

12. As of the 1970 census Edgefield County's population was 8,104 black and 7,586 white. The total voting age population was 9,364, of which 4,167 or 44.5% were black and 5,195 or 55.5% were white. Although blacks make up 51.6% of the population, they comprise only 44.5% of the voting age population, obviously due to the age structure of the black and white populations of the county.

13. As of July 31, 1975 there were 5,685 registered voters in Edgefield County, 2,254 being black and 3,429 white. Therefore, the black citizens comprise 51.6% of the total population 44.5% of the voting age population and 39.6% of the registered voters. For whites these figures are 48.3%, 55.5% and 60.3% respectively. These figures reflect that 54% of the black voting population of the county is currently registered to vote.

14. Of the five council districts[4] in Edgefield County two contain a majority of black registered voters. In District Two blacks make up 61.8% of the total registered voters and 52.3% in District Five. The black percentage in Districts One, Three and Four are 30.8%, 36% and 18% respectively.

15. Of the 46 counties in South Carolina, Edgefield ranks 37th in size with 482 square miles. According to the 1970 census Edgefield County is 41st in total population and 37th in population per square mile with 32.6 persons per square mile. The rural population is 10,390 or 66.2% and the urban population is 5,302. The rural population is 54.3% black and a majority of these persons are located in the northern and eastern parts of the county.

16. Black citizens of Edgefield County now register to vote on an equal basis with whites. As was true in many other areas of the south, it was quite difficult, and often impossible,

[4] The residence districts follow precinct lines, as follows

District 1: Johnston I, Johnston II, Long Branch
District 2: Trenton, Central, Bacon
District 3: Edgefield I, Edgefield II
District 4: Merriweather, Colliers, Cleveland, Kendall
District 5: Red Hill, Rock Hill, Moss, Meeting Street, Pleasant Lane

to register to vote until approximately 30 years ago. At the time of the passage of the Voting Rights Act in 1965 less than 20% of the voting age blacks of Edgefield County were registered.[5]

17. The Democratic Party has always dominated government in Edgefield County. Until the past 15 years the primary of this party was the only meaningful election anywhere in the state. Blacks were excluded from participation in the Democratic primaries until Elmore v. Rice, 72 F.Supp. 516 (E.D.S.C. 1947) aff'd, 165 F.2d 387 (4th Cir. 1948). But even after this landmark decision blacks in Edgefield County found it very difficult to register and threats were made against some blacks who did register.

18. No black has ever received a Democratic nomination or been elected to public office in a contested election in Edgefield.[6]

19. Blacks now participate in the affairs of the Democratic Party and this participation has grown in recent years. Blacks have participated within the organization of the Democratic Party and in the selection of its officials. They have also participated in organizing the precincts. At the 1974 County Convention for the Democratic Party approximately one-third of those in attendance were black. Of the 15 delegates elected by the County Convention to the State Convention of the Democratic Party, four were black. The Edgefield Democratic Party has a black vice-chairman and the alternate committeeman to the State Executive Committee is also a black.

20. Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible, although the percentage of registered voters who were black ranged from 33% in 1970 to

---

[5] | | W | B |
|---|---|---|
| VAP | 4,103 | 3,764 |
| Registration | 3,950 | 650 |
| % | 96.3% | 17.3% |

[United States Commission on Civil Rights, Political Participation 252-53 (1968)]

[6] A black was appointed to a vacancy on the County School Board and has been unopposed in subsequent elections.

40% in 1974. The figures, arranged separately for primaries, general elections and a school board election, are as follows:

Primaries	#W	#B	%B
1970	68	4	5.5%
1972	69	4	5.4%
1974	55	9	10.8%
All primaries	192	17	8.1%
General Elections			
1970	87	7	7.4%
1971	50	1	1.9%
1972	86	13	13.2%
1974	58	12	17.1%
All General Elections	281	33	15.4%
School Board Election			
1974	34	4	10.5%
Total (all elections)	507	54	9.6%

Elections conducted in 1970-1974 are as follows:

1970: School Board, Primary, General
1971: Special General
1972: Primary, General
1974: School Board, Primary (including runoff), General

By analyzing these elections, it was possible to get a clear picture of how elections take place in Edgefield County. The Court's overall finding is that blacks were virtually totally excluded up to 1970, and that since that time they have progressed to minimal tokenism.

21. The race of those appointed to serve as precinct election officials has traditionally been regarded as an important barometer of the degree of minority participation in the voting process. In Edgefield County, precinct workers are appointed not by precinct officials but by county officials -- the County Democratic Executive Committee for primary workers, and the County Election Commission for general election workers. Evidence concerning the past few years' elections in Edgefield County showed exclusion of blacks (by officials exercising state action) in a critical part of the election process.

22. Of the 17 precincts in Edgefield County, fully 8 have never had a black person serve at the polls, at any of the eight elections conducted since 1970, primary, general, or school board. These precincts are shown below, with the total number of white official who have served during this period:

	W	B
Bacon	27	0
Central	27	0
Cleveland	28	0
Colliers	30	0
Kendall	30	0
Long Branch	27	0
Moss	26	0
Red Hill	30	0

23. Even among precincts whose voters are predominately black, county officials and county Democratic Party officials have refused to appoint any significant number of black precinct workers. The number of precinct workers, by race, for all elections since 1970 is shown below for the 5 precincts which are majority black:

	% B Reg.		#W	#B	% B
Johnson I	(51%)		38	5	11.6%
Meeting St.	(55%)		28	1	3.4%
Pleasant Lane	(68%)		24	2	7.6%
Rock Hill	(80%)	=	28	1 *6	3.4%
Trenton	(66%)		35	10	22.2%
Total			153	19	11.5%

24. The evidence also showed that in each election certain officials are given greater responsibility [Edwards testimony] and work and are paid for more than one day. Records for the 1971 and 1974 elections showed 4 whites and no blacks in these positions. (During the 1972 election some precincts worked all workers for two days, but here again 22 whites worked more than the minimum number of days, compared to 0 blacks.)

25. Evidence was also presented concerning the race of the precinct Democratic Committee members. The number of such precinct officials, by race, for 1970 and 1974, is shown below:

	W	B	% B
1970 (12 precincts reported)	34	1	2.8%
1974 (17 precincts)	43	4	8.5%
Total	77	5	6.1%

[6] Five of the 10 black workers appointed at Trenton (McCain's precinct) have come in the two elections since black voters captured control of the precinct during the 1974 precinct organization meeting. Even in both those elections, a majority of the workers appointed were white.

26. The evidence established that voters in Edgefield County, when confronted with a race between black and white candidates, vote along racial lines. This behavior pattern is very clear as to white voters, many of whom will not vote for a black candidate. This fact is evident both from a visual examination of election results and from the statistical analysis of those results done by plaintiffs' expert witness, Dr. John Suich.

27. Four black candidates have run for office in Edgefield County, 1970-74, two for school board in 1970 (Lanham and Senior), one for County Council in 1974 (McCain), and one for South Carolina House of Representatives in 1974 (Brightharp). One of these candidates, Brightharp, also was in a runoff.

28. Examination of the election results shows an extraordinarily high correlation in every election between the votes received by a black candidate and the racial composition of the precinct. This is true for all precincts, but is especially clear in the precincts which are virtually all white. In these precincts, in each election, the votes cast for black candidates ranged from zero to just a handful:

1970 School Board Election

	1970 % B Reg.	W	B	W	B
Colliers	8%	66	2	68	0
Long Branch	10%	30	5	30	5
Red Hill	1%	92	0	92	0

		(House)		(County Council)		(House Runo	
	1974 % B Reg.	W	B	W	B	W	B
Cleveland	5%	45	0	37	4	49	4
Colliers	4%	81	2	78	6	87	4
Long Branch	12%	45	3	43	7	51	5
Red Hill	1%	66	0	53	9	67	5

29. The Edgefield County pattern of racial bloc voting was confirmed by plaintiffs' expert witness, Dr. John Suich, who testified that the statistical correlation between the race of the voter and the race of the candidate was extraordinarily high,

in the range of 0.90 (on a scale of -1.00 to +1.00) for each election in which a black candidate has run. Dr. Suich testified that the correlation was not just statistically significant but overwhelming, and the Court agrees. The correlation between race and voting pattern went up, not down, from 1970 to 1974.

30. The testimony also showed that in both 1970 and 1974, each of the two black candidates received almost identical numbers of votes in each precinct. This was true for each precinct,but again was especially marked for those precincts which are virtually all white. In 1970, for example, the two black candidates lost to the two white candidates by identical votes in the precincts of Central (43-6), Cleveland (51-1), Kendall (66-18), Long Branch (30-5), and Red Hill (92-0). In six more precincts, the difference between the two blacks (and, correspondingly, between the two whites) was three votes or less. In 1974, the two black candidates lost in Central by idential votes of 35-14, and the votes in eight other precincts varied by eight votes or less.

31. The nearly identical votes cast for the two black candidates in 1974 were the more striking because of the evidence about the differences between them. T. C. McCain has long been known as an "activist" and has been engaged in many controversies with county officials. George Brightharp has not been engaged in controversial issues and has had a relatively close relationship with county officials and other white people. The evidence shows that these differences were wholly outweighed by the one common characteristic shared by McCain and Brightharp--their race.

32. The testimony of plaintiffs' witness Brightharp and defendants' witness H. Sam Crouch shows that blacks do not have equal access to the election process and the present system dilutes their strength. Brightharp testified that he had decided to run for office in the hope that voters would decide on the basis of issues or the merits of the candidates and in the hope that

racial politics was a thing of the past. After analyzing the election and the returns, he concluded, sadly, that racial politics is ever present in Edgefield County, and that because of it, blacks are not able to participate fairly as Edgefield County voters.

Mr. Crouch, Secretary of the Edgefield County Democratic Party, testified that blacks do not participate as equals in the electoral process of Edgefield County, and that the present system is the legacy of a long history of racial segregation. He said that there has been some improvement but it must come slowly, and indicated that no greater speed would be possible voluntarily -- that it would take a court order.

33. Juries. Blacks were historically excluded from jury service in Edgefield County. As late as 1968 and 1970, the grand jury had no blacks at all, while the trial jury venires in those years had few blacks. It was not until suit was brought in 1971 that the jury list was reconstituted to include blacks fairly. Bright v. Thurmond, CA No. 71-459 (D.S.C. 1971).

34. Chain Gang. The Edgefield County Council historically kept the county chain gang segregated by race, until a suit was brought in 1971. Carracter v. Morgan, CA No. 71-314 (D.S.C. Nov. 17, 1971); 491 F.2d 458 (4th Cir. 1973).

RJG #13.

35. Blacks have been excluded from county employment by the County Council, even up to the present. No current black employee began service before 1971. Until the very eve of trial in this case, black employment was negligible. It was only when trial was about to begin that the County suddenly began hiring blacks in any numbers.

	W	B
As of 9/1/75	33	4
From 9/1/75 to 11/12/75	8	11

In addition, blacks are heavily concentrated at the lower wage levels. Of the last minute hires, none of the 11 blacks earns more than $5,460, while none of the 6 white males earns less

than that figure. (Two white females earn less than $5,460. For all county full-time employees, the salary levels are as follows:

	WM	WF	BM	BF
Less than $5,460	0	7	1	4
$5,460	2	0	7	0
More than $5,460	22	6	2	0

36. Blacks have been excluded by the County Council in appointments to country boards and commission. The date of trial membership of boards and commissions appointed by the County Council is as follows:

	W	B
Fire Study Committee	7	0
Human Relations Committee	10	9
Emergency Ambulance Service Board	3	0
Airport Commission	3	0
Planning Board	7	2
Tech District	1	0
Board of Tax Assessors	5	0
Tax Board of Appeals	3	0
Center for Mental Health Services	1	0
Health Professional Scholarship Board	5	0
Registration Board	3	2
Mini-Bottle Commission	6	1
Alcohol & Drug Abuse Commission	6	1
Hospital Board	7	0
Water & Sewer Authority Board	4	1
Migrant Health Program	9	0
Department of Social Services	3	2
Upper Savannah Regional Planning Board	3	1
Senior Citizens Council	9	6
Total	95	25
Total excluding Human Relations Commission and Senior Citizens Council	76	10

RMC #14.

37. The Human Relations Committee was described by two witnesses, T. C. McCain and Willie Bright. McCain testified that he had been instrumental in persuading the County Council to create such a committee, and that the Council had set a condition that there be a white majority and white chairman. Bright a member of the Committee, confirmed McCain's account of the Committee's origin, and testified that after a few meetings, the chairman (white) resigned, and was replaced by another white. After one more meeting, the new chairman never called another, and the Committee had become defunct. When asked on cross-examination why the black members had not called a meeting them-

selves, Bright testified that the lifelong traditions of Edgefield County and the conditions under which the Committee had been set up did not allow for any such exception to white dominance.

38. The public schools of Edgefield County were historically segregated by race. School officials' first response to the ban on school segregation did not come until well after the 1954 Brown v. Board decision, and was a "freedom of choice" plan which resulted in fewer than 3% of the black students attending school with white students. It was not until September 1970 that any appreciable amount of desegregation took place, under a plan finally approved by the U. S. Department of HEW. After formal desegregation began to take place there was an effort by school trustees to maintain the racially discriminatory character of the schools. Under the school board's 1970 plan, Strom Thurmond High, the formerly white school, was designated the high school for all students. It kept "Confederate Rebel," and "Dixie" as the school nickname and school song, and kept the use of the Confederate Flag as the school symbol at athletic and other events. Black citizens complained that Strom Thurmond High was being maintained as an essentially segregated school, and that the school symbols were badges of slavery, white racism and were degrading indicia of second-class citizenship for blacks. The school board promptly resolved that "the existing traditions now in force in all schools of the system will continue," and secured an ex parte injunction against blacks' gathering or demonstrating against the school policies. Blacks affected by the injunction were never able to obtain a hearing on their motion to dissolve the ex parte injunction, which led this Court to vacate it McCain v. Abel, CA No. 70-1057 (D.S.C. 19

39. Blacks in Edgefield County have a much lower socio-economic status than do whites. Blacks as a group have smaller incomes, less education and fewer employment opportunities

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CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to 28 U.S.C. 1331(a), 1331(3) and (4) and 2201. Also pursuant to Rule 23 of the Federal Rules of Civil Procedure the Court has the power to consider an act upon application for establishing a class action.

2. The Court finds that the necessary requirements of Rule 23 have been met for the maintenance of the class action since the class is so numerous that the joinder of all members is impractical, there are questions of law and fact common to the class, claims or defenses of the representative parties are typical of the claims or defenses of the class and representati parties will fairly and adequately protect the interest of the class. The class is composed of all black citizens who are residents of Edgefield County, South Carolina.

3. This action is brought for declaratory and injunctive relief alleging deprivation under color of law, statute, ordinance, regulation, custom or usage of certain rights and privileges secured to the plaintiffs by the Constitution and laws of the United States and such suits is authorized by 42 U.S.C. §1983. The plaintiffs claim constitutional deprivation of rights secured by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

4. Since the plaintiffs have made a constitutional attack on the form of government now in use in Edgefield County, South Carolina and the method of electing the members of County Council and the residential requirements of these members, the plaintiffs have the burden of proof and must establish their claim by the greater weight or preponderance of the evidence in establishing that the political processes leading to the nomination and election of candidates to County Council are not equally open to participation by blacks and that members of the class have less opportunity than do white residents of the county to participate in the political process and to elect representative

of their choice. White v. Regester, 402 U.S. 755 (1973). White also holds that it is not enough that plaintiff show that a racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. It must prove that the election process is not equally open to participation by the minority group. This been proved in the present case.

5. The Supreme Court in White v. Regester identified several factors indicative of denial of access to political process. Among these are:

a. A history of official racial discrimination which touched the right of the minority to register and vote and participate in the democratic process;

b. An historical pattern of a disproportionately low number of the groups' members being elected to the legislative body.

c. A lack of responsiveness on the part of elected officials to the needs of a minority community;

d. A depressed socio-economic status which makes participation in community processes difficult;

e. Election rules or party rules requiring majority vote as a prerequisite to nomination.

P.Ho #17.

Other indicia were added by the Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). These include.

a. Poll taxes

b. Literacy test

c. Property ownership requirements for running for offic

d. Disproportionate education, employment, income levels and living conditions.;

e. Bloc voting - polarized voting by race

f. Segregation principles adopted by political parties;

g. Requirement for majority vote to be elected;

h. Prohibition against single-shot voting;

i. Systematic exclusion from juries, and

j. Levy of taxes to maintain a dual school system.

While many of these restrictions have been removed i.e. single-shot voting now allowed, no poll tax, no literacy test, unified school system, jury selection open to all registered voters, there is still a long history of racial discrimination in all areas of life. There is bloc voting by the whites on a scale that this Court has never before observed and all advances made by the blacks have been under some type of court order.

Participation in the election process does not mean simply the elimination of legal, formal or official barriers to black participation. The standard is whether the election system as it operates in Edgefield County tends to make it more difficult for blacks to participate with full effectiveness in the election process and to have their votes fully effective and equal to those of whites. Black voters have no right to elect any particular candidate or number of candidates, but the law requires that black voters and black candidates have a fair chance of being successful in elections, and the record in this case definitely supports the proposition and finding that they do not have this chance in Edgefield County.

RRe
#8.

If black candidates lose in the normal give-and-take of the political arena then the courts may not interfere. And under no theory of the law can a court direct a white to vote for a black or a black to vote for a white. However, if there is proof, and there is ample proof in this case, that the black candidates tend to lose not on their merits but solely because of their race, then the courts can only find that the black voting strength has been diluted under the system and declare the same unconstitutional.

Black participation in Edgefield County has been merely tokenism, and even this has been on a very small scale. Black workers at the polling places are appointed by the white controlled democratic party and blacks have been poorly represented even in

predominately black precincts as the above findings of fact reflect.

There can be no other explanation for the amazing votes reflected in Findings of Fact 28-30 except that whites absolutely refuse to vote for a black.

The County Council has not been responsive to the needs of black citizens, even though they make up a majority of the population of the county. The small number of blacks employed by the county, their pay scale, the small number of blacks appointed to various county committees and the nature, duties and responsibilities of these committees are stark proof of official neglect and unconcern on the part of the Edgefield County Council. There are 120 positions on various boards and commissions appointed by the present County Council. Of these 25 are held by blacks, with 9 of the positions being on the now non-existent human relations committee and 6 of the remaining 16 being on the senior citizens counsel. Of the 19 different boards and commissions black serve on only 9.

12/6 #19.

No black has been elected to County Council, the state legislature or any countywide office. The black serving on the school board obviously serves as a token and at the pleasure of the white power structure.

Normally the majority vote requirement and run-off elections to insure a majority do not dilute black voting strength but in combination with all the other evidences of discrimination, bloc voting and disregard for needs of black citizens the majority vote requirement, run-off elections and even staggered terms of the members of council tend to dilute the voting strength of the blacks.

The present at-large voting plan is aggravated by the fact that there is only one party politics in Edgefield County, because there is no competition between parties and no need for the existing party to seek black support.

All these factors when coupled with the strong history and tradition of official segregation and discrimination draws the Court to the inevitable conclusion that the rights of the blacks to due process and equal protection of the laws in connection with their voting rights have been and continue to be constitutionally infringed and the present system must be changed.

IT IS, THEREFORE, ORDERED that judgment be entered in favor of the plaintiffs and that the defendants are hereby enjoined from holding any further elections for Edgefield County Council until a new and constitutional method of electing members to County Council has been adopted pursuant to applicable state law.

IT IS FURTHER ORDERED that the Court shall maintain jurisdiction of this case during the interim and while the plan is being adopted in accordance with the provisions hereof.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

April 17th, 1980
Columbia, South Carolina

TRUE COPY:
TEST:
MILLER C. FOSTER, JR., CLERK
BY: DEPUTY CLERK

Senator HATCH. Our next witness will be Dr. Arthur Flemming, formerly the Chairman of the U.S. Civil Rights Commission.

Dr. Flemming, we are happy to have you with us today.

STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS, ACCOMPANIED BY THELMA CRIVENS, VOTING RIGHTS ACT STUDY PROJECT DIRECTOR, AND PAUL ALEXANDER, ACTING GENERAL COUNSEL

Dr. FLEMMING. I am Arthur Flemming, presently Chairman of the U.S. Commission on Civil Rights. With me today are Thelma Crivens, the Commission's Voting Rights Act study project director, and Paul Alexander, our Acting General Counsel.

I appreciate the opportunity to speak to you today concerning S. 1992, the Senate equivalent of H.R. 3112. We support this bill.

I would like to submit for the record, in addition to my statement, a copy of our recently released report entitled, "The Voting Rights Act: Unfulfilled Goals."

Senator HATCH. Without objection, it will be entered in the subcommittee record.

Dr. FLEMMING. There are two remaining issues of concern to many seeking an appropriate extension of the Voting Rights Act. The first issue relates to a proper standard for proving discrimination under section 2 of the act. In our report we recommended amending section 2 of the Voting Rights Act to prohibit voting practices and procedures that leave the effect of discriminating. We included this recommendation because of the confusion as to the status of the law growing out of the 1980 decision of the Supreme Court of the United States.

The confusion created by the *Bolden* decision is aptly described by the Fifth Circuit Court of Appeals Judge Goldberg in a recent case. "As Justice White surmised," he said, "in *Bolden*, the Supreme Court's decision 'leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.'"

The House of Representatives has chosen to clear up this confusion through an approach that facilitates the elimination of voting discrimination. We support the solution that is represented by the amendment to section 2 included in the bill that has passed the House.

Section 2 as proposed in the House-passed bill is modeled after the standard for proving unconstitutional vote dilution in *White* v. *Regester*. In that decision, which involved the constitutionality of multimember districts in Dallas and Bexar Counties, Tex., the Supreme Court enunciated the following standard of proof:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White v. *Regester* sets realistic standards for analyzing voting dilution cases. Prior to *Bolden*, *White's* logic guided lower court decisionmaking. *White* commanded courts to look at the objective conditions and the totality of circumstances that, along with the challenged practice, combined to exclude minorities from effective political participation.

Thus, in *White,* evidence of voting dilution in Dallas County included lack of access to slating candidates, the use of racial campaign tactics, and lack of concern by white candidates for the needs of the black community. In Bexar County, proof of vote dilution included a history of discrimination against Mexican-Americans in education, employment, economics, health and housing, restrictive voting, registration procedures, a white only primary, and general unresponsiveness to Mexican-American interests.

White also makes unmistakable that the lack of opportunity to participate in the political process on an equal basis with whites is the standard for determining unconstitutional vote dilution. The Court specifically stated that to sustain a finding of unconstitutional vote dilution "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."

Proof under the *White* standard is by no means easy. Indeed, litigants have lost voting dilution cases under it, even in situations where plaintiffs have established a lack of proportional representation because of the existence of at-large systems. The standard for proving discriminatory result requires much more than proving underrepresentation. Such a standard insures against the filing of unmeritorious lawsuits.

Examples of the type of evidence that would be relevant to proving unconstitutional vote dilution under a results test, but not under an intent test, are contained in our report. I have referred to those case histories in my written testimony.

The existence of the problems that are reflected in the case histories that are set forth in my written testimony are irrelevant under an intent test that inquires into the minds of public officials. They would be highly relevant under a results test that inquires into the extent of minority access to and participation in the political process of the community.

If the *White* v. *Regester* standard is not followed, litigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.

I would like to make a few comments on the second issue continuing to divide those seeking extension of the Voting Rights Act—bailout. The Commission in its report does not make a recommendation regarding a bailout provision because we believe that the protections afforded by section 5 are critical to continued progress and that the existing bailout provisions are tightly drawn. However, review of the House-passed bill led us to support the revised bailout procedure as it is carefully drawn to assure that States or counties are not permitted to remove themselves from coverage when discrimination continues to exist.

The Senate, it seems to us, is at a crossroads on voting rights. The Congress has the power and duty to eliminate the current confusion about the standards for judging the fairness of elections systems. If the Congress travels the "intent path," it will lead to fruit-

less inquiries into the minds of State and local legislators and continuing judicial confusion over how to prove intent. This path will leave minorities in a position where they would find it virtually impossible to obtain judicial relief from indefensible situations.

On the other hand, if the Congress travels the "results path," it will contribute to the promulgation of realistic standards that can assure minorities the opportunity for equal participation in our Nation's political processes and help finally to fulfill the long-delayed promises of the 13th, 14th, and 15th amendments.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Dr. Flemming.

The Civil Rights Commission recommended, in its September 1981 report, "The Voting Rights Act: Unfulfilled Goals"—I think you have a copy right there—that the act be extended 10 years. This was done at least a month after the House Judiciary Committee had reported its final version of H.R. 3112. I guess the question is: Why does the Commission's recommendation differ from that of the House? The House, of course, is extending it in perpetuity?

Dr. FLEMMING. Our feeling at that time was that a 10-year extension would constitute sound public policy. On the other hand, we have had the opportunity, as you know, since the House bill was reported and since the House passed on that particular bill, to take a look at the position taken by the House. As I indicated in a public statement some months ago, the Commission does concur in the House bill.

Senator HATCH. You are fully aware that section 2 will be extended to every jurisdiction in this country?

Dr. FLEMMING. That is correct.

Senator HATCH. And that it will apply to all at-large jurisdictions in this country as well—some 12,000 jurisdictions.

Dr. FLEMMING. That is correct.

Senator HATCH. Every State in this Union has to be somewhat concerned, whether or not what is done in section 2 of the House bill is going to be in fact a good change in law or a bad change in law. Is that correct?

Dr. FLEMMING. Yes. After all, every jurisdiction up until now has had to be concerned about section 2. As I have indicated in my statement and as the Commission has indicated in its report, we believe that because of developments in the courts the amendment that has been added to section 2 is a sound amendment.

Senator HATCH. On pages 40 through 44 of the Commission's report there is much said about the differences between white registration figures and minority registration figures. What does that tell us?

Dr. FLEMMING. Pardon me, but I did not hear the entire question.

Senator HATCH. On pages 40 through 44 of the Commission's report, I point out that there is much said about the differences between white registration figures and minority registration figures. What exactly does that mean? What should that tell us? What is the significance of all that evidence?

Dr. FLEMMING. This is designed, Mr. Chairman, to show the degree of progress or lack of progress over a span of time in this particular area.

Senator HATCH. According to the Census figures, in the 1980 election in South Carolina, for example, black registration was 61.4 percent and white registration was 57.2 percent. What does that tell us? What is the significance of those figures?

Dr. FLEMMING. From our point of view, I have not seen those particular figures. Our figures show, as you know because you are looking at this part of the report, that at the time they were compiled it was 64 percent white and 60 percent black. If the census figures now reflect the kind of change that you have indicated, which is a fairly slight change but nevertheless a change in the right direction, we are delighted that is the case. We feel, as we try to reflect in this report, that the Voting Rights Act has made a very significant contribution in various others. However, also as a result of our fieldwork and as a result of other evidence that we have been able to consider, we feel there is a great distance still to travel.

Senator HATCH. Your 1976 figures indicate that between the 1976, and the 1980 figures, which I have just cited 61.4 percent black registration and 57.2 white registration, that there has been a significant gain under the present voting rights law, which you have recognized in your statement.

Dr. FLEMMING. As you appreciate, Mr. Chairman, figures of this kind are one factor that is taken into consideration in evaluating a situation in any jurisdiction. As far as these particular figures are concerned, they do indicate some progress. There is no question about that at all. However, there are other factors that always have to be taken into consideration also.

Incidentally, Mr. Chairman, I would like to make clear that in connection with our discussion of section 2 we recognize that section 2 must be administered or implemented under the kind of standards that are set forth in the *White* opinion.

Senator HATCH. On page 253 of the report——

Dr. FLEMMING. 253?

Senator HATCH. Yes. I do not think it will be necessary for you to look it up. The Commission recommends an effects standard in section 2. Are you satisfied with the results standard in the House bill and S. 1992?

Dr. FLEMMING. That is correct. My answer is we are satisfied with it. I have noted some of the discussion about the distinction that might be drawn between effects and results. Personally, I feel that they are both headed in the same direction. As a commission—and we did consider this as a commission—we are satisfied with the results standard and feel that it does achieve the kind of objective that we had in mind in our recommendation to which you have referred.

Senator HATCH. In the report on page 254, there is an example to illustrate the need for change in section 2 as follows:

> A jurisdiction's effort to annex a predominantly white residential area may have the effect of decreasing substantially the minority population in the annexing jurisdiction. This decrease could dilute the political strength of the minority community, resulting in the community's inability to elect candidates of its choice.

If such annexation occurred and the result were a dilution of the minority's voting strength, would this not be a violation of section 2 as amended, even if, for example, the annexation was made to

increase the jurisdiction's tax base with the purpose of increasing services to all citizens?

Dr. FLEMMING. Mr. Chairman, this would be only one factor that it seems to us a court would take into consideration. There would be a good many other factors relative to the situation in that jurisdiction that would have to be taken into consideration and weighed by the court before a decision could be made.

It seems to us that certainly the courts have indicated through the *White* case that in evaluating a situation of this kind you look at a whole list of factors and that a judge then weighs them and arrives at the decision.

Personally, it seems to me that is a sound approach to try to get a record which reflects the actual conditions that exist in a particular locality relative to the possibility of access to the political system on the part of minorities, and then the judge, having had the benefit of listening to all of that evidence and evaluating it, arrives at a conclusion as to whether or not the minorities really do have a genuine opportunity for access. To me, that is our way of getting at a problem.

Senator HATCH. Under the results test how does a judge arrive at that conclusion? What does the judge ask himself? What is the standard that he can apply so that he knows how to arrive at an appropriate conclusion?

Dr. FLEMMING. I think the *White* case is a good example of the way in which the mind of the judge would and should operate. The great thing about that approach is that it means that we have the benefit of an adversary proceeding before a judge who is looking at the facts relative to the situation in that particular locality. On the basis of that adversary proceeding, the judge arrives at a conclusion as to whether or not minorities have been and are being denied access to the political system. I believe in the adversary system before a judge.

Senator HATCH. But what does each party argue in that adversary system? What does the judge ask himself in *White*? Tell me what he asks himself. How does he reach that judgment? How does he know that judgment is correct? Does he just say, "Well, I feel like the totality of circumstances suggests discrimination." What is the standard?

Dr. FLEMMING. If we take the *White* case, it is clear that they reviewed evidence on a whole series of points. I referred to it briefly in my opening statement here. I have read that.

There is a whole series of factors that clearly were weighed by this case, the judges that participated in that ultimate result. They related to the question of whether or not minorities really had a genuine opportunity for access to the political system.

Senator HATCH. We know they looked at evidence. However, using the *White* case, what question did the judge ask himself that evaluated this evidence? How did he "weigh" the evidence?

Dr. FLEMMING. Pardon me?

Senator HATCH. Consideration of the totality of the evidence is required in the intent test approach as well. If we get an inference of intent, then the judge can make the decision.

Dr. FLEMMING. I think I have indicated in my statement that we feel that the intent test introduces a factor that is very undesirable

as far as the whole life of the community is concerned. First of all, I appreciate the discussion that has taken place before you relative to the difficulties that are involved in establishing intent. Those difficulties divide into two categories.

Obviously if you are dealing with a statute, with an ordinance, or with a decision that was arrived at a good many years ago, it is clearly more difficult to establish intent. On the other hand, if you are dealing with an ordinance or a decision that took place fairly recently, it is still difficult to establish intent.

What you are doing is trying to probe the minds and the attitudes of the people involved. As I indicated, what you are trying to do is develop evidence which will, it seems to us, have the effect of dividing that community along racial lines. I much prefer to have the courts applying a test which makes it possible for them to look at the results of what people have done and decide whether or not those results denied minorities access to the political system.

Senator HATCH. Regardless of whether or not any intent to discriminate is involved?

Dr. FLEMMING. That is correct.

Senator HATCH. It does not make any difference what the rationale was for the actions in question were initiated?

Dr. FLEMMING. I do not think that the intent test is a satisfactory test from any point of view. In terms of trying to bring the communities of this Nation together, I feel that the intent test will have just the opposite effect—it will be very divisive. I think it is totally unnecessary in order to establish whether or not on the basis of what has happened the facts point to the conclusion that minorities either have or have not been denied access to the political system.

Senator HATCH. If, as you say, proportional representation is not a desired goal, as I think both the report and your statement indicate, not a desired goal of the act as amended by the House, why do we find such references as the following in the Commission's report?

At page 3, for instance, it says:

To determine how extensive and serious these voting rights problems were, Commission staff undertook an indepth examination of jurisdiction subject to the preclearance provisions of the Voting Rights Act. Jurisdictions considered for in depth analysis met the following criteria.

Then you list some criteria.

The percentage of minority-elected officials was less than the percentage of minorities in the population.

On page 30,

In none of the Southern States covered under the preclearance provisions of the Voting Rights Act were blacks elected to public office at a rate approaching their proportion in the population,

Which certainly indicates that proportion is quite important.

Page 87, another example of the use of percentages throughout this report:

According to 1980 Census data, Fort Gibson, Miss., has a black population of 63.4 percent. For the 1980 elections there were four poll managers chosen by the election commission but only one was black.

This is throughout your report.

On page 103—and I am just giving you a few:

For example, by annexing predominantly white areas, a jurisdiction can increase its proportion of white voters.

You go on to say,

These types of changes would reduce the opportunities for minority representation in the enlarged jurisdiction since the minority percentage of the total population would decrease.

Throughout the report it indicates that proportionate representation is an important goal.

Dr. FLEMMING. Mr. Chairman, I think, as I have tried to make clear, we feel at the Commission that there are a great many factors that should be taken into consideration before the judgment is made by a judge. All of the opinions and all of the discussion that has taken place revolving around this issue recognize the kinds of quotations that you have just referred to in our report are one of the factors that people look at, but I feel that the courts have made it clear that it is never the sole factor and, in our judgment, never should be the sole factor. Anybody who drew a conclusion that minorities have been denied access solely on the basis of that particular factor would not be acting in an objective and judicial manner.

Senator HATCH. I do not think anybody is making that argument here. The argument being made is that any other "objective" factor, coupled with lack of proportional representation evidences "discrimination."

Dr. FLEMMING. I have not had my attention called to any case where that factor plus one other factor has led to a decision on the part of a judge.

Senator HATCH. Then I suggest you read this bill and report because that is exactly what it suggests.

Dr. FLEMMING. I appreciate that there has been debate on the interpretation of the bill. I do not interpret the amendment to section 2 in that particular manner. It seems to me that if the amendment to section 2 becomes the law of the land, that it will be read in the same manner that the law was interpreted in the *White* case and in the same manner in which it has been interpreted in other cases, which means that you consider a great many factors before you arrive at this particular conclusion.

I think what it comes down to, as far as I am concerned, is that really I do have confidence in our judicial system. I have confidence in our judges. I have confidence in the fact that if they have the benefit of an adversary proceeding on this particular point, they are able to consider the evidence pro and con on this particular point and weigh it, and that they will arrive at a sound decision relative to whether or not minorities have or have not been denied access to the political system. If an individual judge gets off the beam, we do have an appellate system to review the record and to review findings of that particular kind.

If the Congress clarifies the situation—and I guess we all are in agreement on the fact that it does need clarification——

Senator HATCH. I do not think that is true.

Dr. FLEMMING. If the Congress clarifies it in this particular manner, then we can have confidence in the ability of the judicial system to take testimony on what has happened in the community,

and then, on the basis of what has happened in the community, decide whether or not minorities have or have not been denied access.

Senator HATCH. With this great confidence that you have in the judicial community, I interpret that to mean that you also have confidence in courts outside the District of Columbia.

Dr. FLEMMING. I do have confidence in courts outside the District of Columbia——

Senator HATCH. In these cases?

Dr. FLEMMING. I think the Congress was very wise in the beginning to place a good deal of responsibility as far as the Voting Rights Act is concerned on a court here in the District of Columbia.

Senator HATCH. Now we have matured to a point where some have confidence in Federal courts throughout the country, especially with 40 percent of the judges having been appointed in the last 5 years. Perhaps we can allow these cases to be tried in other jurisdictions as well?

Dr. FLEMMING. Mr. Chairman, with regard to your reference to judges that have been appointed in the last 5 years, I started serving in public office in 1939 and have had the opportunity of watching our judicial system operate over that period of time. All I can say is that on balance I do have complete confidence in the way in which that system has operated and is operating.

As far as the Voting Rights Act is concerned, I think that the Congress was wise in the beginning to decide that there were certain issues that could more appropriately be cited by a court here in the District of Columbia. I think experience as borne that out.

As I understand it, those who say, "Look, what we want is an extension of the act as it is at the present time," are in effect saying that particular arrangement is okay. As I understand the testimony, for example, of the Department of Justice, they seem to agree with that arrangement because they have testified, as I understand it, before this committee that they want the act extended as it is. Therefore, I gather that they have concluded that is a good arrangement and a sound arrangement.

Senator HATCH. There are certain people who have and certain people who have not concluded that.

Let me ask one other question, and then I have to run to vote.

Has the Commission's volume at all considered jurisdictions other than the covered jurisdictions in these matters?

Dr. FLEMMING. The answer is no.

Senator HATCH. Yet, you are so enthusiastic about extending the effects test to the entire country. I am going to have to run for a vote. If you do not mind waiting, I will come right back.

[Recess taken.]

Senator HATCH. The hearing will come to order.

I apologize. I should have let you go ahead, but I thought I could go over and come right back. I was on my way back and almost here when the second bell rang. I was in such a rush to return to this hearing, that I forgot to ask if there was going to be a followup vote after that first one. I suspect we will have one right after the other.

Let me announce in advance that, if that occurs, I am going to have to ask staff to finish these hearings today because I just will be bouncing back and forth like a ping pong ball.

Go ahead.

Ms. BAKER. Dr. Flemming, are you the present Chairman of the Civil Rights Commission?

Dr. FLEMMING. Yes, I am still serving as chairman and will continue to serve until my successor has been confirmed by the Senate.

Ms. BAKER. You discussed with Senator Hatch your belief in the courts of this Nation. Haven't section 2 cases always been brought in courts throughout the country, not just in the District of Columbia? Won't that continue under the House-passed version of the bill?

Dr. FLEMMING. I am sorry; I did not quite get that question.

Ms. BAKER. The question is whether section 2 cases—as distinguished from section 5 cases have always been brought in courts throughout the country, not just in the District of Columbia?

Dr. FLEMMING. Yes.

Ms. BAKER. Won't that continue under the House-passed version?

Dr. FLEMMING. The answer to that is yes, very definitely.

Ms. BAKER. Which do you feel would create more racial strife and animosity—use of the *White* v. *Regester* standard or the plurality's intent standard in *Bolden*? And why?

Dr. FLEMMING. As I indicated in my statement, my direct testimony to the committee, and in response to some questions by the chairman, I really believe that if they were trying a case in a community under the intent standard, it would lead to increased divisiveness along racial lines.

On the other hand, it seems to me that if you are applying the results test, then you are not probing people's minds and attitudes, and so on. You are looking at the results of their actions and you are evaluating the results of their actions. The judge is going to reach a conclusion as to whether or not, on the basis of those results, minorities have or have not been denied access to the political process.

Ms. BAKER. There has been no case presented at these hearings—and I wonder if you know of any case—where courts applying the *White* v. *Regester* standard, which is the standard adopted by S. 1992, required proportional representation. Do you know of any cases where courts applying the *White* v. *Regester* standard required proportional representation?

Dr. FLEMMING. I do not. I have asked our acting general counsel that question a good many times because it interests me. The cases I have read have not required it, but have taken into consideration the other factors in the life of the community, which it seems to me do have a definite bearing on the question of whether or not minorities have or have not been denied access.

Ms. BAKER. Thank you.

Senator HATCH. You might want to look at the *Kirksey* case in the fifth circuit where they did apply the effects test to do exactly that. That might be an interesting case for you. Also *Petersburg* and *Richmond*.

Thank you, Dr. Flemming. We are glad to have had you with us today.

Dr. FLEMMING. I appreciate the opportunity, Mr. Chairman. Thank you.

[The prepared statement of Dr. Flemming follows:]

PREPARED STATEMENT OF ARTHUR S. FLEMMING

I am Arthur S. Flemming, Chairman of the United States Commission on Civil Rights. With me today are Thelma Crivens, the Commission's Voting Rights Act Study Project Director, and Paul Alexander, our Acting General Counsel. I appreciate the opportunity to speak to you today concerning and S. 1992, the Senate equivalent of H.R. 3112. We support this bill. I would like to submit for the record, in addition to my statement, a copy of our recently released report entitled The Voting Rights Act: Unfulfilled Goals.

Since the Commission was established in 1957, it has been concerned that all American citizens be able to exercise the right to vote. The Commission has conducted hearings and field surveys on the problems that minorities face in becoming full participants in the political process and has made recommendations to Congress concerning remedies for voting discrimination. Our recent report and the Commission's testimony before the House Subcommittee on Civil and Constitutional Rights on the extension of the Voting Rights Act reflect our continued concern for voting discrimination. Both addressed one key issue then pending before Congress: Was there sufficient voting discrimination to justify extension of the special provisions of the Voting Rights Act? The Commission's research revealed that voting discrimination remains widespread and we are gratified that both the House Judiciary Committee and individual members of the House found this information useful in determining their respective positions on extension of the Act.

As a bipartisan Commission, we are gratified that there is now bipartisan support for legislation that will help to remedy the continued problems in voting that the Commission has addressed in our voting rights report and earlier testimony.

There are, however, two remaining issues of concern to many seeking

an appropriate extension of the Voting Rights Act. The first issue relates to a proper standard for proving discrimination under Section 2 of the Act.

In our report, The Voting Rights Act: Unfulfilled Goals, we recommended amending Section 2 of the Voting Rights Act to prohibit voting practices and procedures that have the "effect" of discriminating. We included this recommendation because of the confusion as to the status of the law growing out of the 1980 decision of the Supreme Court of the United States: City of Mobile v. Bolden. Four justices endorsed a strict standard of intent in Bolden. These four justices stated that Section 2 of the Voting Rights Act was merely a restatement of the 15th amendment and applied the requirement of proof of intent to lawsuits filed under this section. The remaining five justices issued four separate opinions, each with different standards.

The confusion created by the Bolden decision is aptly described by Fifth Circuit Court of Appeals Judge Goldberg in a recent case:

> As Justice White surmised...in Bolden, the Supreme Court's decision "leaves the courts below adrift on unchartered seas with respect to how to proceed on remand"...There was no majority opinion on the proper test to be employed in assessing the legality of an electoral system alleged to discriminate against minority citizens. Moreover, I am not sufficiently clairvoyant to discern the complete body of law which will evolve from future trials and appeals to fill the void left by the Supreme Court's simultaneous rejection of [previous law] and its failure to construct a successor. Jones v. City of Lubbock, No. 79-2744 (5th Cir. Mar. 25, 1981) (per curiam) (specially concurring opinion, Goldberg, J.)

The House of Representatives has chosen to clear up this confusion through an approach that facilitates the elimination of voting discrimination. It amended Section 2 of the Voting Rights Act to read:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to

> vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section. [New matter underlined.]

We support this solution.

Section 2 as proposed in the House-passed bill is modeled after the standard for proving unconstitutional vote dilution in White v. Regester. In that decision, which involved the constitutionality of multimember districts in Dallas and Bexar Counties, Texas, the Supreme Court enunciated the following standard of proof:

> ...The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White v. Regester sets realistic standards for analyzing voting dilution cases. Prior to Bolden, White's logic guided lower court decisionmaking. White commanded courts to look at the objective conditions and the totality of circumstances that, along with the challenged practice, combined to exclude minorities from effective political participation. Thus, in White, evidence of voting dilution in Dallas County included lack of access to slating candidates, the use of racial campaign tactics and lack of concern by white candidates for the needs of the black community. In Bexar County, proof of vote dilution included a history of discrimination against Mexican Americans in education, employment, economics, health and housing, restrictive voting registration procedures, a white-only primary and general unresponsiveness to Mexican American interests.

White also makes unmistakable that the lack of opportunity to participate in the political process on an equal basis with whites is the

standard for determining unconstitutional vote dilution. The Court specifically stated that to sustain a finding of unconstitutional vote dilution "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."

Proof under the White standard is by no means easy. Indeed, litigants have lost voting dilution cases under it, even in situations where plaintiffs have established a lack of proportional representation because of the existence of at-large systems. The standard for proving discriminatory result requires much more than proving underrepresentation. Such a standard ensures against the filing of unmeritorious lawsuits.

Examples of the type of evidence that would be relevant to proving unconstitutional vote dilution under results test, but not under an intent test are contained in our report. In Johnson County, Georgia, where there has never been a black elected to the governing board that is elected at-large, intimidation and harassment are major problems. In one incident shots were fired into the home of a black man who was considering running for sheriff. His daughter was wounded. Two whites were arrested for the shooting. The man decided not to run for sheriff. In another Johnson County incident, black voters reported that they were heckled by whites with guns visible in their trucks when they attempted to vote in the county primary. Problems in access to registration were also reported in Johnson County. The registrar refused a request by a black organization to appoint deputy registrars to go into the community and register blacks. It was only after the intervention of the ACLU and the governor's office that she agreed to appoint deputy registrars. These deputy registrars, however, could not register voters; they only could bring them to the registrar's office. The effect of these and other incidents of intimidation and harassment and of the problems of access to registration have deterred minority registration and voting in Johnson County, Georgia.

In Opelika, Alabama, at-large elections and other voting rules make it impossible for black candidates to be elected without white votes. There is a very high degree of racial bloc voting in Opelika. No black candidate has ever won a single voting box (precinct) in the white community. The one black candidate who reached a runoff failed to attract the votes that had gone to white candidates defeated in the primary election. Currently, all three members of the Opelika City Commission live in the predominantly white north side of the city.

Blacks complain that the all-white city commission has not been responsive to their needs. They cite problems in employment as well as problems related to access to services. Blacks in Opelika have been frustrated in all of their attempts to gain white support for black representation in elective office, and an increasing number of blacks may be convinced, as one black observer put it, that "the white attitude here is that black folks are not ready for leadership."

The existence of these problems are irrelevant under an intent test that inquires into the minds of public officials. They would be highly relevant under a results test that inquires into the extent of minority access to and participation in the political process of the community. If the White v. Regester standard is not followed, litigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.

I would like to make a few comments on the second issue continuing to divide those seeking extension of the Voting Rights Act—bailout. The Commission in its report does not make a recommendation regarding a bailout provision because we believe that the protections afforded by Section 5 are critical to continued progress and that the existing bailout

provisions are tightly drawn. However, review of the House-passed bill led us to support the revised bailout procedure as it is carefully drawn to assure that states or counties are not permitted to remove themselves from coverage when discrimination continues to exist.

The Senate is at a crossroads on voting rights. The Congress has the power and duty to eliminate the current confusion about the standards for judging the fairness of elections systems. If the Congress travels the "intent" path, it will lead to fruitless inquiries into the minds of state and local legislators and continuing judicial confusion over how to prove intent. This path will leave minorities in a position where they would find it virtually impossible to obtain judicial relief from indefensible situations. On the other hand, if the Congress travels the "results" path, it will contribute to the promulgation of realistic standards that can assure minorities the opportunity for equal participation in our Nation's political processes, and help finally to fulfill the long-delayed promises of the 13th, 14th and 15th Amendments.

Senator HATCH. We had Mr. Anthony Troy of Virginia, former attorney general of Virginia, who was going to be with us, but he canceled his appearance before the committee just yesterday. That seems to be happening on this committee quite a bit.

Therefore, our last witness today will be Mr. Frank Parker, director of the Voting Rights Project of the Lawyers' Committee for Civil Rights.

Mr. Parker, we are happy to welcome you here.

I think you were the attorney on the *Kirksey* case, weren't you?

STATEMENT OF FRANK PARKER, DIRECTOR, VOTING RIGHTS PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. PARKER. Yes, sir, I was.

Senator HATCH. That was a proportional representation result, was it not?

Mr. PARKER. No; it was not, Senator.

Senator HATCH. It was not?

Mr. PARKER. I would like to cover that issue.

Senator HATCH. That would be fine. I would like you to do that.

Mr. PARKER. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before you today to support the extension and amendment of the Voting Rights Act of 1965 contained in S. 1992. It is a real honor for me to testify after Dr. Arthur Flemming, the chairperson of the U.S. Commission on Civil

Rights, whom we all have a great deal of respect for and admire very much.

The proposed amendment to section 2 of the Voting Rights Act is necessary to effectuate the purposes of the 14th and 15th amendments and the Voting Rights Act itself, to eliminate invidious discrimination affecting the right to vote.

In the *City of Mobile* case, the majority of a heavily divided Supreme Court drastically altered the legal standard under which black and Hispanic voters had been successful in overcoming racial gerrymandering of district lines, discriminatory at-large elections, and other discriminatory electoral barriers.

The majority ruled that these constitutional amendments prohibit only those voting laws adopted or retained for a racially discriminatory purpose. The proposed amendment to section 2 does not challenge this construction of the Constitution.

A plurality of the court, but not a majority, also construed section 2 of the Voting Rights Act to require proof of discriminatory intent. The proposed amendment to section 2 addresses the confusion resulting from this misinterpretation of section 2 protections and restores a meaningful remedy for discrimination affecting voting.

Mr. Chairman, I ask permission that my entire statement be included in the record as if read.

Senator HATCH. Without objection, we will place it in the record immediately following your oral presentation.

Mr. PARKER. To summarize my testimony, Mr. Chairman, I would like to respond specifically to a number of false allegations that were made this morning in a letter to the editor of The Washington Post, which was signed by William Bradford Reynolds, who is the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department. His allegations and false statements contained in that letter are refuted by the testimony which I am presenting here this morning.

The first false allegation which Mr. Reynolds makes and to which I would like to respond, to which my testimony responds, is that the proposed section 2 amendment involves a change—moving from the intent standard to the result standard. This is not correct. The original intent of Congress in enacting section 2 of the Voting Rights Act was not to require an intent standard, but rather to require an effects standard.

The *City of Mobile* decision itself was the change. The amendment restores the original intent of Congress and would also restore the legal standard applied by the courts prior to the *Mobile* decision.

All you have to do to see the incorrect legal nature of this statement is to read the cases. Mr. Chairman, my staff, Mr. Rob McDuff and Ms. Barbara Phillips and I, have collected the cases decided prior to this radical change in the *Mobile* decision. These are attached to my testimony.

Attached is an appendix including the summaries of 23 reported vote dilution cases decided by the Federal courts of appeals prior to 1978, 19 of these decisions emanate from the U.S. Court of Appeals for the Fifth Circuit in the South. These 19 cases portray the practical jurisprudential understanding of the application of this legal

standard for voting rights cases prior to the fifth circuit's *Mobile* decision in 1978. The additional cases from the other courts of appeals are in agreement with the fifth circuit's interpretation of the law.

Considered together, these cases irrefutably demonstrate the following major points:

First, the operative legal standard for almost all vote dilution cases in this country prior to 1978 focused on the context, the nature, and the results of the challenged law—in other words, the results standard of the proposed amendment to section 2.

Second, under this results standard proportional representation by race or racial quotas was specifically repudiated in every case in which this issue was raised.

Third, under this results standard, at-large elections were never held to be a per se violation of the right to vote and were never automatically invalidated.

Fourth, this results test, contrary to some of the unsupported statements made during these hearings, does not ensure near certain victory for minority voters. Of the 23 cases analyzed in the appendix, the defendants prevailed in more than half.

Fifth, this results test as it was actually applied by the courts requires much more than a mere scintilla of evidence to prove a violation. These 23 cases clearly demonstrate that facts showing only the existence of at-large elections, defeat at the polls of minority candidates, and racially polarized voting have never been held sufficient to render a challenged at-large election system unlawful under the standard.

Opponents to the amendment to section 2 who insist upon raising the rhetoric of proportional representation must refute these statements and must refute these cases with something more than mere cries of alarm. Where are their facts? Where are their cases?

The second inaccuracy in Mr. Reynolds' letter of this morning is that *Whitcomb* v. *Chavis* and *White* v. *Regester* "tacitly recognized that proof of discriminatory intent is a necessary element of a constitutional violation." This also is completely incorrect.

We only have to look at Judge John Minor Wisdom's concurring opinion in *Nevett* v. *Sides,* decided in 1978. Judge Wisdom is a 25-year veteran of the fifth circuit appellate bench. He has handled more voting rights cases than anyone in this room or possibly anyone in the country in his 25 years of service on the U.S. Court of Appeals for the Fifth Circuit. If anyone knows what *White* v. *Regester* held and *Whitcomb* v. *Chavis* held, certainly Judge Wisdom would.

In *Nevett* v. *Sides,* Judge Wisdom wrote, "In *White* v. *Regester* and *Whitcomb* v. *Chavis,* the leading cases involving multimember districts, the Supreme Court did not require proof of a legislative intent to discriminate." I have looked very carefully through the Supreme Court opinions in *Whitcomb* v. *Chavis* and *White* v. *Regester,* and I have been unable to find a specific holding by the Supreme Court of intentional discrimination or purposeful discrimination. This allegation by Mr. Reynolds is simply contrary to what those decisions actually say.

Finally, Mr. Reynolds makes the point that intent can be proved by circumstantial and indirect evidence and, therefore, there is no particular difficulty with the intent standard. This also is incorrect.

What is required to prove discriminatory intent? No one knows for sure. In *Palmer* v. *Thompson,* which was the Jackson, Miss. swimming pool closing case, the Supreme Court held, and I quote: "It is extremely difficult"—this is the Supreme Court of the United States—"It is extremely difficult for a court to ascertain the motivation or collection of different motivations that lie behind a legislative enactment."

The Supreme Court's pronouncements on this issue are frequently self-contradictory and inconsistent. In *Arlington Heights,* the Supreme Court seemed to indicate that proof that intent was the sole, dominant, or primary motivation was not required, but then in footnote 21 said that partial racial motivation is not enough.

In *Mobile,* the Supreme Court ruled that the *White* v. *Regester* decision is consistent with the requirement of discriminatory purpose but then in the *Mobile* decision rejected as probative evidence all of the factors relied upon by the Court in *White* v. *Regester* for its holding and held that the case fell far short of showing purposeful discrimination.

Finally, since 1976 the Supreme Court repeatedly has held that discriminatory intent may be proved by circumstantial evidence, but in every case since 1976 when faced with this evidence the Supreme Court has termed it insufficient. In the last case, *City of Memphis* v. *Greene,* they said there was no evidence.

The intent requirement of the *Bolden* case is more difficult to meet than any other intent requirement employed in the law. For example, in the tort cases one is presumed to have intended the natural and foreseeable consequences of one's acts.

In the *Mobile* decision this is insufficient; this does not apply. The Supreme Court held that if the district court in the *Mobile* case meant that the State legislature may be presumed to have intended that there would be no Negro commissioners simply because that was the foreseeable consequence of at-large voting, then it applied an incorrect legal standard.

Voting, Mr. Chairman, is a fundamental constitutional right. Minority voters should not be required to satisfy the most difficult intent standard—in fact, the most difficult legal standard—known to the law in order to protect their basic right to vote.

Let me finally turn to *Kirksey* v. *Board of Supervisors of Hinds County* in which I represented the plaintiffs and in which the fifth circuit ordered relief from a racial gerrymander in that case.

Now you have to understand the facts of the case in *Kirksey* v. *Hinds County Board of Supervisors* to appreciate the result of that decision. The *Kirksey* case challenged a blatant racial gerrymander of the five supervisors' districts of Hinds County, Miss. I have with me today a map showing the district boundaries of the five supervisors' districts.

Sixty-nine percent of the black population of Hinds County lived in the central city of Jackson, which as you can see is this area to the right of the map. The five supervisors' district boundaries all crossed the county in long, narrow corridors, snaked into the city

of Jackson, and split up this black population concentration among five districts.

Senator HATCH. Five different gerrymanders, in other words?

Mr. PARKER. Five districts were gerrymandered; that is correct.

Senator HATCH. Five different points came into Jackson.

Mr. PARKER. Exactly, Mr. Chairman. District 3 started in the extreme southwestern portion of Hinds County. It snaked into the city of Jackson by means of a corridor which was 1 mile wide and approximately, I would say, 15 miles long into the inner city of Jackson and extreme eastern portion of Hinds County.

Senator HATCH. It looks almost just like a point there.

Mr. PARKER. Almost like spokes from a wheel, all converging in the central city, all five districts converging on the black community in the central city of Jackson.

Senator HATCH. Was this drawn by a Federal judge?

Mr. PARKER. No, sir. This was drawn by the board of supervisors of Hinds County, Miss.

District 3 was described by the district court as looking like a turkey. District 4 was described as closely resembling a baby elephant.

It was this blatant racial gerrymander that the U.S. Court of Appeals for the fifth circuit held to violate the constitutional rights of the black voters of Hinds County, Miss. It was held that it denied black voters the opportunity to elect candidates of their choice in any of the five districts, and that all of the factors which the Supreme Court said in *White* v. *Regester* were significant were present—or most of these factors were present—and on an aggregate a constitutional violation had been established on the *White* v. *Regester standard.*

Senator HATCH. Mr. Parker, may I interrupt you?

We have gone way over your 10 minutes. I have done that deliberately because I wanted to listen to you, but I have to leave. I would like to put all your statement into the record. There is no question that it is an excellent statement. We will keep the record open for you to submit an additional summary if you would care to do so.

Mr. PARKER. Thank you, Mr. Chairman. I also would like to submit for the record this report, "Voting in Mississippi, A Right Still Denied." It contains the map to which I have referred.

Senator HATCH. Here is one of the problems I have: It is a thick report. If you could summarize that for us and submit it for use in the record, I would prefer to do that, rather than have such a thick record. If you can summarize, fine. If you cannot, we will discuss it with you and see if there is some way we can get it in. I would prefer a summary to be submitted for the record, however.

I suspect this record will be kept open for at least a week after our last hearing. That is two or three weeks from now.

Mr. PARKER. I would prefer to put the report in.

Senator HATCH. Let me look at it. I just went before the Rules Committee yesterday. They chided some of us, or at least gave strong indication that they were not very happy with us for putting too much material into the record and running the costs up. I will be happy to look at the statement. We probably will put the whole

thing in if that is what you would like to do. However, I would prefer a summary if that is at all possible..

I would like to submit several questions to you in writing, as would Senator Metzenbaum. If you will permit that, we would like to have your answers back as quickly as possible because they will become part of the record.

In addition, I would like to afford Mr. Reynolds the opportunity to respond to your criticisms at a point in the record because your criticisms have been very strong. He should have that opportunity.

Mr. PARKER. I have no objection.

Senator HATCH. In addition to that, the next hearing will be held tomorrow morning at 9:30.

I appreciate the effort you have put forth. We will build the record on that basis. Let me look at the report to see if we need to put the whole thing in. Again, if we do not, I would prefer not to do so. If we do, I guess we have to do it.

Thank you so much.

[The prepared statement of Mr. Parker and additional material follow:]

PREPARED STATEMENT OF FRANK R. PARKER

Mr. Chairman, members of the Subcommittee, and Senators, I am grateful for the opportunity to appear before you today to support the extension and amendment of the Voting Rights Act of 1965 contained in S. 1992. We all agree that the Voting Rights Act is the most successful civil rights legislation ever enacted by Congress. John Lewis, former director of the Voter Education Project in Atlanta, has described it as the "lifeblood of black political progress."

BACKGROUND

The Lawyers' Committee is a national organization founded in 1963 at the request of the President of the United States to help ensure equal civil rights for all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Lawyers' Committee. The purposes of the Voting Rights Project are to protect the rights of minority citizens secured by the Voting Rights Act and to help ensure that the Act is effectively enforced.

I have been directly involved in studying, writing about, and litigating voting rights issues for the past 17 years. I was a law clerk with the Civil Rights Division of the Department of Justice in 1965 when the Voting Rights Act was signed into law by President Johnson. As a staff attorney with the United States Commission on Civil Rights, I was the principal author of the Commission's comprehensive report on the implementation of the Act, Political Participation, issued in 1968. In December, 1968, I moved to Mississippi, where for 12 years I was employed as Staff Attorney and then Chief Counsel of our Mississippi Office. I have represented minority voters and candidates in more than 30 voting rights cases, including the Mississippi legislative reapportionment case, which went on for fourteen years--including nine trips to the Supreme Court--until the black voter plaintiffs finally prevailed in 1979, the recent Virginia legislative reapportionment case, a number of county redistricting cases challenging racial gerrymandering of district lines, lawsuits challenging racially discriminatory at-large elections, and other types of voting rights cases.

THE NEED TO AMEND SECTION 2 OF THE VOTING RIGHTS ACT
TO ELIMINATE THE "INTENT" REQUIREMENT

Mr. Chairman, I am happy to be here today to support the proposed amendment to Section 2 of the Voting Rights Act of 1965, which was passed overwhelmingly with bipartisan support in the House of Representatives by a vote of 389 to 24. The record should show that the House bill, on final passage, was unanimously supported by the House delegations from South Carolina, Louisiana, and Florida, and received a majority of the votes of the House delegations from Alabama, Georgia, Mississippi, North Carolina, and Texas.

A. The Intent Requirement Subverts The Purposes Of The Voting Rights Act.

The proposed amendment to Section 2 of the Voting Rights Act is necessary to effectuate the purposes of the Fourteenth and Fifteenth Amendments and the Voting Rights Act, and to eliminate invidious discrimination affecting the right to vote. In City of Mobile v. Bolden, 446 U.S. 55 (1980), a slim majority of a heavily divided Supreme Court drastically altered the legal standard under which black and Hispanic voters had been successful in overcoming racial gerrymandering of district lines, discriminatory at-large elections and other discriminatory electoral barriers. The majority ruled that the Fourteenth and Fifteenth Amendments prohibit only those voting laws adopted or retained for a racially discriminatory purpose.

A plurality of the Court, 446 U.S. at 58-80, but not a majority, also construed Section 2 of the Voting Rights Act to require proof of discriminatory intent. Justices White, Blackmun, and Stevens did not discuss the statutory issue, and Justices Marshall and Brennan expressed the view that Section 2 would prohibit voting practices which are discriminatory in purpose or effect.

In some areas of the country, black and Hispanic voters are denied equal access to the political process by racial gerrymandering, discriminatory at-large elections, and other electoral devices which minimize and cancel out minority voting strength. In Jackson, Mississippi, for example, blacks constitute 47 percent of the population, but no black person has been elected to the

all-white city council since at-large voting was adopted in 1912. Equal black electoral participation is barred by an extensive past history of official discrimination and purposeful disfranchisement of blacks, majority vote and full-slate voting requirements, racially polarized voting, disproportionate socio-economic deprivations, and other factors. Unless minority voters are able to overcome these discriminatory barriers to equal participation, these communities can continue to cling to these unjust voting schemes.

So debate over the "intent" requirement is not merely a matter of losing or winning lawsuits, as some have contended. Instead, it involves the critical issue of whether racially discriminatory voting laws not covered by the Section 5 preclearance requirement can ever be eliminated, or whether black and Hispanic voters should continue to be shut out of the electoral process.

As should be expected, the difficulty of meeting this "intent" requirement has not been lost on local officials who maintain discriminatory voting systems. In Mississippi, since 1970, we have filed eleven separate lawsuits against individual cities challenging at-large voting systems which discriminate against black voters. Prior to Mobile, in one case we obtained a favorable judgment, and in six cases, the local officials--knowing they would lose--agreed to settle the cases against them, abolished the at-large systems, and instituted ward election plans. Since Mobile, the local officials have not settled a single case, and have strenuously resisted any efforts to eliminate those discriminatory systems.

For minority citizens whose votes are diluted or cancelled out by discriminatory voting laws, proving discriminatory intent is extremely difficult, and in most cases, impossible. Proving discriminatory intent ultimately requires a determination of what was in the minds of legislators who enacted or retained a voting law alleged to be discriminatory. This difficult psychoanalytic task is fraught with sometimes insuperable practical and legal barriers.

The Supreme Court itself, in Palmer v. Thompson, 403 U.S. 217 (1971), the Jackson, Mississippi, swimming pool closing case,

pinpointed some of the inherent difficulties in attempting to prove invidious intent. In Palmer, the Court held that evidence of discriminatory intent was not relevant to showing a constitutional violation. ". . . [N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."

> First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. [Citations omitted.] Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand, the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators.

403 U.S. at 224-25.

How can the legislative motivation of a diverse body, such as a state legislature, be determined with any degree of accuracy? Frequently, the more diverse the body, the more diverse the reasons for passing particular legislation. Allan Nevins, in his book, The Gateway to History, has written: "A . . . danger in the use of [a single] hypothesis lies in the temptation toward oversimplification . . . causation is never single, always plural." Should a particular voting law passed by a legislative body consisting of, say, 174 individuals, be struck down merely because one legislator made a racist speech in support of it? Can the motivation of one legislator reasonably be attributed to the other 173, particularly if other legislators give nonracial reasons for the bill?

Most state legislatures, unlike Congress, do not publish committee reports on proposed legislation, and floor debates and committee deliberations typically are not recorded or published. How then, is the legislative purpose to be determined?

The second reason given by the Supreme Court in Palmer demonstrates the futility in hinging the validity of a law on discriminatory intent.

> Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its

> facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

403 U.S. at 225.

Thus, the application of this discriminatory intent requirement can lead to grave injustices and unequal treatment of governing bodies to which it is applied. Suppose in one county in the South the county governing board switched to at-large elections and revealed its discriminatory motivation in doing so. The county next to it, presumably with a smarter lawyer who had more control over the public statements of his clients, did the same thing under identical conditions, and for the same reason, but the county officials of the second county concealed their discriminatory purpose by announcing that their purpose was to promote progressive governmental reform, to get away from ward healing and the corruption of ward politics. The first county's change would be struck down because of the discriminatory motives of its supporters, but the same change under identical circumstances by the second county would presumably be valid because the relevant governing body merely announced different reasons for its action. The results, in both cases, are the same--minority voters are shut out of the electoral process by a discriminatory law.

The discriminatory purpose requirement condones dilution and abridgement of the right to vote and makes unlawful only a discriminatory purpose. In this manner, the discriminatory purpose requirement belittles the voting rights of minorities in this country, and fails to provide effective protection for voting rights denials.

The difficulties of proving discriminatory intent are enhanced by other practical and legal barriers which cut off the best sources of evidence of discriminatory motivation:

--Many discriminatory voting and election laws were adopted years ago by legislators who are now dead. As the Birmingham (Alabama) Post-Herald noted in an editorial supporting the House-passed bill, "It would be a neat trick to subpoena them from their graves for testimony about their racial motivations."

--Testimony from live legislators who authored or supported discriminatory legislation generally is prohibited by the "legisla-

tive privilege" rule, which prevents litigants from cross-examining legislators concerning their motivation. 1/

--Recently, the U.S. Court of Appeals for the Fifth Circuit, where most voting rights cases originate, ruled that the motivation of the voters in adopting and retaining election procedures by popular referendum is immune from judicial inquiry. 2/

The courts have widely noted that direct evidence of discriminatory intent is rarely present. As the Court of Appeals for the Fifth Circuit recently observed:

> In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose, it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.

Quite simply, there will be no "smoking gun." Lodge v. Buxton, 639 F.2d 1358, 1363 and n. 8 (5th Cir. 1981) (footnotes omitted). In the absense of a smoking gun, victims of discriminatory laws must resort to evidence producing what courts and legal scholars have called "inferences," "suspicions," and "likelihoods" of discriminatory intent. This introduces a wholly subjective and arbitrary factor into judicial decision-making. Whether or not these "inferences," etc. are sufficient to prove discriminatory intent depends largely upon the personal predilictions of the individual judges. As Circuit Judge John Minor Wisdom, one of the most respected jurists and constitutional scholars in the American judiciary, recently put it:

> In some cases legislative intent may be unprovable; resort must be had to inference. When, however, a court must consider a laundry list, an "aggregate" of factors, some pointing one way and others pointing another way, the case turns on the attitude of the trial judge and the appellate judges toward the American brand of federalism. . . . The answer may depend more on the legal philosophy of the particular judge or judges in the case than on the logical relationship between effects, as evidentiary facts, and the inference that the state or local governing body necessarily intended to deny or to dilute the votes of black citizens.

Nevett v. Sides, 571 F.2d 209, 233 (5th Cir. 1978) (concurring opinion).

Judges and legal commentators frequently disagree, often strenuously, on what constitutes sufficient circumstantial proof of discriminatory intent. The nine Justices of the Supreme Court

in the Mobile case itself were unable to agree on a majority opinion setting forth the proper legal standard. The plurality opinion in the Mobile case was strongly criticized by the Harvard Law Review as "disappointing because it refused to draw inferences [of discriminatory intent] that are reasonable in light of the Court's intent decisions . . ." 3/ In the words of Supreme Court Justice Byron R. White in his dissenting opinion, the Supreme Court's decision "leaves the courts below adrift on uncharted seas with respect to how to proceed." 446 U.S. at 103.

B. The Legal Standards Governing Proof Of Discriminatory Intent Are Full Of Contradictions And Inconsistencies.

Justice White's words are prophetic. Attempts to implement this new "intent" requirement in voting rights cases have led to massive confusion and contradictory court decisions. The two most prominent voting rights decisions since Mobile, which have frequently been cited during these hearings as examples of the use of circumstantial evidence of intent, exemplify this confusion. In Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), prob. juris. noted sub. Rogers v. Lodge, 50 U.S.L.W. 3244 (No. 80-2100) (U.S. Oct. 5, 1981), the Fifth Circuit held that proof of unresponsiveness by the white elected officials to the needs and interests of the minority community is an essential element of a prima facie case of unconstitutional vote dilution under the Fourteenth and Fifteenth Amendments.

> The Supreme Court implicitly concluded in Bolden, as we explicitly do today, that absent such proof of unresponsiveness a prima facie case can not be established.

639 F.2d at 1373-74. Another panel of the same court, only one month prior to the Lodge decision and applying the same Mobile standard, came to exactly the opposite conclusion:

> Whether current office holders are responsive to black needs and campaign for black support is simply irrelevant to that inquiry [concerning discriminatory intent]; a slave with a benevolent master is nonetheless a slave.

McMillan v. Escambia County, 638 F.2d 1239, 1249 (5th Cir. 1981).

One constitutional scholar has termed the discriminatory intent area "one of the most muddled areas of our constitutional jurisprudence." 4/ The legal standards for proving discriminatory intent are full of inconsistencies and contradictions.

1. Whether minority voters must prove that racial intent was the "sole," "dominant," or "primary" motivation. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the leading Supreme Court decision setting forth the legal standards for proving discriminatory intent, the Court seemed to suggest that plaintiffs need not prove

> that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandare made a decision motivated solely by a "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

429 U.S. at 265-66. Notice that the Court did not say that when there is proof that a discriminatory purpose has been a motivating factor, a constitutional violation is established. Instead, the Court only said that "this judicial deference [to legislative decisions] is no longer justified."

Then, in footnote 21 the Court indicated that evidence that the challenged action "was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision." Rather, this merely shifts the burden to the defendants

> "of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party . . . no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.

429 U.S. at 270 n. 21.

In my experience, even in cases of the most blatant racial gerrymandering and vote dilution, the defendants can always come up with some plausible nonracial explanation for their discriminatory actions. The Supreme Court's articulation of this standard seems to establish a difficult "but-for" test--to prevail over defendants' nonracial explanation, plaintiffs must show that the challenged action would not have been taken but for a discriminatory intent. And if this "but-for" standard applies, then plaintiffs

would indeed have to prove that a racial purpose was the "sole," "dominant," or "primary" motivation.

2. Whether the White v. Regester factors provide circumstantial evidence of discriminatory intent. In Mobile, the plurality opinion stated that the Court's prior decision in White v. Regester, 412 U.S. 755, 765-70 (1973), "is . . . consistent with 'the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" 446 U.S. at 69. In White, the Supreme Court held unconstitutional at-large legislative voting in Dallas and Bexar (San Antonio) Counties in Texas on proof showing, among other things, systematic underrepresentation of blacks and Mexican-Americans in the legislative delegations; proof of "indifference to their needs and interests on the part of white elected officials" (Mobile, 446 U.S. at 69); "a long history of official discrimination against minorities" (id.); and electoral mechanisms such as a majority vote requirement, the post or "place" requirement, and the absence of a district residency requirement which enhanced the opportunity for discrimination at the polls.

But in the Mobile decision the plurality rejected each of these factors, one by one, for failing to provide sufficient circumstantial evidence of discriminatory intent. 5/

(a) Lower court findings that no black person had been elected to the city council and that "the processes leading to nomination and election were not open equally to Negroes" (446 U.S. at 73) were rejected as proof. "It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation" (id.).

(b) The evidence of official discrimination against blacks in municipal employment and public services was rejected as "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which [white officials] attained their offices" (446 U.S. at 74, footnote omitted).

(c) The Mobile evidence of a substantial history of

official discrimination in Alabama "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question" (id.).

(d) The discriminatory electoral mechanisms "tend naturally to disadvantage any voting minority . . . They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters" (id., footnote omitted).

3. Whether circumstantial evidence of discriminatory intent is ever sufficient. In case after case, the Supreme Court has reiterated the view that circumstantial evidence of discriminatory intent may be sufficient.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

Arlington Heights, 429 U.S. at 266. However, in each of these Supreme Court cases, the plaintiffs lost and the Supreme Court held that the circumstantial evidence presented was not sufficient to show a constitutional violation. 6/ In the latest of this series of cases, City of Memphis v. Greene, 49 U.S.L.W. 4389 (1981), the City of Memphis erected a barrier closing off the main street between an all-white neighborhood and an adjoining, predominantly black section of town. Despite the presence of extensive direct and circumstantial evidence of discriminatory intent, 7/ the majority of the Supreme Court held that "there is no evidence that the closing was motivated by any racially exclusionary desire" (49 U.S.L.W. at 4393, footnote omitted).

4. Whether the foreseeability of a discriminatory impact constitutes evidence of discriminatory intent. In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Supreme Court indicated:

> Certainly, when the adverse consequences of law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn.

442 U.S. at 279 n. 25. Similarly, in the school segregation cases, the Supreme Court has held such evidence to be "quite relevant." Columbus Board of Education v. Penick, 443 U.S. 449, 464-65 (1979) ("actions having foreseeable and anticipated disparate impact are relevant evidence"); Dayton Board of Education v. Brinkman, 443 U.S. 526, 536 n. 9 (1979) ("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose").

However, in Mobile the plurality seems to have rejected such evidence:

> [I]f the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." Personnel Administrator of Mass. v. Feeney, 442 U.S., at 279 (footnotes omitted).

446 U.S. at 72 n. 17.

This passage clearly refutes those who have argued that the Mobile intent requirement is not so difficult or unusual because because intent is so widely required in tort and criminal cases. In tort cases, the rule is that one is presumed to have intended the natural and foreseeable consequences of one's acts. Under the Mobile decision, this presumption of intent does not apply to voting rights cases. Thus, the intent requirement of the Mobile case is more difficult to meet than any intent requirement currently employed in the law. Voting is a fundamental constitutional right. Minority voters should not be required to satisfy the most difficult intent requirement known to the law in order to protect their basic right to vote.

MOBILE REPRESENTS A RADICAL DEPARTURE FROM PRIOR VOTING RIGHTS CASES

City of Mobile v. Bolden represents a radical departure by the Supreme Court from prior voting rights cases. In prior cases, the Court had said that unconstitutional dilution of minority voting strength could be proved by "an invidious result" and "totality of circumstances" showing that a challenged practice

denied minorities equal access to the political process, regardless of motivation. Both the District Court and the Court of Appeals held in Mobile that, under this prior standard, a constitutional violation had been shown. However, a slim majority of the Court reversed, applying instead a new standard requiring strict proof of discriminatory intent.

Under Mobile, as the courts have said in vacating and remanding cases decided under this prior standard for reconsideration in light of Mobile, "the rules of the game are changed;" 8/ the prior standard has been "declared to be improper." 9/

This abrupt reversal was most dramatically illustrated in McCain v. Lybrand, a challenge to at-large elections for the Edgefield County (South Carolina) Council. In April, 1980 the District Court, applying the prior cases, held that the black voter plaintiffs had proved that at-large voting unconstitutionally diluted black voting strength. Five days later, the Mobile decision was handed down, and the District Court abruptly reversed itself and vacated its prior judgment.

Here's how this change occurred:

(1) In two of the earliest vote dilution cases, Fortson v. Dorsey (1965)10/ and Burns v. Richardson (1966)11/, the Supreme Court indicated that multi-member districts would be unconstitutional if it could be shown that

> designedly or otherwise, a multi-member constituency scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.12/

The Court indicated that this standard would be satisfied by proof of "an invidious result."13/

(2) Then, in the Jackson, Mississippi, swimming pool closing case decided in 1971, Palmer v. Thompson, the Supreme Court held that proof of discriminatory intent was not relevant to showing a constitutional violation because of the inherent difficulties in proving discriminatory intent. Prior cases, including the Tuskegee gerrymander case, Gomillion v. Lightfoot,14/ were held not to rest on proof of discriminatory intent:

> But the focus on those cases was on the actual effect of the enactments, not upon the motivation which led the states to behave as they did.15/

(3) In Whitcomb v. Chavis (1971)16/ and White v. Regester, (1973)17/ two cases challenging multi-member legislative districts, the Supreme Court held that the focus should be, not on the motivation of the legislators, but on the "totality of the circumstances:"

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.18/

As Judge Wisdom, a twenty-five year veteran of the Fifth Circuit appellate bench, correctly stated (Nevett v. Sides, 571 F.2d at 232):

> In White v. Regester and Whitcomb v. Chavis, the leading cases involving multi-member districts, the Supreme Court did not require proof of a legislative intent to discriminate.

The principles declared in those cases were implemented and followed by the lower courts in Zimmer v. McKeithen 19/ and other cases. Indeed, the Zimmer court carefully paid heed to what the Supreme Court said in the Jackson swimming pool case:

> In Palmer v. Thompson [citation omitted] the Supreme Court stated that although its past decisions contain language which suggests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot [citation omitted] focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.20/

(4) Then the Supreme Court reversed itself in Washington v. Davis (1976)21/, an employment discrimination case, and Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977)22/ a discriminatory zoning-fair housing case, and held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

(5) In Mobile, the slim majority chose to apply the Washington v. Davis/Arlington Heights standard requiring strict proof of discriminatory intent, rather than the White v. Regester/ Zimmer v. McKeithen "totality of the circumstances" approach.

Moreover, in doing this, Justice Stewart, writing for the plurality, openly acknowledged the prior understanding (now called a "misunderstanding") that proof of intent was not required:

> [Zimmer v. McKeithen] was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause--that proof of a discriminatory effect is sufficient.23/

The prior standard, in effect at least since 1965, was thus repudiated, and the electoral access of minority voters was conditioned on whether or not they can produce specific evidence of discriminatory intent.

WHAT MINORITY VOTERS WOULD HAVE TO PROVE TO SATISFY THE NEW SECTION 2 "RESULTS" STANDARD

As indicated in the House Report (H.R. Rep. No. 97-221, pp. 29-30), the proposed "results" standard is designed to restore the pre-Mobile understanding of the proper legal standard which focuses on the results and consequences of an allegedly discriminatory voting law rather than on the intent or motivation behind it. The application of this standard is illustrated in Whitcomb v. Chavis, White v. Regester, and Zimmer v. McKeithen. Merely a discriminatory effect measured by the absence of minority office holders would not be sufficient. Minority voters would have to prove that the challenged electoral law or paractice denied minority voters equal access to the political process.

Some have erroneously charged that the new Section 2 "results" standard would lead to the wholesale elimination of all at-large election systems everywhere in the Nation. They contend that it would be difficult to imagine a political entity containing a significant minority population without proportional representation that would not be in violation of the Section 2 amendment. This is simply incorrect and grossly distorts the intent of this amendment. The House Report clearly states (p. 30):

> Not all at-large election systems would be prohibited under this amendment, however, but only those which are imposed or applied in a manner which accomplishes a discriminatory result.

In Whitcomb v. Chavis black voters challenged at-large voting in multi-member legislative districts in Marion County, (Indianapolis) Indiana. The Supreme Court held that the mere fact

that black "ghetto" voters were not proportionately represented, did not show invidious discrimination

> absence evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice.24/

In White v. Regester, on the other hand, the Supreme Court held that multi-member districts in Dallas and Bexar Counties denied minority voters equal access to the political process on findings of the District Court which showed:

--A "history of official racial discrimination in Texas, which, at times, touched the right of Negroes to register and vote and to participate in the democratic processes."

--A majority vote requirement for party primaries and a "place" or post requirement limiting candidates to a specified "place" on the ballot, which were not "in themselves improper nor invidious, [but which] enhanced the opportunity for racial discrimination."

--No subdistrict residency requirement for candidates, meaning that "all candidates may be selected from outside the Negro residential area."

--Since Reconstruction, only two black candidates from Dallas County had been elected to the Texas House of Represenatives, and these two were the only blacks ever slated by the Dallas Committee for Responsible Government, a white-dominated slating group.

--The slating group did not need the support of the black community to win elections, and did not exhibit good-faith concern for the needs and aspirations of the black community.

--The slating group had employed "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community."

--The Mexican-American community of San Antonio had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."

--Mexican-Americans suffered "a cultural and language

barrier that makes [their] participation in the community processes extremely difficult . . ."

--A history of a discriminatory poll tax and restrictive voter registration procedures which continued to have a residual impact reflected in disproportionately low voter registration levels.

--Only five Mexican-Americans had served on the Texas Legislature, and only two were from the barrio area.

--The Bexar County legislative delegation in the House "was insufficiently responsive to Mexican-American interests."

--A pattern of racially polarized voting showing that "race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities."

These findings showed that based on "the totality of the circumstances," Mexican-Americans were "effectively removed from the political processes . . ."25/

This equal-access-to-the-political-process standard was then implemented and applied by the Fifth Circuit in Zimmer. The Court correctly noted that disproportionate minority representation was not sufficient to show a violation:

> Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.26/

The Zimmer court also correctly held that the existence of two or three of these factors would not suffice:

> The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.27/

Applying this pre-Mobile standard, courts in numerous cases--both in the South and in the North--rejected challenges to at-large election systems alleged to dilute minority voting strength. See, for example, Whitcomb v. Chavis, 403 U.S. 124 (1971) (Indianapolis, Indiana); McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976) (Gadsden County, Fla.) (only four Zimmer elements proven); David v. Garrison, 553 F.2d 926 (5th Cir. 1977) (Lufkin,

Texas) (no proof of denial of equal access to the political process); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978) (Shreveport, La.) (District Court findings inadequate to meet the standard); Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976) (Pine Bluff, Ark.) (burden of White v. Regester not met); Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) (Boston, Mass.) (no denial of equal access proven).

THE NEW SECTION 2 "RESULTS" STANDARD WOULD NOT REQUIRE PROPORTIONAL REPRESENTATION BY RACE OR RACIAL QUOTAS

The language of the Section 2 amendment itself makes it unmistakeably clear that the "results" test is not intended to create a right to proportional representation by race or racial quotas:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The "in and of itself" language means that a court may take exclusion of minority representation into consideration, but it would not be the determining factor.

Some have erroneously contended that the proposed language specifically disavowing proportional representation would apply only in circumstances in which minority candidates did not run for office, but would not apply where minority candidates ran and failed to gain proportional representation for the minority community. There is no basis for such a grossly distorted view of the House bill either in the statutory language or the legislative history in the House. The Whitcomb case itself illustrates the point that mere "political defeat at the polls" (403 U.S. at 153) for minority candidates does not establish a violation of this standard.

The specter raised by some witnesses at these hearings that this "results" standard would lead to proportional representation by race and racial quotas has no basis whatsoever. As I indicated earlier in my statement, the House Judiciary Committee Report makes clear that the purpose of this amendment is merely to restore the legal standard applied by the courts prior to the introduction of the "intent" test. In preparation for my testimony, my staff and I have reviewed the appeals court decisions rendered prior to

the Fifth Circuit's Mobile decision in 1978, and I invite every Senator concerned about this issue to do the same.

Attached as an appendix to my statement are summaries of 23 reported vote dilution cases decided by the Federal courts of appeals prior to 1978. Nineteen of these decisions emanate from the United States Court of Appeals for the Fifth Circuit, which, during this period, covered most of the South from Georgia to Texas and which has been the center of the vast majority of vote dilution litigation. These 19 cases represent most, if not all, of the judicial decisions of the Fifth Circuit on this issue prior to 1978, and therefore portray the practical jurisprudential understanding of the application of this legal standard in this country during this period. The additional cases from other courts of appeals reflect agreement with the Fifth Circuit's interpretation of the relevant issues.

Considered together, these cases irrefutably demonstrate the following major points:

First, the operative legal standard for almost all vote dilution decisions in this country prior to 1978 focused on the context, nature, and results of the challenged voting law, in other words, the proposed "results" standard.

Second, under this results standard, proportional representation was never required, and in fact any right to proportional representation by race or racial quotas was specifically repudiated in every case in which the issue was raised.

Third, under this results standard, at-large elections were never held to be a per se violation, and were never automatically invalidated.

Fourth, this results test, contrary to some of the unsupported statements made during these hearings, does not ensure near-certain victory for minority voters. Of the 23 cases analyzed in the appendix, the defendants prevailed in more than half.

Fifth, this results test as it was actually applied by the courts in these cases required much more than a "mere scintilla of evidence" to sustain a finding of unconstitutionality. These cases clearly demonstrate that facts showing only the existence of at-large

election systems, defeat at the polls of minority candidates, and racially polarized voting has not been sufficient to render challenged at-large voting systems unconstitutional.

These cases show the following:

1. The results test was the operative standard for almost all vote dilution decisions in this country prior to 1978. Some have insisted during the course of these hearings that only a few "isolated" lower court decisions prior to Mobile employed the results test. This simply is not true.

Each of the 23 cases summarized in the appendix--the main Courts of Appeals decisions regarding vote dilution prior to 1978--employed a results test. I have found no Fifth Circuit case prior to 1978 which required a showing of present discriminatory intent to prevail on a vote dilution claim. Even if there are one or two or three which I missed, that does not obviate the fact that the vast, vast majority of vote dilution cases in this country were decided under a results test.

One of the earliest Fifth Circuit cases to address the issue was Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir.), cert. denied, 405 U.S. 925 (1972). There, the court said, a constitutional violation could be made out by a showing of racial motivation, or by demonstrating that "designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 453 F.2d at 457-458 (emphasis added), quoting Burns v. Richardson, 384 U.S. 73, 88 (1966).

In 1973, the full en banc Court of Appeals for the Fifth Circuit outlined the parameters of the dilution doctrine in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc) aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). The court specifically followed the holding of Howard that racial motivation need not be proven, and that an electoral system which "designedly or otherwise" minimized or canceled out racial voting strength violated the constitution. 485 F.2d at 1304.

Subsequent decisions of the Fifth Circuit show that, contrary to some assertions, Zimmer was not an isolated instance of the use of the results test. Instead, it provided the reasoning which was continuously followed in the Fifth Circuit for several years. In the vast majority of the 23 cases summarized in the appendix, the Zimmer format and the Zimmer results test formed the basis for judicial decision-making. Thus, in a 1978 opinion, Marshall v. Edwards, 582 F.2d 927, 929 (5th Cir. 1978), the court explained that Zimmer had for years guided the Fifth Circuit in its vote dilution cases. And the courts repeatedly joined with the panel in Hendrix v. Joseph, 559 F.2d 1265 (5th Cir.), cert. denied, 434 U.S. 970 (1977), to echo what Zimmer had made clear: "[M]otive is not a direct issue in the dilution context . . . ." 559 F.2d at 1269.

In similar fashion, other courts of appeals followed Zimmer in the implementation of a pre-Mobile results standard. See e.g., Kendrick v. Walder, 527 F.2d 44, 48-49 (7th Cir. 1975) (citing Zimmer, and quoting Fortson v. Dorsey 379 U.S. 433, 439 (1965) for the proposition that an electoral plan is unconstitutional if it "designedly or otherwise" cancels out or minimizes minority voting strength).

Justice Stewart's plurality opinion in Mobile expressed the opinion that White v. Regester was consistent with an intent standard. Whatever the merits of that conclusion--and it seems doubtful, since White v. Regester never spoke of intent nor examined the motivation behind the officials who designed the multi-member districts at issue--it is clear that for years the lower courts in this country decided vote dilution cases under a results test. Thus, we have historical expreience against which to examine the dire predictions that a results standard will lead to proportional representation.

2. Under the results test, proportional representation was never required. None of the 23 cases summarized in the appendix, all of which rested upon a results analysis, mandated proportional representation. Indeed, in 21 of the 23, the concept of proportional representation was specifically repudiated either in the outcome of

the case or by specific language in the opinion. The remaining two, Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974), and Robinson v. Commissioners Court of Anderson County, 505 F.2d 674 (5th Cir. 1974), contain nothing to suggest that they required proportional representation in any form. Thus, out of the many vote dilution cases decided in this country under the results test, absolutely none require proportional representation.

As early as Howard v. Adams County, the Fifth Circuit accompanied its articulation of the results test with a clear signal that proportional representation was not the relevant benchmark. 453 F.2d at 458, quoting Whitcomb v. Chavis, 403 U.S. 124, 156, 160 (1971). Zimmer followed with the statement that under the results test, "it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305. Time and again, in subsequent years, the Fifth Circuit consistently eschewed in rhetoric and practice the concept of proportional representation in cases governed by the results standard:

> [N]o racial or political group has a constitutional right to be represented in proportion to its numbers, [and] it follows that no such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages.

Wallace v. House, 515 F.2d 619, 630 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1975).

> Members of a minority group have no federal right to be represented in legislative bodies in proportion to their numbers in the general population.

Panior v. Iberville Parish School Board, 536 F.2d 101, 104 (5th Cir. 1976).

> The Court has clearly stated that no one group is constitutionally entiteld to elect representatives from that group.

David v. Garrison, 553 F.2d 923, 927 (5th Cir. 1977).

This has not been empty rhetoric on the part of the Fifth Circuit, but has been implemented in actual practice. Indeed, in the context of court-ordered remedial plans designed to replace unconstitutional election systems, the Court has held it impermissible to use proportional representation as a benchmark. Marshall v. Edwards, 582 F.2d 927, 939 (5th Cir. 1978). In Perry v. City of

Opelousas, 515 F.2d 639 (5th Cir. 1975), the plaintiffs challenged a court-ordered remedial plan which provided for the at-large election of one city alderman in addition to the election of the remaining five from single-member districts. The court rejected the plaintiffs' contentions and held the mixed plan constitutional, despite the fact that it would probably result in the election of four whites and two blacks in a city that was 51 percent black. 515 F.2d at 641-642. Clearly then, proportional representation--which would have meant three blacks and three whites--was not required.

Other circuits applying the results test have also noted that it does not include the concept of proportional representation. For example, in Kendrick v. Walder, the Seventh Circuit stated that use of the results test "is not to suggest that the designation of seats for minority representatives in proportion to their voting strength is compelled (or even permitted) by the equal protection clause . . . ." 527 F.2d at 48.

3. Under the results test, at-large elections are not automatically invalidated. In conjunction with its initial articulation of the results test in the at-large context, the Fifth Circuit stated in Zimmer that "[i]t is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional." 485 F.2d at 1304. This is borne out by an analysis of the 16 cases in the appendix which involved challenges to at-large elections or multi-member districts, and which evaluated those challenges under a results standard. All 16 repudiated the notion that at-large elections are per se unconstitutional, either through language in the opinion or by a holding sustaining the at-large or multi-member election scheme at issue. Indeed, of the 16, the defendants prevailed in 10 by securing a decision allowing continued use of multi-member districts or at-large plans. These include cases from other appeals courts as well as decisions by the Fifth Circuit. See e.g., Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) (upholding an at-large election system under a results analysis).

4. The results test does not insure near-victory for minority plaintiffs, and defendants have won a significant number

of cases under the results test. Of the 23 cases summarized in the appendix, all using the results test, defendants emerged victorious in 13, and prevailed on some of the issues in an additional two. With defendants carrying over a fifty percent success rate under the results test, with most of the cases emanating from the Fifth Circuit--which covers the territory long governed by de jure racial discrimination--it cannot be said that the results test implies automatic victory for minority plaintiffs.

5. The results test requires much more than a scintilla of evidence in addition to the absence of minority elected officials to sustain a finding of unconstitutionality. Some have repeatedly contended that the results test would require plaintiffs to prove no more than disproportionate representation plus a "scintilla" of additional evidence. They have defined a "scintilla" to mean proof of only one of the Zimmer factors. The numerous cases applying the results test show that this position is simply wrong.

The opinion in Zimmer elucidated the evidentiary factors to considered in a vote dilution case, then stated that "[t]he fact of dilution is established upon proof of the existence of an aggregate or these factors." 485 F.2d at 1305. This aggregation standard has been repeated time and again by the Fifth Circuit in its application of the results standard, as the cases in the appendix illustrate.

On a number of occasions, plaintiffs who have proven one or two or three of the Zimmer factors--certainly more than a "scintilla"--have been found to fall short of the showing required to render an electoral scheme void under the results test. In Hendrix v. Joseph, 559 F.2d 1265 (5th Cir.), cert. denied, 434 U.S. 970 (1977), the district court found in the plaintiff's favor on one of the Zimmer main factors and three of the enhancing factors, and failed to make findings on the remaining Zimmer criteria. The Court of Appeals reversed and remanded for further findings, holding that a constitutional violation had not been proven.

> Before [declaring an at-large system unconstitutional], thorough and detailed findings on each issue that the courts have thus far found to be relevant must be made. To allow conclusory findings that "the government is unresponsive," and that "no black has ever been elected" to substitute for such detail would alter the balance

> that our constitutional system of federalism is designed to protect.

559 F.2d at 1271.

Similarly, the plaintiffs' challenge to at-large elections in McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976), was rejected where the only proof was of a history of past discrimination, plus the existence of a majority vote requirement and, a district residency-numbered post provision which nullified the effect of single-shot voting.

> [W]e cannot say that the effects of past discrimination, in themselves, cause an at-large voting scheme to unconstitutionally deny blacks access to the political process.

535 F.2d at 281.

The fact of past discrimination along with the absence of black elected officials also failed to prove a violation under the results test in Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975), where the court said:

> The single glaring fact that no black has ever been elected to a parish office does not by itself support judicial nullification of a reapportionment plan. It evidences no more at the most than a policy of past discrimination. But the issue here, of course, is not whether Rapides Parish discriminated against blacks in the past, but rather whether any debilitating effects of that discrimination still persist.

508 F.2d at 1112.

In David v. Garrison, 553 F.2d 923 (55h Cir. 1977), and Nevett v. Sides (Nevett I), 533 F.2d 1361 (5th Cir. 1976), the court stressed the aggregation requirement of Zimmer, and held that consideration of all the Zimmer factors was necessary to decide a dilution case under the results test. In both cases, the appeals court found the trial court findings far too limited to support a conclusion of unconstitutionality, adding that the "scintilla" of racial bloc voting in combination with the absence of minority elected officials was insufficient to prove a constitutional violation.

> Specifically, the trial court's findings may be read as indicating that elections must somehow be so arranged--at any rate where there is evidence of racial bloc voting--that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires.

David v. Garrison, 553 F.2d at 930-931, quoting Nevett I, 533 F.2d at 1365.

In contrast to the numerous cases where an "aggregate" of the Zimmer factors must be proven, and where defendants have prevailed in the face of proof of only a few factors, there are no reported decisions where the Fifth Circuit Court of Appeals has voided an electoral system under the results test upon proof of disproportionate representation plus only one other Zimmer factor.

The Administration and some other witnesses opposing the Section 2 amendment have attempted to deflect attention from the true issues at stake here by raising the false specter of proportional representation. I agree with The New York Times' characterization of this Administration strategy as "obfuscation and dithering" (January 29, 1982). As the Washington Post correctly editorialized (December 20, 1981), "The drafters of the House bill went to some trouble to avoid this misapprehension." Opponents also have waved the red flags of near-automatic invalidation of at-large elections and constant defeat for local communities under a results test which would require only a "scintilla of evidence" along with disproportionate representation to establish a violation. The previously discussed analysis of the treatment of dilution claims by the courts of appeals demonstrates the historical and logical emptiness of these positions.

If the opponents of the House-passed version of Section 2 still cling to those positions, let them come forward with something other than mere cries of alarm and ominous predictions about the future. Let them come forward with a list of cases showing that intent was the practical standard used by the overwhelming majority of the lower courts in dilution cases prior to 1978. Let them also come forward with a list of cases, decided under the results standard, which mandated proportional representation. Let them present a compendium of judicial decisions declaring at-large elections per se unconstitutional in light of the results test. Let them explain away the large number of victories by defendants whose electoral practices were validated after a results evaluation. And let them show us historical instances where plaintiffs prevailed under the results standard by proving only disproportionate representation plus a mere "scintilla" of evidence--one other Zimmer factor. If they cannot come forward and show us these

things, the bankruptcy of their contentions will remain exposed for all to see.

IMPLEMENTATION OF THE RESULTS STANDARD WOULD NOT LEAD TO THE WHOLESALE INVALIDATION OF PAST ELECTIONS

Recently, a new false specter has been raised that implementation of this results standard would lead to the wholesale invalidation of past elections, and that elected officials in many parts of the country would have to run again, at great expense and inconvenience, to regain the offices to which they were elected prior to the passage of this amendment.

This new "scare tactic," like the ones which preceded it, also is without basis, as can be demonstrated by the existing case law. The leading case on this issue is Toney v. White, 488 F.2d 310 (5th Cir. 1973), a pre-Mobile Section 2 case decided by the Fifth Circuit sitting en banc. There the court agreed with a prior decision by a three-judge panel of the Fifth Circuit "that the law imposes the duty on parties having grievances based on discriminatory practices to bring the grievances forward for pre-election adjudication" (488 F.2d at 314). The court held that "prompt pre-election action" was a "prerequisite to post-election relief," and that if there was "a deliberate bypass of a pre-election judicial remedy," no post-election relief invaliding the challenged election could be granted. This case--which establishes firm principles of law and which has been applied by other courts--clearly indicates that plaintiffs who fail to seek prompt pre-election relief give up any chance of voiding challenged elections.

Accordingly, there is no chance that minority voters subjected to voting practices made unlawful by the Section 2 amendment could void any prior elections without first seeking prompt pre-election relief. This means that, except in those few areas where Section 2 lawsuits were pending, prior to the last elections (certainly no more than a dozen jurisdictions), elections which already have been held can not be voided. No public officials elected in these past elections can be required to run again before the completion of their terms of office.

THE BAILOUT STANDARDS PROVIDE COVERED JURISDICTIONS WITH AN INCENTIVE TO COMPLY WITH THE LAW

I have not extensively discussed the new liberalized bailout standards because they have been discussed by other witnesses and are fully covered in the House Judiciary Committee Report. The new bailout provisions are designed to provide an incentive to jurisdictions covered by the preclearance requirement of Section 5 to comply with Federal voting rights laws and to open up their registration and electoral processes to equal participation by all citizens. No one in good faith can really be against these provisions.

The current bailout standard effectively bars bailout for all but a few jurisdictions. The proposed Section 4 amendment liberalizes the bailout process, and enables covered jurisdictions to bail out upon proof of a ten-year record of compliance with the Act and the elimination of discriminatory voting procedures and methods of election. The new bailout standards are fair, and there is no reason why covered jurisdictions operating in good faith and with a genuine desire to open up their electoral processes to full participation by all citizens should not be able ultimately to satisfy these requirements.

Questions have been raised about the standard which provides that covered states and political subdivisions must show that they "have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process." The statutory language employs the equal-access-to-the-political-process standard of White v. Regester and the pre-Mobile cases, and therefore is comparable to the requirements of the proposed Section 2 "results" standard. This bailout provision therefore merely provides an incentive for covered jurisdictions to comply with the requirements of the proposed Section 2 amendment and gives these jurisdictions an opportunity to comply with the law without expensive and time-consuming litigation.

1/ Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

2/ Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981).

3/ The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 147 (1980).

4/ P. Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 99.

5/ In Mobile and campanion cases, the Court of Appeals for the Fifth Circuit attempted to fuse these two standards by ruling that the White-Zimmer factors showing denial of equal access to the political process provided "acutely relevant" circumstantial evidence of discriminatory intent. See Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978), rev'd, 446 U.S. 55 (1980). The Supreme Court condemned this effort as "inconsistent with our decisions in Washington v. Davis and Arlington Heights" and ruled that although the presence of these indicia may afford "some evidence," "satisfaction of those criteria is not of itself sufficient." 446 U.S. at 73.

6/ Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights, supra; Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); City of Mobile v. Bolden, 446 U.S. 55 (1980); City of Memphis v. Greene, 49 U.S.L.W. 4389 (1981).

7/ 49 U.S.L.W. 4399-4404 (dissenting opinion); The Supreme Court, 1980 Term, 95 Harv. L. Rev. 91, 317-18 (1981).

8/ Jones v. City of Lubbock, 640 F.2d 777, 778 (5th Cir. 1981) (Goldberg, J., concurring).

9/ Kirksey v. City of Jackson, 625 F.2d 21 (5th Cir. 1980); accord: Corder v. Kirksey, 639 F.2d 1191, (5th Cir. 1981).

10/ 379 U.S. 433 (1965).

11/ 384 U.S. 73 (1966).

12/ 379 U.S. at 439; 384 U.S. at 88 (emphasis added).

13/ 384 U.S. at 88.

14/ 364 U.S. 339 (1960).

15/ 403 U.S. at 225.

16/ 403 U.S. 124 (1971).

17/ 412 U.S. 755 (1973).

18/ 412 U.S. at 765-66.

19/ 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1977).

20/ 485 F.2d at 1304 n. 16.

21/ 426 U.S. 229 (1976).

22/ 429 U.S. 252, 265 (1977).

23/ 446 U.S. at 71.

24/ 403 U.S. at 149.

25/ 412 U.S. at 769.

26/ 485 F.2d at 1305 (first emphasis added).

27/ Id.

APPENDIX

Summary of Court of Appeals Decisions in vote dilution cases prior to 1978

1. Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir.) cert. denied, 405 U.S. 925 (1972).

   Challenge to configuration of district lines for Adams County, Mississippi Board of Supervisors.

   Holding in favor of defendants.

   Results test:

   > "[T]o establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines . . . or (2) that ' . . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population'" 453 F.2d at 457-458 (emphasis added), quoting Burns v. Richardson, 384 U.S. 73, 88 (1966).
   >
   > Thus, when the Court of Appeals found that the plaintiffs had failed to prove racial intent, it went on to separately consider the plaintiffs' dilution claim. 453 F.2d at 458.

   Proportional representation not required: 453 F.2d at 458, quoting Whitcomb v. Chavis, 403 U.S. 124, 156, 160 (1971).

2. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976)

   Challenge to at-large elections for school board and police jury in East Carroll Parish, Louisiana.

   Holding in favor of plaintiffs.

   Results test:

   > "[T]o establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that ' . . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 485 F.2d at 1304, quoting Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457 (5th Cir. 1972).

   Proportional representation not required:

   > "Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305.

   Proportional representation not required in the formulation of a remedial plan:

   > "While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for pariticipation in the political processes." 485 F.2d at 1308.

At-large elections not unconstitutional per se:

"It is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional." 485 F.2d at 1304.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

"The fact of dilution is established upon proof of the existence of an aggregate of these factors." 485 F.2d at 1304.

3. Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973).

Challenge to a multimember reapportionment plan for the police jury of Ouachita Parish, Louisiana.

Holding in favor of plaintiffs.

Results test: Zimmer-type analysis constitutes the proper inquiry. 490 F.2d at 193-194.

Proportional representation not required:

"(A) minority group is not constitutionally entitled to an apportionment structure designed to maximize its political advantage . . . ." 490 F.2d at 197.

"A minority group is not constitutionally entitled to one or more 'safe' or majority districts simply because an apportionment scheme could be drawn to reach this result." 490 F.2d at 197, n. 24.

Multi-member districts not per se unconstitutional:

"We recognize, of course, that multimember representation is not per se unconstitutional." 490 F.2d at 196, n. 23.

More than a scintilla of evidence in addition to the absence of black elected officials is required:

"Dilution, as with so many complex factual determinations, turns on an aggregation of the circumstances." 490 F.2d at 124.

4. Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974).

Challenge to district lines for election of county supervisors in Leflore County, Mississippi.

Holding in favor of plaintiffs regarding the district court's rejections of the defendants' proposed districting plan, and in favor of defendants regarding the plaintiffs' objection to the court-formulated and court-ordered plan.

Results test:

"A reapportionment plan is unconstitutional if it is a racially motivated gerrymander or if it is a plan drawn along racial lines which, . . . designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 502 F.2d at 623-624, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

Zimmer factors cited as the proper inquiry: 502 F.2d at 624.

Proportional representation not required.

5. Robinson v. Commissioners Court of Anderson County, 505 F.2d 674 (5th Cir. 1974).

Challenge to the configuration of district lines for the county commission of Anderson County, Texas.

Holding in favor of plaintiffs.

Results test:

> "[T]o establish the existence of a constitutionally impermissible redistricting plan . . . plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines . . . or (2) that ' . . . designedly or otherwise, a(n) . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 505 F.2d at 678, n. 3 (emphasis added), quoting Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457-458 (5th Cir. 1972).

Zimmer factors cited as the proper inquiry: 505 F.2d at 678-679.

Proportional representation not required.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

> "The fact of dilution is established upon proof of an aggregate of [the Zimmer] factors." 505 F.2d at 678, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1304 (5th Cir. 1973) (en banc) (emphasis added).

6. Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975).

Challenge to multi-member districts for Rapides Parish, Louisiana police jury and school board.

Holding in favor of defendants

Results test:

> "[P]laintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that ' . . . designedly or otherwise, a(n) . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 508 F.2d at 1113 (emphasis added) quoting Zimmer v. McKeithen, 485 F.2d 1297, 1304 (5th Cir. 1973) (en banc) and Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457 (5th Cir. 1972).

Zimmer factors cited as the proper inquiry: 508 F.2d at 1112.

Proportional Representation not required.

Multi-member districts not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

> "The single glaring fact that no black has ever been elected to a parish office does not by itself support judicial nullification of a reapportionment plan. It evidences no more at the most than a policy of past

discrimination. But the issue here of course is not whether Rapides Parish discriminated against blacks in the past, but rather whether any debilitating effects of that discrimination still persist." 508 F.2d at 1112.

7. Gilbert v. Sterrett, 509 F.2d 1389 (5th Cir.), cert. denied, 423 U.S. 951 (1975).

Challenge to the configuration of districts for the County Commission of Dallas County, Texas.

Holding in favor of defendants.

Results test:

"(I)t is recognized that the apportionment plan was subject to attack if it 'would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 509 F.2d at 1393, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)(emphasis added).

"It is well established that to prove the existence of a constitutionally impermissible redistricting plan in the absence of malapportionment, plaintiffs must show (1) a racially motivated gerrymander, or a plan drawn along racial lines, or (2) the apportionment plan would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 509 F.2d at 1390-1391 (footnotes omitted)(emphasis added), quoting with approval the lower court opinion.

Zimmer cited as the proper form of analysis: 509 F.2d at 1391.

Proportional representation is not required:

"An apportionment scheme is not constitutionally impermissible because its lines are not carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups." 509 F.2d at 1391, quoting with approval the lower court opinion.

"What counsel for plaintiffs-appellants asked on oral argument was a remand with direction that the Commission redistrict itself once more, this time so that the majority of voters in at least one district be Blacks. That would be contrary to the settled rule that 'a minority group is not constitutionally entitled to an apportionment structure designed to maximize its political advantage.'" 509 F.2d at 1394, quoting Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973).

8. Wallace v. House, 515 F.2d 619 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1975)

Challenge to at-large elections for town aldermen in Ferriday, Louisiana.

Holding for plaintiffs on the merits, but the defendants prevailed in the choice of their preferred remedial plan, which had four single-member districts and one at-large district, over the proposed remedial plan of the plaintiffs which had all five aldermen to be elected from single-member districts.

Results test:

"(A)ggrieved voters may establish the existence of an unconstitutional districting scheme either by showing a racially motivated gerrymander or a plan drawn along racial lines, or by demonstrating that, designedly or otherwise, the particular scheme operates 'to minimize or cancel out' the voting strength of minority elements of the voting population." 515 F.2d at 622-623 (Emphasis Added), citing Howard v. Adams County Board of Supervisors, 453 F.2d 455, (5th Cir. 1972)

Zimmer factors cited as the proper inquiry: 515 F.2d at 623.

Proportional representation not required:

"(N)o racial or political group has a constitutional right to be represented in the legislature in proportion to its numbers, (and) it follows that no such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages." 515 F.2d at 630.

"Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 515 F.2d at 623, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc).

At-large districts not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

"The fact of dilution is established upon proof of an aggregate of (the Zimmer) factors." 515 F.2d at 623, citing Zimmer, 485 F.2d at 1305 (Emphasis Added).

9. Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975).

Challenge to a court-ordered remedial plan for aldermanic elections in the city of Opelousas, Louisaina. The plaintiffs challenged the at-large nature of one aldermanic post in a mixed plan which provided that the other five aldermen be elected from single-member districts

Holding in favor of defendants.

Results test: 515 F.2d at 641.

No proportional representation required, even in court-ordered remedial plans:

The court held the mixed plan to be constitutional, despite the fact that it would probably result in the election of four whites and two blacks in a city 51% black. 515 F.2d at 641-642. Clearly then, proportional representation -- which would have meant three whites and three blacks -- was not required.

At-large election of one adlerman not per se unconstitutional.

10. Ferguson v. Winn Parish Police Jury, 528 F.2d 592 (5th Cir. 1976)

Challenge to a multi-member district in the electoral plan for the Winn Parish, Louisiana police jury.

Holding: in favor of plaintiffs, with the court of appeals remanding the case to the district court for reconsideration of the multi-member district in light of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc).

Results test:

"The Supreme Court has held that before a multi-member plan can be invalidated on constitutional grounds, it must be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 528 F.2d at 597 (emphasis added), quoting Fortson v. Dorsey. 379 U.S. 433, 439 (1965).

Zimmer factors cited as the proper inquiry: 528 F.2d at 599.

Multi-member districts are not per se unconstitutional: 528 F.2d at 597, citing Whitcomb v. Chavis, 403 U.S. 124, 147 (1971).

More than a scintilla of evidence is required in addition to the absence of balck elected officials:

"The fact of dilution is established upon proof of the existence of an aggregate of [the Zimmer] factors." 528 F.2d at 599, quoting Zimmer, 485 F.2d at 1305 (emphasis added).

11. Nevett v. Sides (Nevett I), 533 F.2d 1361 (5th Cir. 1976).

Challenge to at-large municipal elections in Fairfield, Alabama.

Holding in favor of defendants, with the court of appeals vacating the district court's judgement for the plaintiffs on the ground that the district court made inconclusive findings of fact, and remanding for further consideration and findings.

Results test:

"[A] successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." 533 F.2d at 1365, quoting Dallas County v. Reese, 421 U.S. 477 (1975).

Zimmer factors cited as the proper inquiry: 533 F.2d at 1365.

Proportional representation not required.

At-large elections not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

"Unless [the Zimmer] criteria in the aggregate point to dilution, i.e., if the criteria "don't really help", then plaintiffs have not met their burden, and their cause must fall." 533 F.2d at 1365.

"Specifically, the trial court's findings may be read as indicating that elections must be somehow so arranged -- at any rate where there is evidence of racial bloc voting -- that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires." 533 F.2d at 1365.

12. McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976).

Challenge to at-large elections for county commission in Gadsden County, Florida.

Holding in favor of defendants.

Results test: following the Zimmer standards: 535 F.2d at 280.

Proportional representation not required.

At-large elections not unconstitutional per se.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

The plaintiffs only had evidence of a history of past discrimination, along with a majority vote requirement and a district residency-numbered post provision which nullified the effect of single-shot voting. These factors were insufficient to show a constitutional violation.

"[W]e cannot say that the effects of past discrimination, in themselves, cause an at-large voting scheme to unconstitutionally deny blacks access to the political process." 535 F.2d at 281.

"The fact of dilution is established upon the existence of an aggregate of [the Zimmer] factors." 535 F.2d at 280, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc) (emphasis added).

13. Panior v. Iberville Parish School Board, 536 F.2d 101 (5th Cir. 1976)

Challenge to the configuration of district lines for single-member district elections for the Iberville Parish, Louisiana school board.

Holding in favor of defendants.

Results test:

"Before a properly apportioned redistricting plan may be declared to be constitutionally impermissible it must be shown that it is (1) a recially motivated gerrymander, or a plan drawn along racial lines or (2) that designedly or otherwise the plan would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 536 F.2d at 104-105 (emphasis added) (footnotes omitted).

Proportional representation not required:

"Members of a minority group have no federal right to be represented in legislative bodies in proportion to their numbers in the general population." 536 F.2d at 104.

14. Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976).

Challenge to at-large elections for the city commission by Albany, Georgia

Holding in favor of defendants, with the court of appeals vacating a district court judgement for plaintiffs which had relied on an "inevitable effects" analysis gleaned from Gomillion v. Lightfoot, 364 U.S. 339 (1960), and remanding for further consideration and findings in accordance with Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc).

Results test:

The Court of Appeals concluded that a Gomillion-type case requires proof of racially motivated gerrymandering. However, "(s)ince the advent of the dilution decisions there has apparently been no need to resort to Gomillion to eliminate unconstitutional at-large plans," inasmuch as the dilution decisions do not require a showing of intent. Rather than Gomillion, evaluation of at-large systems "should be made under more recent and less ambiguous (dilution) precedents (which) do not reach the question . . . of racial motivation." 538 F.2d at 1110.

Zimmer factors cited as the proper inquiry:

"This court's decision in Zimmer was affirmed by the Supreme Court, 'but without approval of the constitutional views expressed by the Court of Appeals.' East Carroll Parish School Board v. Marshall, 424 U.S. 636, 638 (1976). The Zimmer standards, however, are still controlling in this circuit. McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976); Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976)." 538 F.2d at 1110-1111, n. 4.

Proportional representation not required:

"To establish that a plan impermissibly dilutes, the plaintiff must show more than a mere disparity between percentage of minority residents and percentage of minority representation." 538 F.2d at 1111.

At-large elections not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

"The fact of dilution is established upon proof of an aggregate of [the Zimmer] factors." 538 F.2d at 1111, quoting Zimmer, 485 F.2d at 1305.

15. David v. Garrison, 553 F.2d 923 (5th Cir. 1977)

Challenge to at-large elections for the city commission of Lufkin, Texas.

Holding in favor of defendants, with the court of appeals vacating the district court's judgement for the plaintiffs on the ground that the district court made insufficient findings of fact, and remanding for further consideration and findings.

Results test: following the Zimmer standards: 553 F.2d at 928.

Proportional representation not required:

"The Court has clearly stated that no one group is constitutionally entitled to elect representatives from that group." 553 F.2d at 927.

At-large elections not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

"Specifically, the trial court's findings may be read as indicating that elections must be somehow arranged -- at any rate where there is evidence of racial bloc voting -- that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires." 553 F.2d at 930-931, quoting Nevett v. Sides (Nevett I), 533 F.2d 1361, 1365 (5th Cir. 1976).

16. Hendrix v. Joseph, 559 F.2d 1265 (5th Cir.), cert. denied, 434 U.S. 970 (1977).

Challenge to at-large elections for the county commission of Montgomery County, Alabama.

Holding in favor of defendants, with the court of appeals vacating the district court's judgement for the plaintiffs on the ground that the district court made insufficient findings of fact, and remanding for further consideration and findings.

Results test, and not intent:

"[M]otive is not a direct issue in the dilution context . . . ." 559 F.2d at 1269.

Zimmer factors cited as the proper inquiry: 559 F.2d at 1268.

Proportional representation not required.

At-large elections not per se unconstitutional.

More than a scintilla of evidence is required in addition to the absence of black elected officials:

Even though the district court found in the plaintiff's favor on one of the main Zimmer factors and three of the enhancing factors, that was not enough to prove a constitutional violation where the district court failed to make findings on the other Zimmer factors. 559 F.2d at 1268-1271.

"Before [declaring an at-large system unconstitutional], thorough and detailed findings on each issue that the courts have thus far found to be relevant must be made. To allow conclusory findings that 'the government is unresponsive,' and that 'no black has ever been elected' to substitute for such detail would alter the balance that our constitutional system of federalism is designed to protect." 559 F.2d at 1271.

17. Parnell v. Rapides Parish School Board, 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978).

Challenge to multi-member districts in elections for the Rapides Parish, Louisiana police jury.

Holding in favor of plaintiffs.

Results test: Zimmer analysis is the appropriate means of evaluating charges of vote dilution. 563 F.2d at 184.

Proportional representation not required.

Multi-member districts not unconstitutional per se:

> "Zimmer pointed out that statistics alone could not prove impermissible dilution of minority voting power." 563 F.2d at 184.

18. Kirksey v. Board of Supervisors of Hinds County, Mississippi, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968 (1977).

Challenge to the configuration of a districting plan for various county elections in Hinds County, Mississippi.

Holding in favor of the plaintiffs.

Perpetuated results test:

> "Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional." 554 F.2d at 146.

Proportional representation is not required:

> "As a matter of pure semantics it can be argued that a minority is denied equality of access to the political process if it does not have representation in proportion to its voting strength. With anything less its strength is minimized, cancelled out, or 'diluted.' The Supreme Court and this circuit have consistently eschewed such a mechanistic approach. 'Clearly it is not enough to prove mere disparity between the number of minority residents and the number of minority representatives.'" 554 F.2d at 142-143, quoting Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973)(en banc).

Zimmer factors are proper focus of inquiry: 554 F.2d at 143.

More than a scintilla of evidence in addition to the absence of black elected officials is required:

> "By proof of an aggregation of at least some of (the Zimmer-White v. Regester) factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access." 554 F.2d at 143.

19. United States v. Board of Supervisors of Forrest County, 571 F.2d 951 (5th Cir. 1978).

Challenge to the configuration of district lines for county elections in Forrest County, Mississippi

Holding in favor of plaintiffs, vacating the district court judgement in favor of defendants and remanding for reconsideration in light of Kirksey v. Board of Supervisors of Hinds County, Mississippi, 554 F.2d 139 (5th Cir. 1977) (en banc).

Perpetuated results test:

> "Zimmer and Kirksey have established a multi-step inquiry for determining whether a districting plan unlawfully dilutes a minority's participation in the political process. The testing seeks to determine whether the plan either is a racially motivated gerrymander or perpetuates

an existent denial of access to the political process. . . . Since the government concedes that the Forrest County plan was drawn without regard for race, we need consider only the second portion of the Zimmer-Kirksey assay." 571 F.2d at 953 (emphasis added).

Zimmer cited as proper inquiry: 571 F.2d at 953-954.

Proportional representation not required, even in the formulation of a remedy:

"Kirksey does not expressly require the creation of a district that has a majority of registered voters who are black. The goal of any remedy is to assure "effective black minority paritic pation in democracy." Kirksey, 554 F.2d at 151. . . . [T]his court has concentrated upon access to the political process rather than assurance of a particular result." 571 F.2d at 955 (footnote omitted).

More than a scintilla of evidence in addition to the absence of black representation is required:

A finding of unconstitutionality must be based on proof of "a number" or "the aggregate" of Zimmer-Kirksey factors. 571 F.2d at 955.

20. Kendrick v. Walder, 527 F.2d 44 (7th Cir. 1975).

Challenge to at-large elections for the Cairo, Illinois city council.

Holding favor of plaintiffs, vacating the district court's dismissal of the complaint and remanding for trial.

Results test:

"[D]esignedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case [might] operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 527 F.2d at 48 (emphasis added).

Zimmer cited as appropriate precedent: 527 F.2d at 48.

Proportional representation not required or permitted:

"[The dilution doctrine] is not to suggest that the designation of seats for minority representatives in proportion to their voting strength is compelled (or even permitted) by the equal protection clause . . . ." 527 F.2d at 49, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

21. Vollin v. Kimbel, 519 F.2d 790 (4th Cir.), cert. denied, 423 U.S. 936 (1975).

Challenge to at-large elections for the county board of Arlington County, Virginia

Holding in favor of defendants.

Results test:

Inquiry is whether the "plan in fact operates to impermissibly dilute the voting strength of an identifiable element of the voting population," 519 F.2d at 791, quoting Dallas County v. Reese, 421 U.S. 477, 480 (1975).

At-large elections not per se unconstitutional.

Proportional representation not required.

22. Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976).

Challenge to at-large elections for the city council of Pine Bluff, Arkansas.

Holding in favor of defendants.

Results test:

"The constitutional touchstone is whether the systems is open to full minority participation . . . ." 539 F.2d a5 1155.

Proportional representation not required: 539 F.2d at 1155.

At-large elections are not unconstitutional per se.

More than a scintilla of evidence in addition to the absence of black elected officials is required:

Proportional representation along with racial bloc voting do not, by themselves, render an electoral scheme invalid.

23. Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977).

Challenge to at-large election of members of the Boston, Massachusetts school committee.

Holding in favor of defendants.

Results test applied:

The Court of Appeals expressed some concern that, after Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), intent may be required in a dilution case. 565 F.2d at 4, n. 6. However, the Court proceeded with a results analysis, and the found the plaintiffs lacking. Therefore, there was no need to resolve the intent issue. What is important is that, under the results analysis, the First Circuit said at-large systems are not unconstitutional per se, proportional representation is not required, and more than a scintilla of evidence is necessary to prove a violation.

Multi-member schemes "will be struck down only when the challenger carries a burden of proving that the system was instituted to further racially discriminatory purposes or that the effect of the method is to 'minimize or cancel out the voting strength of racial or political elements of the voting population.'" 565 F.2d at 4, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

Proportional representation not required.

At-large elections not unconstitutional per se:

"Any analysis of the at-large system under attack must begin with an acknowledgement that multi-member districts are not per se invalid." 565 F.2d at 4.

More than a scintilla of evidence is required in addition the absence of black elected officials:

Plaintiffs proved a number of factors, including history of discrimination, large district, no residency requirement, recent racial campaign tactics, no blacks elected, black voter alienation, intimidation of black candidates in the community, and unresponsiveness. Yet this evidence was not enough.

FOR IMMEDIATE RELEASE
September 3, 1981
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LAWYERS' COMMITTEE RELEASES REPORT ON VOTING RIGHTS DENIALS IN MISSISSIPPI

The Lawyers' Committee for Civil Rights Under Law today released its final report on continuing voting rights discrimination in Mississippi entitled, Voting in Mississippi: A Right Still Denied. The report, which is based on an extensive investigation of voting rights litigation in the state and the records of the United States Justice Department, concludes: "Sixteen years after the passage of the Voting Rights Act of 1965, its goal of fair and effective participation for all citizens in the electoral process remains unfulfilled in many parts of the South."

In a 7-page foreword to the report, eight former top Justice Department officials with civil rights responsibilities--former Attorney General Nicholas deB. Katzenbach, former Federal District Court Judge and Deputy Attorney General, Harold R. Tyler, Jr., five former Assistant Attorney Generals in charge of the Civil Rights Division, and one former Civil Rights Division planning staff director--conclude: "Section 5 and the Voting Rights Act have played a critical role in preventing discrimination and nullification of the minority vote in Mississippi and throughout the nation. Unfortunately, the need for the law remains. The statute must be renewed in order to ensure that minorities may register and vote without discrimination and to guarantee that every American will have a fair opportunity to participate in politics."

The report notes the dramatic progress that has occurred in Mississippi as a result of the Voting Rights Act. Black voter registration has increased from 6.7% of the black voting age population (1964) to more than 60% currently. The number of black elected officials in Mississippi has increased from 29 (1968) to 387 (1981), giving Mississippi more black elected officials than any other state in the country. Despite these gains, there are still no black elected officials in Mississippi's congressional delegation or in statewide office, and blacks constitute only 7% of the total number of elected officials in a state which is 35% black. The Lawyers' Committee finds, "Analysis of court decisions and the Justice Department's Section 5 objections show that sixteen years after the passage of the Act, efforts to discriminate against black voters have not abated, and that the desire to cancel out black voting strength still exists in Mississippi."

Section 5, the heart of the Voting Rights Act, prohibits covered jurisdictions from enforcing any voting law changes until they obtain a ruling from the U.S. Attorney General or the U.S. District Court for the District of Columbia that any change is not racially discriminatory in purpose or effect.

Contrary to the opponents of the Voting Rights Act who argue that the Voting Rights Act is no longer needed, the report cites Justice Department statistics which show that of the 77 Voting Rights Act objections to discriminatory Mississippi election law changes since 1965, more than half--40--were lodged since 1975.

Frank R. Parker, Director of the Lawyers' Committee's Voting Rights Project, said in releasing the report, "In significant instances, the Voting Rights Act has been all that has stood between black citizens and the efforts of Mississippi public officials to nullify their vote. If the Voting Rights Act were allowed to expire, the limited gains made thus far could easily be eradicated."

The report catalogues the continuing efforts to minimize and cancel out the power of the black vote in Mississippi:

--From 1965 to 1979 black voters were denied effective representation in the Mississippi Legislature by the discriminatory use of multi-member legislative districts with at-large voting. When multi-member districts finally were abolished by a Section 5 objection and reapportionment litigation, the number of black legislators increased from 4 to 17.

--Thirteen counties have attempted to dilute black voting strength by switching from district to at-large elections for members of the county boards of supervisors, and 22 counties have attempted to elect county school board members on an at-large basis, all of which were blocked by Section 5 objections and, in some instances, Federal court litigation.

--Fourteen counties have gerrymandered district boundaries to prevent the election of black county supervisors, justices of the peace, constables, county school board members, and county election commissioners.

--The Mississippi Legislature in 1966, 1970, 1975, 1976 and again in 1979 enacted "open primary" bills to prevent the election of black independent candidates to state and local office by abolishing party primaries and imposing a majority vote-runoff requirement to win election.

--Forty-six cities and towns have attempted to prevent the election of black city council members by switching from ward to at-large, citywide elections.

--Seven cities and towns have unlawfully diluted black voting strength by annexing adjoining white residential areas to offset the increased voting power of black city voters. In the case of Indianola, Mississippi, a Federal District Court found this year (Dotson v. City of Indianola), that the city had violated the Voting Rights Act through four discriminatory annexations from 1965 to 1967 which prevented blacks from gaining a majority of the city vote. None of these annexations had been precleared under the Voting Rights Act.

--Ten counties attempted to prevent the election of black school superintendents by abolishing the elective positions and making the office appointive.

--Several counties have attempted to make voting more difficult for black voters by relocating polling places to predominantly white residential areas five to ten miles from black neighborhoods. In the 1978 senatorial election in which Charles Evers was a candidate, Hinds County election officials switched 30 Jackson polling places, many in predominantly black precincts where one-third of the black voters of Jackson resided, and did not announce the changes until the eve of the election.

--Voting laws still on the books in Mississippi continue to discriminate against black voters and prevent them from electing candidates of their choice. Mississippi law still prohibits voters from "single-shot" voting and requires that they vote for all positions to be filled in order for their ballot to be counted, and still requires a majority vote to win party nomination, which in many areas is tantamount to election. Racial bloc voting--particularly white voters banding together to defeat black candidates because of their race--continues to be the rule throughout Mississippi.

The Lawyers' Committee report was prepared by the Lawyers' Committee's Voting Rights Project. The Lawyers' Committee for Civil Rights Under Law is a non-partisan civil rights legal organization organized to provide legal representation to disadvantaged and minority citizens. The Committee was formed in 1963 at the request of the President of the United States.

WRITTEN QUESTIONS SUBMITTED BY SENATOR ORRIN G. HATCH

1. You are familiar with the pending litigation in Indianola, Mississippi, and the consequent submission to the Justice Department of several annexations which have taken place since 1965. According to the district court's opinion in that case, the population within the original city limits is 45% white and 55% non-white. If all the annexations had been approved by the Justice Department, the non-whites would retain a slim majority of 50.3%. The Justice Department, however, approved only the annexation of non-white areas, thereby reducing the white population to 35%. Do you believe that the approval of this annexation dilutes the white vote under Section 5? Why or why not?

ANSWER: I am familiar with the facts of this case, but I have not seen the Justice Department letter approving only the annexation of the nonwhite areas, and I cannot give an explanation of their reasoning; you would have to ask Justice Department officials about the reasons for their action.

The City of Indianola belatedly, and under court order, submitted to the Justice Department several unprecleared annexations undertaken since the Voting Rights Act was enacted which had the purpose and effect of diluting black voting strength in Indianola. As I understand it, the Justice Department approved the annexation of the black areas because they were nondiscriminatory under Section 5 standards, but disapproved the white annexations as discriminatory.

The legislative history of the Voting Rights Act indicates that its purpose was to protect racial and language minorities, principally blacks and Hispanics, from denial or abridgement of their right to vote on account of race or language minority status, and was not enacted to protect whites. In any event, there can be no claim that the Justice Department's action diluted white voting strength since in the last municipal elections--after

the Justice Department's objection--the white slate (with one black on it) won all the municipal offices, and the all-black slate was defeated. Hence, whites still control Indianola despite the Justice Department's action.

2. As you know, Indianola held several elections under the expanded boundaries before those boundaries were disapproved by the Justice Department. Elections are held on an at-large basis in Indianola. During those elections, one black was elected as an alderman, and four white aldermen and a white mayor were also elected. Based upon your familiarity with the situation in Indianola, do you believe the electoral system as it existed under the expanded boundaries would violate the proposed results test in Section 2? Why or why not?

ANSWER: Whether any given electoral system would violate the proposed Section 2 "results" standard would be for the court to determine, and second-guessing the courts is always a hazardous proposition at best. Nevertheless, based on my familiarity with the Mississippi situation, a good case could be made. Indianola's municipal elections conducted with the annexation of several predominantly white areas, and with these election changes not having been precleared, were conducted in direct violation of Section 5 of the Voting Rights Act. Blacks were denied equal access to the political process in the post-annexation community by at-large elections which denied black voters the opportunity to elect candidates of their choice, an extensive past history of vigorously-enforced official discrimination, the effects of which are perpetuated today in disproportionately lower black voter registration levels and electoral participation, a majority vote requirement which requires candidates to win a majority to secure political party nomination, an anti-single shot voting requirement which prevents black voters from single-shot voting for the candidates of their choice and which requires voters to vote for candidates they oppose in order to have their ballots counted, a racially-charged community atmosphere of hostility to black

political participation which precludes effective campaigning by blacks in the white community and which enables white candidates to make racial appeals, the lack of any subdistrict or ward residency requirement which prevents representation of black areas of the city, depressed socio-economic conditions in the black community in the areas of education, employment, income, health, and other areas which are the direct result of past discrimination and which prevent black citizens from effectively exercising their franchise, a stark pattern or racially polarized voting by whites on the basis of race which prevents black candidates from being successful in any election contest in which black voters do not constitute an overwhelming majority, and even then black voters may not be successful in electing candidates of their choice, and a deeply entrenched plantation system and plantation mentality under which black citizens are heavily dependent upon whites for jobs, housing, health care, and other essentials of life and which prevents black citizens from freely participating in the electoral process.

3. You were the attorney for the plaintiffs in Kirksey v. Hinds County, in which the fifth circuit directed that two of the five districts on the Board of Supervisors should be controlled by minorities, who compose 40% of the county's population. Last week, Mr. Rios told us that this approximation of proportional representation was an entirely proper remedy under his view of the results test in Section 2. Do you agree that a court would properly be able to impose the remedy if a violation of the amended Section 2 is proven?

ANSWER: Your characterization of the decision of the Court of Appeals for the Fifth Circuit in Kirksey v. Board of Supervisors of Hinds County, Mississippi, 554 F.2d 139 (5th Cir.) (en banc), cert. denied. 434 U.S. 968 (1977), is not correct. The Fifth Circuit held that the challenged county redistricting plan was unconstitutional because, under White v. Regester and Zimmer v. McKeithen, it perpetuated an existent denial of access by a racial

minority to the political process (554 F.2d at 142). The case was "REVERSED and REMANDED to the district court for the fashioning of a remedy" (554 F.2d at 152), but the Fifth Circuit did not specify what that remedy should be. Thus, it is incorrect to say that "the fifth circuit directed that two of the five districts on the Board of Supervisors should be controlled by minorities."

Naturally, if a Federal court finds a violation of constitutional or statutory guarantees, then it is required to formulate a remedy for the violation of a right. The discretion of the District Court to formulate a remedy is governed by traditional and historic legal standards governing the types of remedies which may be formulated. In any case, the remedy must be strictly tailored to the nature and scope of the violation, and any remedy formulated must not exceed correcting the violation. If a court finds a violation under the standard proposed in amended Section 2, then it would be required to formulate a remedy to fit the violation. S. 1992 specifically indicates that the absence of proportional representation does not constitute a violation.

4. You also tried the fourteen year suit to reapportion the Mississippi Legislature. While you have cited this case as an example of dilution of the minority vote by use of multi-member districts, isn't it a fact that the Supreme Court expressly refused to decide whether or not such a dilution in fact existed?

ANSWER: In the Mississippi legislative reapportionment case, the plans implemented for state legislative elections in 1967, 1971, and 1975 were court-ordered plans, and the Supreme Court's preference for single-member districts and against multi-member districts was first expressed in this case. Connor v. Johnson, 402 U.S. 690, 692 (1971). The Supreme Court explained that single-member districts were preferred in court-ordered plans because multi-member districts, inter alia, "tend to submerge electoral minorities and overrepresent electoral majorities." Connor v. Finch, 431 U.S. 407, 415 (1977).

In addition, on June 10, 1975, the Attorney General objected to the multi-member districts in the Mississippi legislative

reapportionment plan pursuant to Section 5 of the Voting Rights Act on the ground that Mississippi had failed to show that the reapportionment plan did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race. Connor v. Finch, 431 U.S. 407, 412 n. 8 (1977). The Justice Department's explanation for its objection indicated that the objection was based on the discriminatory multi-member districts contained in the plan which diluted black voting strength.

5. You have complained about several municipal annexations in Mississippi which you claim violates Section 5. Under the explanation which this committee has heard of the proposed results test for Section 2, the court could not order relief until several successive elections had proven that minorities were completely shut out of the electoral process. Do you agree that an annexation could not be found to violate Section 2 until many years had provided proof of discriminatory results? If such evidence does emerge, would a court then be authorized to revoke the annexation which had happened many years earlier?

ANSWER: I do not agree that an annexation could not be found to violate Section 2 until many years have provided proof of the failure of minorities to win elections. Section 2 is violated when an election law or practice results in a denial or abridgement of the right to vote. This violation is not measured by election results.

If a court found that a discriminatory annexation denied minority voters equal access to the political process under the Section 2 "results" standard, then it would be required to formulate a remedy. There are a variety of remedies which would be available, of which revoking the annexation could be one. The court could also, as it has in the Section 5 cases, require the municipality to abolish an at-large voting system, and institute a ward voting system so that the annexation would not deny minorities an opportunity to participate in the electoral process. There may be other available remedies as well, depending upon the particular situation.

6. You told the House Committee that the thirty-nine large cities in Mississippi which elect their governments at-large denied their 130,000 black residents "any opportunity to gain representation in city government." Do you mean to imply that each of these municipal governments would become unlawful under the results test of Section 2? Why or why not? Can you tell us how this reasoning would apply in other states?

ANSWER: The results test proposed for Section 2 would not necessarily prohibit all at-large election systems, but would only prohibit at-large election systems imposed or applied in a manner which accomplishes a discriminatory result. I reached the conclusion that I did because I know that in these Mississippi cities there is an extensive history of official racial discrimination, including poll tax requirements and discriminatory disfranchisement of black voters, the effects of which continue to persist to the present time; severe racial bloc voting which prevents black voters from electing candidates of their choice; majority vote requirements; anti-single shot voting prohibitions; in many cities the absence of a subdistrict or ward residency requirement; persistent deprivations in the black community in education, employment, income, health, and other socio-economic characteristics; continued white hostility to blacks running for office and participating in the political process; and other indications of continued denial to blacks of equal access to the political process.

This same standard and reasoning would be applicable to at-large election systems in other states where minority voters could prove an aggregate of the White v. Regester and Zimmer v. McKeithen factors showing a denial of equal access to the political process.

QUESTIONS SUBMITTED BY SENATOR HOWARD M. METZENBAUM

1. How does the Section 2 results test effectuate rights protected by the Fourteenth and Fifteenth Amendments?

Even if we concede that discriminatory intent must be proved to establish a Fourteenth or Fifteenth Amendment violation, the Section 2 results test is necessary to effectuate Fourteenth and Fifteenth Amendment rights because discriminatory intent is easily concealed and difficult to prove. There is therefore the risk that intentional discrimination will go unredressed. The proposed Section 2 standard is necessary to eliminate the risk of intentional discrimination.

2. Is it your testimony that the lower courts have held that the Supreme Court's decision in City of Mobile v. Bolden changed the legal standard in voting rights cases and made violations more difficult to prove?

Yes. After the Mobile decision, the Court of Appeals for the Fifth Circuit, which covered most of the South from Georgia to Texas before it split last year, vacated and remanded several significant cases tried under the prior White v. Regester standard because Mobile changed the law applicable to voting rights cases.

In Kirksey v. City of Jackson, 625 F.2d 21 (5th Cir. 1980), a challenge to at-large municipal elections in Jackson, Mississippi for unconstitutional dilution of black voting strength, both parties asked the Fifth Circuit to decide the case under the new Mobile standard, but the Fifth Circuit refused.

> It is apparent to us that the fact findings that were made by the Trial Court were based on criteria developed in Zimmer v. McKeithen [citation omitted], whose further validity is now very much in question in light of the recent Supreme Court opinion in City of Mobile, Alabama v. Bolden [citation omitted]. We have many times held that fact findings that were made under the spell of legal principles, which were either improper or since then declared to be improper, really can't be credited one way or the other. [Footnote omitted.] Accordingly, we do not now determine whether the findings of the fact of the Trial Court were clearly erroneous under F.R. Civ. P. 52(a) because we are not in a position to accept the findings. Rather, we vacate the District Court's opinion and remand this case to be reconsidered in light of Bolden.

625 F.2d at 21-22. In the first appeal in Corder v. Kirksey, a case challenging at-large county commissioner elections in Pickens County, Alabama, the Fifth Circuit held that the District Court's findings were inadequate under the prior standard, and remanded the case for further findings under Zimmer v. McKeithen. Corder v. Kirksey, 585 F.2d 708, 712 (5th Cir. 1978). On remand the District Court made its Zimmer findings. When the case went back to the Fifth Circuit, however, the appeals court found that the intervening Supreme Court decision in Mobile "has cast some doubt on the continued vitality of the Zimmer rationale," and remanded the case once again "to enable the district court to reexamine the evidence, and its findings, in light of City of Mobile, Ala. v. Bolden. . ." 625 F.2d 520, 521 (5th Cir. 1980).

In a challenge by blacks and Mexican-Americans to at-large city council elections in Lubbock, Texas, Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. 1981), the Fifth Circuit followed the same course. Circuit Judge Irving Goldberg, a 15-year veteran of the Federal appellate bench, explained the court's reasoning in a specially concurring opinion:

> Since the Supreme Court has completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens, we must remand this case to the district court to reexamine the evidence, and its findings, in whatever light is radiated by Bolden. In addition, due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations.

640 F.2d at 777-78.

3. Has there been any change in the willingness of local communities to eliminate discriminatory voting systems since Mobile?

Yes. Local communities in Mississippi understand the difficulty of meeting the stringent Mobile test of proving subjective intent. Beginning in 1970, we filed eleven separate lawsuits against individual Mississippi cities challenging at-large voting systems which discriminate against black voters under the White v. Regester and Zimmer v. McKeithen standard. We won one case, and

in six other cases the local officials--knowing they would lose--signed consent decrees which abolished the discriminatory at-large voting systems in favor of ward elections. Since the Mobile decision was handed down the local officials have refused to settle a single case.

4. How many voting rights cases were you involved in prior to the Mobile decision?

More than thirty.

5. What were these cases challenging?

Discriminatory multi-member legislative districts, racial gerrymandering of district lines, exclusionary at-large election systems, and other discriminatory voting laws.

6. Were you seeking proportional representation or racial quotas?

No, under the pre-Mobile standard the black voters whom I represent understood that they did not have a right to proportional representation, and that at-large elections were not unconstitutional per se.

7. In any of the cases in which you were successful, did the court order proportional representation or racial quotas?

No, just the opposite. In these cases the courts repudiated the notion that plaintiffs were entitled to proportional representation or racial quotas.

8. Representative Henry Hyde in his testimony supported an alternative amendment to Section 2 which would codify several factors which under the Supreme Court's decision in Washington v. Davis could be used to prove discriminatory intent. Would there be any problems with that approach?

Yes. Any statutory definition of intent would still ultimately depend upon the subjective determination of what was in the minds of legislators who enacted or retained an allegedly discriminatory voting law. Even if the criteria for proving discriminatory intent were spelled out in legislation, the District Court would still have the discretion whether or not to draw an inference of discriminatory intent. If the District Court refused

to draw such an inference, that determination could only be overturned on appeal if it were found to be "clearly erroneous" under Rule 52 of the Federal Rules of Civil Procedure. Thus, appellate review of such determinations is strictly limited. Furthermore, as the Arlington Heights case points out, any inference of intent could be overcome by statements from legislators of plausible nonracial reasons. In my experience, trying voting rights cases for the past 13 years, plausible nonracial reasons for the most blatantly discriminatory voting laws are extremely easy to manufacture, and courts in the past have been extremely solicitous of the reasons given by a state or local governing body for an action alleged to be discriminatory. Federal courts are extremely reluctant in all but the most extreme cases to hold that local officials are lying when they testify that race had nothing to do with a particular action.

The proposed Section 2 results standard is far superior to any statutory intent standard because it does not require Federal courts to label public officials liars or racists in order to grant minority voters relief from racial discrimination denying or abridging their right to vote.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4058

HENRY J. KIRKSEY, et al.,

Plaintiffs-Appellants

versus

CITY OF JACKSON, MISSISSIPPI, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

REPLY BRIEF FOR APPELLANTS

FRANK R. PARKER
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Lawyers' Committee for
Civil Rights Under Law
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Washington, D.C. 20005

Attorneys for Appellants

* * * * * * *

III. DEFENDANTS HAVE FAILED TO REBUT THE INFERENCE THAT THE MISSISSIPPI LEGISLATURE'S ADOPTION OF LEGISLATION AUTHORIZING THE CHANGE TO AT-LARGE VOTING WAS FOR A DISCRIMINATORY PURPOSE.

Defendants have failed to rebut the inference of discriminatory purpose arising from evidence of the enactment of commission legislation authorizing the change to at-large voting and the implementation of this racially motivated legislation in Jackson. Because this evidence is based largely on documentary evidence, this Court should review the District Court's findings free of the "clearly erroneous" rule, United States v. General Motors Corp., 384 U.S. 127, 142 n. 16, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). Contrary to defendants' contention (Appellees' Br., p. 39), the District Judge's "local appraisal" can have no relevance to the analysis of these historical materials. Any local appraisal can best be done by expert

historians, such as those offered by plaintiffs, and their opinions must be given greater weight than that afforded by the District Court.

The absence of a "smoking gun" in the 1908 legislative history does not, contrary to defendants' argument, negate the evidence of discriminatory purpose. Lodge v. Buxton, 639 F.2d 1358, 1363 n. 8 (5th Cir. 1981). Indeed, the record here illustrates the difficulties of producing direct proof of discriminatory motivation from historical materials. The legislative history of the passage of the 1908 legislation is extremely sparse, and thus circumstantial evidence is highly probative.

Defendants' arguments are not sufficient to negate the evidence of discriminatory purpose: (a) the extensive perception that blacks were a political threat throughout this period; (b) at-large voting was viewed by at least one legislative leader who supported this legislation as a purposeful device to prevent black political participation; (c) the inevitable and foreseeable consequence of this legislation was to exclude black representation; and (d) it has had this effect in Jackson. Although defendants are correct that the remarks of a single legislator are not necessarily controlling in analyzing legislative history (Appellees' Br., p. 39), remarks by single legislators--together with other supportive evidence of discriminatory intent--have provided a firm basis for findings of invidious purpose in cases within this Circuit. See, e.g., McMillan v. Escambia County, Florida,

638 F.2d 1239, 1247 (5th Cir. 1981) (one council member supported change to at-large voting to avoid a "salt and pepper" council); Stewart v. Waller, 404 F. Supp. 206, 213 (N.D. Miss. 1975) (three-judge court) (floor statement by one senator, Senator Caraway, a sponsor of the bill, that at-large elections were needed "to maintain our southern way of life"). Thus, Senator Hebron's remarks--totally ignored by the District Court--are probative of the discriminatory purpose of the at-large voting legislation enacted two (not six, Appellees' Br., p. 40) years later.

Nor do defendants negate the proof of discriminatory purpose by contending that the commission form of government was a part of the progressive movement in the early part of this century (Appellees' Br., p. 35). There is no question among historians that the Southern branch of the progressive movement was racially motivated throughout (Ex. P-197, report of Dr. Charles Sallis). Historians have documented that a number of the reform measures of the Progressive Movement in the North became tools to disenfranchise blacks in the South. Ex. P-197. 6/ During this period, "corruption" in politics was equated with black participation, and reform efforts to eliminate this "corruption" were in fact designed to eliminate black political influence. Id., pp. 2, 4. Finally, defendants'

6/ See also, J.T. Kirby, Darkness at the Dawning, pp. 16-17 (1972) ("the official work of undoing Reconstruction was concluded in the midst of the 20th century's first reform movement"); J.M. Kousser, The Shaping of Scuthern Politics, pp. 251, 260-61 (1974) ("In fact, disfranchisement was a typically Progressive reform.).

assertions in fact contradict the testimony of their own expert witness who could not come up with any specific evidence that there ever was a progressive movement in Mississippi (Tr. 735-36).

The Jackson newspapers, including Vardaman's The Issue, show that there was a constant fear of black political threat, and that race was on the minds of the participants in the debate on switching to at-large voting. The fact that the white incumbents resisted the change (Appellees' Br., p. 43), which would have ousted them from their positions, does not refute the inference that race was a factor in the enactment of the enabling legislation and its implementation.

* * * * * * *

Senator HATCH. With that, we will recess until tomorrow morning at 9:30.

[Whereupon, at 12:30 p.m., the hearing recessed, to reconvene Friday, February 12, 1982, at 9:30 a.m.]

VOTING RIGHTS ACT

FRIDAY, FEBRUARY 12, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (acting chairman of the subcommittee) presiding.

Present: Senators Mathias and DeConcini.

Staff present: Vinton D. Lide, chief counsel, Committee on the Judiciary; Steve Markman, chief counsel; William Lucius, counsel; Claire Greif, chief clerk; and Prof. Laurens Walker.

Senator THURMOND. The committee will come to order.

Our first witness today will be Prof. Henry J. Abraham, the James Hart Professor of Government at the University of Virginia.

Professor Abraham, will you come around, please? You have a prepared statement?

Mr. ABRAHAM. Yes, sir. Thank you, Mr. Chairman.

Senator THURMOND. Do you wish to present your entire statement or do you wish to place it in the record and highlight it? Which do you prefer to do?

Mr. ABRAHAM. My statement, sir, is very brief and I would prefer to read it.

Senator THURMOND. All right. You may proceed.

Mr. ABRAHAM. I am not a stranger, sir, to being first. In the Army I had KP 16 times because my name started with "Ab," so I am used to this particular spot.

Senator THURMOND. I was just reminded that we have a 10-minute, rule. Will that give you time, do you think, to finish your statement?

Mr. ABRAHAM. Yes, sir. I will try to watch it.

Senator THURMOND. We have a green light here.

Mr. ABRAHAM. As an academician, I have some difficulty, but I will really try.

STATEMENT OF PROF. HENRY ABRAHAM, DEPARTMENT OF GOVERNMENT AND FOREIGN AFFAIRS, UNIVERSITY OF VIRGINIA

Mr. ABRAHAM. Mr. Chairman and members of the subcommittee, it is indeed a privilege to have been invited to testify before you, and I should like to record my appreciation for the opportunity to venture some comments on the proposed 1982 extension and amendment of the Voting Rights Act of 1965 in particular, and on

the House of Representatives-enacted amendment to its section 2 as manifested in H.R. 3112.

Since it has become all but axiomatic to commence testimony with some explanations cum disclaimers of a personal nature—given the volatile and emotion-charged nature of the issue at hand—permit me, sir, to state first that I speak for no one but myself and that I do so solely out of love, respect, and concern for our Constitution and the society its serves, against the background of some 35 years of teaching and writing about constitutional law, civil rights and liberties, and the judicial process.

Second, as the record of some 10 books, 20 revised editions, and close to 100 articles will demonstrate to anyone who may care to examine them, my commitment to the cause of the eradication of all facets and forms of discrimination, to the enhancement of civil rights and liberties in general, and to voting rights in particular, has been total both in practice and in theory.

This commitment, in short, reflects a belief in the obligation of—to use the title of a well-known apposite book by Prof. Ronald Dworkin—"Taking Rights Seriously." However, it most emphatically also reflects a concurrent commitment to the obligation of—to use the title of another apposite book by Professor McDowell—"Taking the Constitution Seriously."

For reasons I shall endeavor to advance in a few moments, I devoutly believe the amendments to section 2 of the pending bill to violate the spirit, if not the letter, of the Constitution; that its clarion call for an effect on a result orientation is tantamount to the introduction of proportional representation, notwithstanding the rather equivocal denial of such an aim in the language of the putative amendment; and that either per se or soi disant proportional representation, far from being required by anything in the Constitution, is alien to the intention of the Founding Fathers, alien to our constitutional system, alien to its representative constellation, and, last but not least, alien to effective political processes. The amendment should be removed from the pending legislation and section 2 restored to its status quo ante.

With all due respect, sir, to those who so overwhelmingly voted for the passage of H.R. 3112 and the sizable number of its sponsors in the Senate, I cannot believe, Mr. Chairman, that a full measure of awareness was brought to the implications of the amendment of section 2. De minimis, the latter was not accorded the hearing and examination it deserved, as the report on H.R. 3112 makes crystal clear both explicitly and implicitly, and as is so ably demonstrated in the report's dissenting views of Representative M. Caldwell Butler.

Notwithstanding the recent assertions in a widely quoted editorial in the New York Times—a staunch supporter of the new section 2—that the House had hearings on the subject all last year, in fact the House Judiciary Committee held but 7 weeks of hearings—not 1 year—out of which exactly 1 day was devoted to the issue of the new effects or results test. On that one day, a mere three witnesses presented arguments and data to support its adoption. That was all. As Representative Butler has well documented, such "brief and one-sided consideration of the issue is inadequate" in general, and concerning proportional representation in particular.

In his testimony before this subcommittee, director Benjamin Hooks of the NAACP, warmly supportive of the amendment to section 2, argued that courts would not be more inclined to mandate a proportionately representative city council, for example, just because a plaintiff would only have to prove an act to be discriminatory in its effect or result, rather than to prove that it was intentionally so. Yet the former is precisely what U.S. Judge Virgil Pittman of Alabama, for one, had done in the *Mobile* litigation even under the erstwhile section 2's stanards.

To hazard predictions, sir, upon what judges will or will not do, is to lean upon a slender reed, especially in the light of the seminal recent developments on the Federal benches. While the House report on H.R. 3112 professes to disavow an entitlement to proportional representation "in and of itself," as section 2 as proposed now phrases the matter, its accompanying table 1 buttresses and encourages its appeal by juxtaposing—in its first and last columns, respectively—the percentages of the black population in the seven leading southern section 5 States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, against the percentage of elected officers held by blacks as of 1980.

Only those who live in a dream world can fail to perceive the basic purpose and thrust and inevitable result of the new section 2: It is to establish a pattern of proportional representation, now based upon race—but who is to say, sir?—perhaps at a latter moment in time upon gender, or religion, or nationality, or even age.

Mr. Chairman, not only am I, too, a member of minority group that has been grievously victimized by discrimination throughout history but I am myself no stranger is persecution, vilification, and discrimination. As a member of a minority group in our body politic, I am entitled to select members of that group to try to represent me, assuming they have duly qualified for public office, and assuming that I choose to give them my vote.

However, I most emphatically have no constitutional, statutory, or any other right to insist that I must be represented by a co-status group member. There is a constitutional right to have one's vote counted properly; there is a constitutional right to unimpeded access to the polls; a constitutional right to no-nonsense equality of opportunity to participate in the political process in full measure. However, to repeat, there is no right to be represented on the basis of group membership. This is not India.

In the hallowed, haunting words of Mr. Justice John Marshall Harlan, the elder, in solitary dissent in *Plessy* v. *Ferguson*:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens * * *. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

To achieve the noble aims of what was then a lonely dissenting opinion but one that would become the law of the land, as ultimately pronounced by a unanimous Supreme Court of the United States in 1954, the Voting Rights Act of 1965—as subsequently amended and extended—was enacted. It is fair to say that that statute is the centerpiece of the commendable plethora of civil

rights legislation passed by Congress in the past two-and-a-half decades.

None has been more widely and more deservedly supported. None has been more fortuitous in its application. None has brought more demonstrably commendable, indeed stunningly successful results along the road of attainment of full citizenship on all levels and for all persons under our Constitution.

The Voting Rights Act should and must be extended, a sentiment few if any would oppose, yet it should either be extended as it now stands upon the statute books or as it has been amended by the House but minus the House-adopted changes in section 2.

That section, Mr. Chairman—to echo Justices Cardozo and Douglas in different contexts and on a different day—represents a veritable derelict in the stream of civil rights and civil liberties legislation. As Mr. Justice Stewart put the matter so trenchantly in *Mobile* v. *Bolden*,

> Action by a State that is racially neutral violates the 15th amendment only if motivated by a discriminatory purpose. . . . The equal protections clause of the 14th amendment reaches only purposeful discrimination . . . and does not require proportional representation as an imperative of political organization.

The adoption of section 2 as amended by the House would reap consequences disastrous to both the spirit and the letter of our fundamental document. The amendment section, sir, is bad public law; it is bad constitutional law; it is bad statutory law. To enact it in its present form would constitute a grievous constitutional and societal disservice.

Thank you, Mr. Chairman and members of the subcommittee.

Senator THURMOND. You must have practiced because you stopped right on time.

Mr. ABRAHAM. Yes, sir.

Senator THURMOND. We are very glad to have you here, and you made an excellent statement.

Mr. ABRAHAM. Thank you.

Senator THURMOND. In your statement you say that the amendments to section 2 of the pending bill violate the spirit, if not the letter, of the Constitution. Would you care to elaborate a little more on that?

Mr. ABRAHAM. What I would say, sir, I suppose one could make an argument that proportional representation per se is not forbidden by the U.S. Constitution. I presume that statutorally one could adopt it, if it were desirable, which I do not believe for one moment.

It certainly, however, violates the spirit of the Constitution and may violate the letter of the Constitution, particularly the "equal protections of the laws" clause, when it is bottomed upon racial considerations. The 14th amendment, to quote Mr. Justice Douglas—certainly a friend of the equal protections clause—the 14th amendment is racially neutral. The equal protections clause has no preferences built into its structure.

Therefore, one could contend with some justice that while proportional representation without more might be acceptable in the constitutional constellation, it violates certainly some of the interpretations that have been given to us by the judiciary in line with the racial components of the equal protections clause, and certainly

it violates the spirit of the kind of representative government that we have had.

We have never been willing to embrace the notion or the concept of proportional representation. It is a notion that emphasizes differences. It is a notion that pinpoints categories that have very little if anything to do with the electoral process. It causes chaos. It Balkanizes the political structure.

If one wishes to point to illustrations, one could, for example, point to the disastrous representative arrangements under proportional representation that Italy has been striving under for some time, the French Third Republic, a host of other countries. Those where it has worked—if one wishes to put it on the basis of proportional representation per se—where it has worked, such as in Scandanavia, you do not really have proportional representation. You have a three-party system in which a minor party usually joins a major party.

Senator THURMOND. Professor Abraham, you also state that the call for an effect or a result orientation is tantamount to the introduction of proportional representation. Would you explain for us how the results test of amended section 2 will lead to proportional representation?

Mr. ABRAHAM. Section 2 changes the erstwhile standards which implicitly, at least, will take good faith efforts into account. Section 2 as amended, while it disavows proportional representation "in and of itself," would nonetheless place a burden upon results to the degree that the table on page 9 implicitly indicates. The table, as I had demonstrated, juxtaposes the percentage of the black population against the percentage of the representatives who happen to be black.

That kind of comparison would inexorably be introduced under the new amendments as evidence of discrimination. The results test, in effect, asks just simply one question: If for example we have, as we may have in some parts of the country, a city council situation in which 40 percent of the city's population happens to be black and 20 percent Spanish, what section 2 envisages as far as I am concerned is unless the representation from that particular city reflects in its representative membership 40 percent black and 20 percent Spanish, there would be a presumption of discrimination.

One can never predict what the judiciary will do, of course, but the record writes large on the question of the juxtaposition of the requirement of representation and the actual facts.

Senator THURMOND. Professor Abraham, do you have any information concerning how a system of proportional representation works in actual practice?

Mr. ABRAHAM. Well, the information I have is information as it has been written upon the record in our European sister democracies such as the Third Republic of France, such as Italy, such as Belgium and Holland, where in effect proportional representation has worked disastrously if the purpose of representation is to provide a workable, politically sound, operable democratic institution.

Senator THURMOND. Professor Abraham, do you believe that amended section 2 would tend to encourage race consciousness and race segregation in our society?

Mr. ABRAHAM. It cannot help but encourage that, Senator Thurmond, because if one has expectations which are bottomed upon representation by percentages based upon race, based upon religion, if you please, or based upon gender—whatever it may be—it would certainly encourage that kind of expectation. The whole purpose of the enactment of the amendments to section 2, I would submit, is in effect an emphasis to point to racial representation and/or racial nonrepresentation. There is no question that this would enhance, that this would exacerbate, race consciousness, not any particular race per se, necessarily, but certainly race consciousness.

Senator THURMOND. Professor Abraham, the voting rights law of course is a permanent law.

Mr. ABRAHAM. Yes, sir.

Senator THURMOND. There is no question about that. So many of the media have said that it expires in August of this year. Of course, that is an error. It is a permanent law. You agree to that?

Mr. ABRAHAM. Yes, sir. It is permanent law.

Senator THURMOND. The only thing that comes up is the matter of the screening, in other words whether the States and the cities and the counties will continue to send their laws up here for the Justice Department to look over.

Mr. ABRAHAM. Yes, sir.

Senator THURMOND. Now if this law is renewed in whatever form, and a State or a political subdivision has not been discriminating, do you know of any reason why it should not be allowed to come out from under the law?

Mr. ABRAHAM. No, sir, I know of no reason as long as it can demonstrate that is has not discriminated. The amendments to the statute go some way toward the realization of some methodology which would bring with it a clearance. It is a very difficult clearance, the so-called bailout provision, but is does of course provide for some methods under which States and localities and other subunits could enter a procedure, difficult to be sure, but nonetheless the amendments do envisage a procedure which would provide a kind of bailout. I think it would be very difficult for the States to bail out but it is not impossible.

Senator THURMOND. Most of the able lawyers and scholars inform us that under the bill passed by the House it would be most difficult for a bailout to take place.

Mr. ABRAHAM. Yes, sir. I agree with that. It would be extremely difficult but it is not impossible.

Senator THURMOND. Thank you very much.

Mr. ABRAHAM. Thank you, sir.

Senator THURMOND. Let's see if there are any questions. I do not believe there is any other member here. We appreciate your presence.

Mr. ABRAHAM. Thank you very much.

Senator THURMOND. Our next witness, we understand, has to catch a plane right away. In order to accommodate him we will take him out of order, if there is not objection. It is Mr. Julius Chambers, the president of the NAACP legal defense fund, from North Carolina.

Mr. Chambers, come around and have a seat.

We are giving the witnesses 10 minutes. You can watch this and when the green light turns yellow, you know you have 1 minute. When it turns red, your time is up. If you do not finish your entire statement, we will put it in the record.

STATEMENT OF JULIUS L. CHAMBERS, PRESIDENT, NAACP LEGAL DEFENSE FUND, INC.

Mr. CHAMBERS. Thank you.

Mr. Chairman, I appreciate the opportunity to testify before this subcommittee today. My name is Julius LeVonne Chambers, and I am president of the NAACP legal defense fund. I have served as counsel in numerous civil rights actions, particularly in my home State of North Carolina.

I am here to urge this Congress to extend the Voting Rights Act of 1965 by passing S. 1992, the companion bill of H.R. 3112.

By using North Carolina as an example, and based on my nearly 20 years of litigation experience in civil rights, I would like to take this opportunity to discuss the difficulty of proving intent in the context of racial discrimination. I will also describe the bailout standards of S. 1992 as they apply to the 40 covered counties in North Carolina. It is my firm belief that the compromise bill before the Senate embodies a workable and realistic standard under which those covered jurisdictions that have stopped discrimination can file for exemption from the responsibilities of section 5.

I am submitting with my testimony a case study of North Carolina, prepared by Steve Suitts, the executive director of the Southern Regional Council. SRC is the oldest biracial organization in the South. As a past president of the council and as an admirer of Mr. Suitts' scholarship, I can assure you that this analysis of the nature of racial discrimination in voting rights in North Carolina is well researched and carefully considered.

His conclusion should also be carefully considered by those on this subcommittee who believe that proof of malevolent intent is the only way to show invidous discrimination. As Mr. suitts states, "North Carolina is a story of generations of official discrimination among those with the best of intentions."

North Carolina offers the paradox of a southern State that has been, at least relative to other States, moderate in some areas of race relations, yet North Carolina has been most effective in "belittling" the voting strength of a sizable black population. Compare, for example, the rate of participation of blacks in North Carolina and Mississippi.

Mississippi has gone from having one black State legislator in 1971 to 17 in 1981. The number of black legislators in either house in North Carolina has yet to go above four. Moreover, as Mr. Suitts concludes, the most effective methods of official resistance to providing equal access to the political process have been hauntingly familiar without being blatant, violent, or even physically intimidating.

What you begin to see, after reading Mr. Suitts' study, is that the work to disenfranchise blacks in North Carolina continues today. It has simply moved backstage. particularly in those counties in North Carolina where blacks present a potential electoral threat to

the white establishment, the Government officials have been very creative in reducing that potential.

They have manipulated electoral schemes. They have transferred control of local governments back to the white legislature when in the late 1800's such a transfer minimized black influence. Conversely, in recent years, attempts to return control to local government have been inspired by the fear of black political influence in the affairs of State government.

Throughout North Carolina during the last 15 years, changes have occurred in practices relating to the methods of election, the number of commissioners, and the terms of their office. Changes in these areas affect the opportunity for blacks to participate equally in the political process.

Those counties with significant black population or under coverage of the Voting Rights Act made more changes with a negative effect on black participation than did other counties in North Carolina. Only one county with a significant black population changed its methods of election voluntarily in a way that increased the opportunity for blacks to participate. Even with this positive change, one must consider it in context, and in doing so one notes that the final result was to substantially dilute black voting strength.

Most counties like the one I have just described have proceeded to enact legislation or rules which have also diluted black voting strength. One may ask, then, what this has to do with the consideration of intent under section 2. If these electoral schemes are discriminatory, one may wonder, why not go to court and prove the racial motivation of the officials who adopted them?

The answer to these queries is neither rhetorical nor hyperbolic. The answer, based on my experience litigating civil rights cases in North Carolina, is simple: Elected officials are too sophisticated to admit their real motivation openly or to a newspaper reporter, so how—if it is my turn to ask the questions—do I penetrate the mask of indifference, the smiles that hide the intent to do mischief?

Where do I look for evidence of discriminatory intent, if the legislative body keeps no records, or if the individual legislators have since died? Is it really possible to force the cooperation of elected officials with my inquiry by subjecting each individual legislator to lengthy depositions and searching cross examination? Is that the only way that an attorney representing black voters can challenge a pattern of discriminatory conduct that succeeds, no matter how benign the intent, in locking them out of the political process?

What is even more disturbing is the standard or lack of standards adopted today by the four members of the Supreme Court in *Bolden*. Prior to that decision we had all assumed or understood that the Court would view the totality of the circumstances to determine whether blacks or minorities were being effectively excluded from the electoral process. We had understood the test to be the effects or results as defined by S. 1992 or section 2 of the House version.

We are told in *Bolden*, however, that purpose or intent is now required whether the 14th or 15th amendment is applied. Even if intent or purpose must be established, that standard of proof is literally impossible, as I see it, under the majority opinion in *Bolden*. The majority opinion there basically ignored the standard of proof

announced in *White* v. *Regester*. Thus the circumstantial evidence referred to by some members of this committee to aid in the proof of intent, I think will not meet the standards the majority opinion suggests in *Bolden*.

We all, therefore, are left without guidance on what is or is not acceptable. Some definition or standard from Congress is imperative, and I think the standard provided in the bill now before the committee is most in keeping with our efforts to insure the equality and the opportunity of all Americans to participate in the electoral process.

Congress did just that with the adoption and extension of the voting rights bill. As the Supreme Court said in *Allen* v. *State Board of Education*, of course, the private litigants could always bring suit under the 15th amendment but it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act.

Recent Justice Department objections illustrate my point. In addition to the examples discussed in my written submission, the city of Reidsville, N.C., recently adopted a change for electing members to the city council. It moved from five at-large elections to staggered terms. The Justice Department, on objections by us, rejected the change based on section 5.

What standard of proof would have been required under *Bolden* if Reidsville were not a covered county? Although the change unquestionably diluted the black vote, and although it was designed to have that effect, the costs in time in making the demonstration would have been enormous. More importantly the standard of proof would have been practically impossible to meet.

Using the standards set forth in S. 1992 would insure meaningful participation of black citizens in Reidsville or in noncovered jurisdictions in selecting their representatives.

I also support the bailout provisions of S. 1992. We all concede, including the majority of this committee and the President, that we need to extend the Voting Rights Act. Accepting that fact, it would be sheer mockery to now provide for all covered jurisdictions to freely escape from the applications of the act. The proposed bailout provisions provide reasonable standards and should be adopted by Congress.

Thank you.

Senator THURMOND. Thank you.

Mr. Chambers, on page 6, with regard to your reference to proving a case no matter how benign the intent, do you mean that motive should not be considered even inferentially, so long as the results are adverse to minority groups?

Mr. CHAMBERS. I mean that the court should look at the total effect or results of the standard or practice that is being implemented, to determine whether those practices exclude effective participation or the opportunities for minorities to participate. If motives can be looked at or can be deciphered from what evidence would be available, obviously that should be one thing that the court should look at.

Senator THURMOND. Mr. Chambers, do you approve of the extension of section 5 in perpetuity?

Mr. CHAMBERS. I would think, Senator, that the bailout provisions that are now proposed in S. 1992 would provide an effective bailout provision for those jurisdictions that make efforts to provide meaningful opportunities for minorities to participate. I cannot say that jurisdictions across this country will now, or in 1992 or subsequently, make it less necessary for a meaningful Voting Rights Act.

Senator THURMOND. Counsel for the chairman of the subcommittee has some questions now.

Mr. MARKMAN. Thank you, Mr. Chairman.

Mr. Chambers, could you please tell me what the relationship is between the results test in section 2 and the effects test in section 5? Are they the same test?

Mr. CHAMBERS. They are not the same test, and I think that the standards of both are set forth in Justice Marshall's dissent in *Bolden*. The results test that is included in S. 1992, as I understand it, is basically the same as the Supreme Court's test in *White* v. *Regester*.

Mr. MARKMAN. In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted.

Mr. CHAMBERS. That is correct, as I understand it.

Mr. MARKMAN. OK. Well, what are the standards that you would use in order to determine the progress of minority groups with respect to the exercise of voting rights? At what point precisely will this Nation, in your opinion, be able to conclude that discrimination no longer exists in any significant respect in this regard? What are the standards by which we can determine whether or not to continue the preclearance provisions of the Voting Rights Act?

Mr. CHAMBERS. I think that Congress can make inquiry, as it has made in connection with the present consideration of extending the act, and can review whether blacks across the country—through evidence presented by those who try to participate in the electoral processes—are allowed an opportunity to participate or are still being excluded from participating.

Mr. MARKMAN. Would the lack of proportional representation be relevant in making that determination?

Mr. CHAMBERS. I think it would be a factor, not in terms of proportionate representation but whether blacks have been able to vote, whether they have been able to have their vote measured effectively, whether they have been able to elect representatives, would be factors that the Congress should consider.

Mr. MARKMAN. Well, the House report says that this factor would be a "highly relevant" factor under the change in section 2. What does that mean, Mr. Chambers?

Mr. CHAMBERS. What does the House mean when it says that lack of proportionate representation, or that the lack of——

Mr. MARKMAN. The lack of proportionate representation would be a "highly relevant" factor in determining whether or not there had been a section 2 violation.

Mr. CHAMBERS. I am not sure what the House report says but I do know that lack of representatives, minority representatives, would be a factor for anybody to consider, the same as in school desegregation. I think that the lack of minority representation in

schools would be a factor for the court to consider but it would not be determining.

Mr. MARKMAN. There is, of course, an intent standard in school desegregation cases, isn't there?

Mr. CHAMBERS. There is an intent standard in school desegregation

Mr. MARKMAN. Do you believe that the results tests in section 2 could be used as a basis for imposing proportional representation requirements upon communities?

Mr. CHAMBERS. I do not think that the present bill anticipates that or would support that, nor do I think the Constitution as interpreted by the Court in *Bolden* would permit it.

I would point out, however, in response to Professor Abraham, that the Supreme Court has sanctioned affirmative actions in a number of contexts, not the least of which would be *Weber* and *Fullilove,* and if Congress here—as I suggest it has with the remedial legislation in the Voting Rights Act—decides to insure meaningful participation by minorities in the electoral processes, it could under the 14th amendment enact this legislation to do it.

Mr. MARKMAN. Mr. Chambers—most of these questions are questions that Senator Hatch did want to address to you and he is sorry he is not here with you today.

How, in your view, is the line drawn between gerrymandering or redistricting designed to limit the influence of a racial minority neighborhood because it may be predominantly Democratic or Republican or predominantly liberal or conservative, as opposed to that gerrymandering or redistricting that is in violation of the Constitution? Minority groups are not immune to gerrymanders under section 2, are they?

Mr. CHAMBERS. Are not immune to gerrymandering? I am really not following that question as such but I would point out that the 14th amendment, as I understand it, was designed to insure that minorities would not be excluded from opportunities that whites have been able to enjoy. The 14th amendment has been interpreted to provide protection for minorities who are being excluded from meaningful participation.

We have historical precedent, I think, for interpreting the 14th amendment and the 15th amendment to provide protection from what the courts have called invidious discrimination for protected groups, namely blacks or namely minorities. That is, as I see it, a dividing line between the cause that I have seen made about proportionate representation and every minority wanting to jump in and suggest some line or some district for their particular group.

Mr. MARKMAN. I guess I am just trying to understand how a court would make a distinction between those districting plans designed to limit the influence of a predominantly minority neighborhood because of its political identification as opposed to that redistricting plan designed to limit their influence because of their race or color.

Mr. CHAMBERS. Well, one thing that we have noted in this country is that a black group is clearly discernible. It is not difficult to decide that group's representation, that is, does this particular legislation or this particular practice affect an identifiable group? Blacks are identifiable.

With respect to the other issues that have been raised in discussions that I have seen or that I referred to in Justice Stewart's opinion, those are clearly distinguishable from the discrimination that blacks have historically suffered in this country and are still suffering.

Mr. MARKMAN. If in fact, though, a predominantly minority neighborhood also has a predominantly partisan identification in one respect or another, you would suggest that districting could not take that factor into account.

Mr. CHAMBERS. I would simply refer the committee to the Court's discussion in *Weber,* Justice Brennan's opinion, the Court's discussion in *Fullilove,* the Court's distinction there between race as a identifiable factor and the other matters or contentions that are raised about how other groups or other interests may insist on some particular representation.

Mr. MARKMAN. In your statement, you say that under the present *Mobile* standard we are basically left without guidance as far as what the criteria are for violations of section 2.

Let me turn that around if I could, very briefly: If a community in fact lacks proportionate representation under a result standard of the sort proposed in section 2, if it lacks proportionate representation on its city council or school board, can you suggest for this committee the kinds of precautions that such a community ought to take in order to insure that it does not become the object of a section 2 suit? What is the guidance there?

Mr. CHAMBERS. I think the standards the Supreme Court set out in *White* v. *Regester,* and looking at the totality of the practices and the effects of those practices is what the community might look at to decide whether it is or is not in violation of section 2. I think those standards are pretty clear. Is is not just whether blacks are represented in numbers according to their representation in the community. That is just one item that the court or the community may look at.

Mr. MARKMAN. Well, if I am the city attorney for that community and I know all the totality of factors in that community and I know the totality of evidence in that community, what question do I have to ask myself or what question do my clients ask of themselves in order to determine whether or not we are within the boundaries of section 2?

Mr. CHAMBERS. I think the same questions that the Court looked at in *White* v. *Regester* and that the fifth circuit has looked at in some cases subsequent to *Bolden.* They would include, I think: What opportunities are there for blacks to participate? Are the practices that we have followed inhibiting or limiting their participation? Are particular schemes for electing officials limiting or inhibiting the effective participation of blacks in the electoral processes?

There are others that follow in *White* v. *Regester,* and in fact, in *Zimmer.* These are all factors that I think that the district should look at. The district may also inquire, what has it done to improve opportunities for minorities to participate in the electoral process?

Mr. MARKMAN. You referred to the idea of an "effective" vote. What is an effective vote?

Mr. CHAMBERS. What is an effective vote?

Mr. MARKMAN. What is an "effective vote," as constrasted to just a vote?

Mr. CHAMBERS. Something similar to whether my vote with my percentage representation counts as much as your vote with your representation in the community; whether I have an opportunity to get to the polls based on where the voting booths are located; whether I have an opportunity, a meaningful opportunity, to slate candidates or participate in the slating of candidates; whether I have a meaningful opportunity to help in selecting a person who will represent my interests.

Mr. MARKMAN. Thank you, Mr. Chambers.

Senator THURMOND. All right. Thank you, Mr. Chambers, for being here.

Mr. CHAMBERS. Thank you.

[The prepared statement of Mr. Chambers and additional material follow:]

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Prepared Statement of Julius LeVonne Chambers

Thank you, Mr. Chairman, for the opportunity to testify before this Subcommittee.

My name is Julius LeVonne Chambers. I am President of the NAACP Legal Defense and Educational Fund, Inc. I have served as counsel in numerous civil rights actions, particularly in my home state of North Carolina.

I am here to urge this Congress to extend the Voting Rights Act of 1965 by passing S. 1992, the companion bill to H.R. 3112.

Using North Carolina as an example, and based on my nearly 20 years litigation experience in civil rights, I would like to take this opportunity to discuss the difficulty of proving intent in the context of racial discrimination. I will also describe the bail-out standards in S. 1992 as they apply to the 40 covered counties in North Carolina. It is my firm belief that the compromise bill before the Senate embodies a workable and realistic standard under which those covered jurisdictions that have stopped discriminating can file for exemption from the responsibilities of Section 5.

I am submitting with my testimony a case study of North Carolina, prepared by Steve Suitts, Executive Director of the Southern Regional Council. SRC is the oldest biracial organization in the South. As a past president of SRC, and as an admirer of Mr. Suitts' scholarship, I can assure you that this analysis of the nature of racial discimination in voting rights in North Carolina is well researched and carefully considered. His conclusion should also be carefully considered by those on this Subcommittee who believe that proof of malevolent intent is the only way to show invidious discrimination. As. Mr. Suitts states, "North

Carolina is a story of generations of official discrimination among those with the best of intentions."

I am not endorsing the intentions of the North Carolina officials who enacted and enforced laws requiring racial segregation in virtually all public facilities and activities including schools, colleges, orphanages, medical facilities, prisons, theaters, buses, trains, restaurants, tax records, zoning and restrooms. Nor do I share Mr. Suitt's characterization of North Carolina officials as having "the best of intentions." His thesis, however, stands as a powerful rebuttal to those who equate racist intention with racial discrimination and vote dilution. North Carolina offers the paradox of a Southern state that has been, at least relative to other states, moderate in some areas of race relations. Yet North Carolina has been most effective in "belittling" the voting strength of a sizable black population.

Compare, for example, the rate of participation of blacks in North Carolina and Mississippi. Whereas Mississippi has gone from having one black state legislator in 1971 to having 17 in 1981, the number of black legislators in either house in North Carolina has yet to go above 4. Black participation in North Carolina has simply not been even an elementary objective of whites. Moreover, as Mr. Suitts concludes, the most effective methods of official resistance to providing equal access to the political process have been hauntingly familiar without being blatant, violent or even physically intimidating. What you begin to see, after reading Mr. Suitts' study, is that the work to disfranchsie blacks in North Carolina continues. It has simply moved back-stage.

Particularly in those counties in North Carolina where blacks present a potential electoral threat to the white establishment, the government officials have been very creative in reducing that potential. They have manipulated electoral schemes, they have transferred control of local governments back to the white legislature, when, in the late 1800's, such a transfer minimized black influence. Conversely, in recent years, attempts to return control to local government have been inspired by the fear of black political influence in the affairs of state government.

Throughout North Carolina during the last 15 years, changes have occurred in practices relating to the methods of election, the number of commissioners, and the terms of their office. Changes in these areas affect the opportunity for blacks to participate equally in the political process. Those counties with significant black population or under coverage of the Voting Rights Act made more changes with a negative effect on black participation than did other counties in North Carolina. (See Table 5).

Only one county with a significant black population changed its method of election voluntarily in a way that increased the opportunity for blacks to participate.

Even this "positive change" must be viewed in context. One positive change may be overcome by a more decisive negative change. For example, in Bladen County where 39 percent of the population is black, an at-large procedure predated 1965. Since the Voting Rights Act, the county has increased the number of members on its board but has changed the term of office from two straight years to four staggered years. The bottom line might be considered the same in 1978 as in 1965, since

the two changes would balance out, but the political arithmetic of voting does not add up in that fashion.

In Bladen in 1965, blacks constituted 39 percent of the population and 21 percent of total registered voters. In 1965 blacks had an opportunity at every election to vote for five members in an at-large scheme. After 1971, with the elmination of the anti-single shot law, Bladen voters could use bullet ballots to improve their chances of electing a sympathetic candidate. By 1978 the change to staggered terms not only nullified the positive effect of increasing the number of commissioners but also lessened by two the number of positions for which voters could cast ballots in any election. Hence, the effects of the voting changes in Bladen County have been to dilute, substantially, black voting strength.

Most counties, like Bladen ., that changed their electoral schemes from 1965 to 1978 are counties where blacks either increased their representation substantially in the registered voting list or where blacks constitute more than 40% of registered voters. As Steve Suitts describes it, "changes occurred where the political arithmetic showed threatening signs of increased black voting participation."

What, you might ask, does all of this have to do with proving intent under Section 2? If these electoral schemes are as discriminatory as I say, you might wonder, then why not go to court and prove the racial motivation of the officials who are adopting them?

The answer to these queries is neither rhetorical or hyperbolic. The answer, based on my experience in litigating civil rights cases in North Carolina, is simple. Elected officials are too sophisticated to admit their real motivation openly or to a newspaper

reporter. So how, if it is my turn to ask the questions, do I penetrate the mask of indifference, the smile that hides the intent to do mischief? Where do I look for evidence of discriminatory intent if the legislative body keeps no records, or if the individual legislators have since died? Is it really possible to force the cooperation of elected officials with my inquiry by subjecting each individual legislator to lengthy depositions and searching cross-examination? Is that the only way that an attorney representing black voters can challenge a pattern of discriminatory conduct that succeeds, no matter how benign the intent, in locking them out of the political process?

I think Congress, in its infinite wisdom, has said no, emphatically no. The problems that black voters have in exercising the franchise is too engrained, too pernicious to leave it to serendipity to determine whether their right to vote is secure. Whatever the constitutional standard may be, in enacting and extending the Voting Rights Act, Congress has seized the opportunity to provide blacks with a more effective remedy than is embodied in the Fifteenth Amendment alone. As the Supreme Court said in Allen v State Board of Elections, 393 U.S. 544, citing South Carolina v Katzenbach, 383 U.S. 301, "Of course the private litigant could always bring suit under the Fifteenth Amendment. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act."

Amending Section 2, as the House did in H.R. 3112, and as S.1992 proposes, will revive the private lawsuit as an effective tool for remedying official voting discrimination and opening up the political process to black voters.

Recent Justice Department objections illustrate my point. Before 1965, the North Carolina Constitution provided that the House of Representatives would be apportioned with each of the 100 counties getting one representative and the other 20 representatives were to be apportioned among the most populated counties. The Senate had 50 seats to be apportioned among the 100 counties. There was a provision that permitted dividing counties for any county entitled to two or more Senators. According to the 1960 census, 10 counties in North Carolina were majority black and an additional county was a majority non-white. Thus, one might have expected several black representatives, at least over a period of time. In fact, North Carolina's unevenly applied literacy test resulted in very low black voter registraion. An example from the 1960 Report of the United States Civil Rights Commission is that several black residents of Franklin County were refused the ability to register because they could not explain the meaning of trial "habeas corpus." Thus, between 1900 and 1968, there were no black representatives in the North Carolina General Assembly.

In 1965, the United States District Court in the case of Drum v. Seawell, struck down the apportionment of both the North Carolina House and North Carolina Senate because each was in violation of the one person one vote requirement of the Fourteenth Amendment. In response to the lawsuit and in order to prevent the Court from enacting a reapportionment plan, the Legislature convened in special session to adopt a new apportionment. Most of the meetings during that session were held behind closed doors with neither the public nor the press

permitted inside. The Committee proposed the current multi-member apportionment system which kept all counties in tact. In addition, the Committee recommended adoption of numbered seats to prevent single shot voting. The protest of black leaders and the fear of court intervention resulted in the withdrawal of this proposal.

In 1967, the General Assembly changed the North Carolina constitutional provision concerning apportionment. They in fact systematized the method used in 1965. At that time they changed the provision allowing division of counties in the Senate by prohibiting division of counties in both the House and the Senate. This assured large multi-member districts. The Committee was warned that multi-member districts would be subject to challenge because they often dilute minority vote in jurisdictions, like North Carolina,with a history of racial discrimination andaracially polarized electorate. The overriding motivation in both 1965 and 1967 was apparently to protect the white incumbents. The constitutional provision was adopted by the voters in 1968, but was not submitted to the United States Department of Justice pursuant to the Voting Rights Act.

In 1971, the General Assembly did adopt a seat number proposal which was subsequently invalidated by the Department of Justice.

In 1981, the Legislature enacted an apportionment of the House and of the Senate that continues the use of large mutli-member districts. The Department of Justice subsequently objected to the North Carolina constitutional provisions prohibiting the division of counties saying that they predictably led to the subversion of concentration of minority citizens into the larger white population. Using the same logic, the Department of Justice objected

to the 1981 apportionment of both the North Carolina House and the North Carolina Senate. However, only 40 of North Carolina's 100 counties are subject to §5 of the Voting Rights Act. Now North Carolina must adopt a plan that does not dilute minority vote in those 40 counties. However, under current court decisions, the black citizens of the other 60 counties can be denied fair representation as long as they fail to prove that the State's purpose is to discriminate.

Unquestionably, the standard is different in Section 5 than in Section 2. Unquestionably, even with the amendment to Section 2 allowing proof of discriminatory results, the standard of Section 2 will still be different than the effects test in Section 5. There is, of course, the higher burden of proof which litigants have to meet as plaintiffs in court, as well as the fact that the standard under Section 5 is more narrowly focussed on the retrogressive effect of a proposed change. Nonetheless, the contrast in North Carolina is stark between a useful and effective standard for 40 counties and no relief without proof of purpose in the other 60.

I would like to discuss briefly the provisions in S.1992 to modify existing law to create an expanded opportunity for covered jurisdictions to bail-out. The experience in North Carolina with non-compliance with the Act in the first place causes me to view the new bail-out with trepidation. If it is agreed that there is a continued need for Section 5 and that it should be extended, I feel compelled to ask why there is a need to change the bail-out provisions. I am not persuaded that there are saintly jurisdictions in North Carolina whose black voters no longer need the protections of continued preclearance. Of the 193 state legislative enact-

ments since 1965 concerning voting changes in the dovered counties, few, if any, involved attempts to improve the opportunity for blacks to participate. Yet the sheer number of such enactments represents a considerable dedication of legislative time to matters of local governance and electoral schemes. Compared, for example, to the number of similar enactments passed by the General Assembly for all 100 counties from 1925 to 1940, during disfranchisement, these figures represent twice as many changes for less than half the number of counties. Furthermore, according to Mr. Suitts' study, this accelerated interest in local elections and forms of government primarily occurred in the first five years after passage of the Voting Rights Act.

Despite the apparent upsurge in concern for local voting laws, the state legislature did not assume similar interest in informing the Department of Justice, as required by the Voting Rights Act, of its efforts. Justice Department records suggest that barely 20% of these legislative acts have been submitted for Section 5 preclearance.

I suggest that several conclusions relative to bail-out can safely be drawn from the massive non-compliance with Section 5 in North Carolina. First, I again submit that left to their own devices, the covered counties in North Carolina will do little to insure equal access to the political process for minorities. Even with the clear mandate of federal law and straight forward administrative procedures, the covered counties felt no compunction about ignoring the law. And at that time the law was enacted for a period of only 5 years. Clearly then these counties need more

than loose talk about incentives and voluntary actions. The objective criteria in the bail-out provision of S.1992 are critical to give these counties notice of what the law requires. Included in the objective criteria is the requirement of timely submission of Section 5 changes. That provision is essential.

Another one of the bail-out criteria is also an appropriate response to the problem of noncompliance by covered counties. A jurisdiction is not eligible to bail-out if there is a final judgment of voting rights violations or a consent decree as a result of which a challenged voting practice has been abandoned. I have litigated all over the State of North Carolina. In my experience, most jurisdictions have taken steps to eliminate their discriminatory practices only under court order or equivalent constraint. I am also unaware of any consent decrees in North Carolina where a jurisdiction voluntarily abandoned a challenged voting practice in an effort to settle a lawsuit unless the plaintiff's claim was so strong that plaintiff was likely to prevail on the merits. The provision in the bail-out, therefore, will not discourage settlements in my opinion, and may have instead the salutary effect of encouraging jurisdictions to consider seriously the claims of minority voters in advance and without the necessity of litigation.

A third aspect of the objective bail-out criteria is also important in view of the experience in North Carolina. No entirely covered state is eligible to bail-out until all of its counties are also eligible. This provision places responsibility on the state to monitor more vigorously the activity of its subunits of government. The gross failure of North Carolina to comply with the preclearance requirements of Section 5 suggests

what can happen when the state legislature takes a passive role, due, in part, to its own immunity.

Finally the bail-out provision in S.1992 sets forth affirmative steps that a jurisdiction should take before seeking exemption. These guidelines and requirements are absolutely essential to guarantee that only those jurisdictions that have stopped discriminating do in fact bail-out. These provisions would give jurisdictions, such as Greensboro, an incentive to adopt a more equitable system for electing its City Council. Efforts to change the present method of election failed by 300 votes in a referendum that split along racial lines. Rather than fostering increased racial polarization, this provision would provide the additional carrot that might unify the voters in a common effort.

I agree with Senator Henry Kirksey from Mississippi that the problems of racial polarity and insensitivity can only be ameliorated by S.1992. The amendment to Section 2 and the specific nature of the bail-out criteria will go a long way toward making the ballot more accessible to the black voters of North Carolina and the other covered jurisdictions.

BLACKS IN THE POLITICAL ARITHMETIC AFTER MOBILE: A CASE STUDY OF NORTH CAROLINA

Steve Suitts

Although its language is no tribute to the King's English, the 1965 Voting Rights Act wrote into American law the unprecedented transfer of protection of the right to vote from the federal courts to the executive branch of the federal government.[1] The Act permitted the Attorney General of the United States to appoint special observers and examiners in local areas and to review before implementation changes in law or practices relating to voting in seven Southern states. This rearrangement was enacted because some Southern federal judges had resisted successfully the enforcement of the federal Constitution's Reconstruction amendments and even at its best moments the judicial process worked too slowly to contain the flurry of resistance to integration. Perhaps the former "moderate segregationist" governor of Mississippi, James P. Coleman, accurately described the practical failures of judicial review, which the new law recognized, when he assured white citizens in Mississippi during a political campaign in the early 1960s that "any legislature can pass a law faster than the Supreme Court can erase it."[2]

During the 15 years in which the amended Voting Rights Act has been enforced, remarkable increases have occurred in the registration of black voters and the election of black officials in the South. In 1966, for example, Alabama had less than 250,000 black registered voters and North Carolina had registered little more than 280,000. By 1980 the number of black registered voters in both states had nearly doubled.[3] From 1968 to 1980, the number of black elected officials in the seven states primarily covered by the Voting Rights Act increased more than ten times from 156 to 1,813. Because of changes in the Act that now require bilingual ballots for some voters, Spanish-speaking groups, especially in Texas, have made noteworthy progress in voter registration and the election of Hispanic officials in recent years.[4]

These achievements of the democratic process have been based only partially on a more accessible ballot. While the freedom to register and cast a vote is fundamental, the history of exclusionary, white primary elections, gerrymandering of district lines, and malapportionment of legislative bodies are irrefutable evidence that the methods and structures of elections can deny effective political participation.[5] In this field, Southern federal courts and the administrative review of the Justice Department have been important forums. Under the Reconstruction amendments and Sections 2 and 5 of the Voting Rights Act, private

litigants and Justice have challenged a series of obstacles, including multimember legislative districts, as attempts "to minimize or cancel out the voting potential of racial minorities."[6]

For the last few years of the 1970s almost 160 federal voting cases were commenced yearly in U.S. District Courts, and a review of them suggests that about half of the cases challenged the dilution of minority voting strength. More than 90 percent were filed by private litigants. (See Table 1.) Most of the dilution cases were filed in the South.

Apart from affirming that a lawyer finds the center of all gravity in the courthouse, these figures verify that litigation has continued to play an important role in addressing new and old voting barriers. Since

Table 1. In U.S. District Courts, Federal Voting Cases Commenced by Basis of Jurisdiction and Nature of the Suit. Recent 12-Month Periods, 1977-1980

12-Month Period	Total	United States Plaintiff	United States Defendant	Private Litigant
12/31/77 - 12/31/78	179	19	9	151
12/31/78 - 12/31/79	119	6	3	110
3/31/79 - 3/31/80	147	8	6	133
9/30/79 - 9/30/80	191	8	10	173
Totals	636	41	28	567
12 Month Average	159	10	7	142

Sources: Federal Judicial Workload Statistics, Administration Office of the U.S. Courts, for periods ending December 31, 1978, chart C-2; ending December 31, 1979, pp. 26-27; ending March 31, 1980, pp. A-9, A-10; ending September 30, 1980, pp. 28-29.

Section 5 of the Voting Rights Act applies only to changes since November 1, 1964, at the earliest, its administrative remedy has not been able to reach those discriminatory schemes set into motion in the early 1960s or before, and court action has often been the only available recourse. For example, in Georgia, at least ten governing boards of counties, cities, and school systems that had instituted diluting voting schemes before 1965 held elections for the time in the fall of 1980 under new forms of government, as a result of court orders.[7]

These cases were decided before April 22, 1980, when the U.S. Supreme Court rendered its judgment in City of Mobile v. Bolden.[8] In this case, Justice Potter Stewart held for a plurality of the Court that the Fifteenth Amendment prohibits only a purposeful discriminatory abridgement by a government of the freedom to vote on account of race, color, or previous condition of servitude and does not permit a challenge of multimember schemes or other techniques that dilute minority voting strength. Equally important, Justice Stewart held that the plaintiff who contests at-large procedures under the Fourteenth Amendment must do more than "show that the group allegedly discriminated against has not

elected representatives in proportion to its numbers." A plaintiff must prove that the disputed plan was "conceived or operated as a purposeful device to further racial discrimination."[9] Justice Stewart warned that where the character of the law was readily explainable on grounds apart from race, disproportionate impact alone cannot be decisive, and courts must look to evidence to support findings of a discriminatory purpose in the electoral scheme. "The ultimate question," Justice Stewart wrote, "is whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question."[10]

The Court's opinion in Mobile was greeted by civil rights organizations and private litigants in voting cases with loud inhospitality and sweeping predictions of impending doom for the political participation of blacks and other racial minorities. Coming little more than two years before the present expiration date of the Voting Rights Act, Mobile was seen in 1980 as the first obituary to this country's commitment to meaningful protection of voting rights.

The passage of a year since Justice Stewart announced the judgment of Mobile has provided an opportunity for some reflection and experience about the effects of the Court's opinion. With the future of the Voting Rights Act in question, the effect of Mobile can be gauged best by beginning an inquiry at the courthouse.

Within One Lawyer's Lifetime

Unlike the constitutional mandate of Mobile itself, an examination of voting rights since the Court's opinion can legitimately inquire only about effect. On this basis, the last 12 months provides some insight about the case's immediate impact.

Perhaps the most fundamental consequence of the Court's opinion has been to halt in its tracks much of the constitutional litigation against dilution of minority voting. Although precise information is not available since April 22, 1980, a special computer report from the Administrative Office of the U.S. Courts indicates that in the first eight months of the fiscal year beginning June, 1980, fewer than ten cases have been filed against voting dilution in federal district courts across the country. Computed on a yearly basis and compared with the average yearly rate of dilution cases commenced in district courts during three prior years, this figure represents a massive reduction in challenges to any voting schemes. Indeed, it suggests that only one in five of the lawsuits filed before Mobile are being filed since the opinion.[11]

This effect is confirmed by an informal survey of the primary legal

organizations and lawyers who have been instrumental in most litigation on voting issues in this country and of Justice Department officials. None of the top litigation groups for voting law has filed constitutional actions in federal court challenging the dilution of black or Hispanic voting strength since Mobile was rendered. According to court records, the Justice Department filed one such lawsuit.[12]

At the same time, some litigants have withdrawn lawsuits filed shortly before Mobile. The Justice Department withdrew its complaint against the apportionment of the South Carolina State Senate, and the Southern office of the American Civil Liberties Union has withdrawn one such civil action filed in Georgia in early 1980.

This response to Mobile verifies in the short term the forecasts of civil rights leaders about the case's effect on the law. The Supreme Court's decision has waylaid one of the two major engines for changes in effective voter participation by minorities by lessening the number of trips lawyers take to the courthouses on minority voting issues.

The future should show some improvement, however, since the highest embankment of the opinion could be eroded as the circuit courts interpret the higher court opinion. At least the lower courts, who have to follow Mobile, will have an incentive to interpret the holding in specific ways that can be understood.

Panels of judges from the Fifth Circuit Court of Appeals in the Deep South have begun recently applying the principles of Mobile to cases that were filed before April 1980. Although the opinions offer disharmonious interpretations of the standards of Mobile, they constitute at least an attempt to identify understandable, measurable standards by which the burden of proving intent can be understood. If they succeed in divining the mysteries of a plurality opinion, accompanied by three separate opinions, there is still reason to worry that the standards may be defined in such manner that they are not obtainable within one lawyer's lifetime. The complexity and burdens of litigation challenging dilution of black voting have been enormous and the additional requirement of proving intent, outside of effect, appears no easy task by any present circuit court opinion.[13]

Despite its immediate effect on judicial remedy, Mobile has had little apparent impact on the executive remedies of the Voting Rights Act.[14] According to data from the Justice Department, both the number of submissions and the number of objections which the Justice Department has issued have not significantly changed during the last year.[15] Since the Section 5 remedy applies only to changes since November 1964 and to a limited number of jurisdictions, the Act could not enlarge its scope without legislative amendment.

While it is important in understanding first impressions, the inspection of case files cannot reveal how litigation and the executive process after Mobile will influence the future state of minority voting in absence of some agreement about the past. So long as the courts are open and their addresses remain public knowledge, complaints will be filed and litigants will attempt to carry the burden of proof as best they can. The history of legal challenges against racial discrimination in this country throughout this century is ample proof that the courts will be used in good time and bad. With a meeting of the minds about the remaining vestiges of past racial discrimination in voting, however, an assessment of Mobile becomes legalistic and superficial. Without the acceptable identification of the wrong, the sufficiency of the remedy cannot be known.

Especially in academic and official circles, agreement on the state of voting rights and the need for forceful remedies is hard to come by.[16] Because the numbers of black elected officials in the Deep South have multiplied tenfold over the past 12 years, the journey to the promised land has been completed, according to some observers, and racial conflict over the franchise has been replaced by cultural and economic differences. With more black elected officials than any other region, the South has performed the miracle of fishes and loaves with the franchise, by some interpretations, and should no longer be considered "a conquered province" in statute or case law.[17] In Congress doubts were real and substantial about the need for presumptive remedies for voting rights in 1975 at the last renewal of the Voting Rights Act and may even be prevailing today.[18]

The differences of opinions are not entirely counterpoints on the same set of facts. Throughout the South and especially in places such as North Carolina, where moderation has been a political tradition, the dispute about voting rights is as factual as ideological. Even in the presence of solid scholarship tracing the ineradicable nature of segregation and its vestiges,[19] the rooted nature of racial discrimination sustained by governmental action in the South is a matter of dispute.

Because it has been a Southern state with a reputation for moderation, North Carolina offers one of the best examples in which to examine the immovable nature of racial discrimination in government and its enduring formulas amid a changing cast of political characters. While North Carolina is a story of generations of official discrimination among those with the best of intentions, the state must be given its due for the accomplishments of self-restraint in a long period of violent reaction.

Nothing Is Finer Than Moderation in North Carolina

Since the turn of the century, when it was one of only three Southern states that did not hold a constitutional convention to disfranchise blacks, North Carolina has maintained a separate identity in the Southern history of race relations and an almost singular Southern "reputation for fair dealings with its Negro citizens."[20] Although the constitutional amendment that disfranchised blacks in 1900 followed Southern practice in permitting an exception for all who could claim direct lineage with soldiers in gray during the Civil War and in requiring the payment of a poll tax, the amendment was not considered as harsh as those others in Southern states that required the ownership of property and the ability to understand the state constitution. North Carolina required that citizens who wished to vote be able to read and write in the English language any section of the state constitution, to the satisfaction of the local registrar.[21]

The disfranchisement of blacks was done with the best of intentions, according to Democratic leaders. By removing the black electorate, white voters would not fight among themselves over the temptation to debase their Anglo-Saxon purity by alliances with black voters and the presence of black officials.

In its first state constitution, North Carolina permitted free blacks to vote. However, by 1835, when a new constitution was drafted, slavery had to be justified by the permanent inferiority of blacks,[22] and both free and slave blacks were denied the vote. Twenty years later when slaves constituted one-third of the North Carolina population, the state had relatively few "baronial slave holders," and in 1861 refused by popular vote to call a secessionist convention. It was one of the last states to secede.[23]

In this tradition, the North Carolina governor set out to prove the Democratic Party's good intentions in the early 1900s by improving blacks' education. Governor Charles B. Aycock later in life reflected that because a black "would not be permitted to govern the state, then his rights should be held more sacred by reason of his weakness."[24]

Over the first several decades in the 1900s this "progressive plutocracy," as V. O. Key called it, showed relative signs of moderation on racial issues at a time of a volatile South. In 1921, for example, the state removed its poll tax.[25] In 1928, North Carolina bolted from the Democratic column in the presidential election despite claims that the party of white supremacy would be endangered.

While North Carolina witnessed 85 recorded lynchings of blacks between 1882 and 1930, the state had the fewest of any Southern state.[26] By 1946, several North Carolina cities were employing black policemen

to patrol black neighborhoods, and Charlotte and Raleigh were the only Southern cities to employ black policewomen.[27]

In 1930, North Carolina compared favorably with other Southern states in its financial support of segregated black education. With an average expenditure of $14.30 for a black child in North Carolina, only one-third the expenditure for white students, North Carolina ranked fourth from the top among all Southern states. Its investment in property for public schools for blacks also ranked fourth in the region, and the daily average attendance of black children in school was second only to that of Tennessee.[28] When segregated education was threatened 24 years later, North Carolina claimed in defense that it paid black teachers more than white teachers.[29]

In politics, too, North Carolina exhibited a sense of tolerance for blacks. As early as 1932, two blacks were elected on the Democratic ticket as justices of the peace in Raleigh.[30] By 1940, North Carolina blacks were registered to vote in proportions greater than those in any Southern state except Tennessee.[31] As early as the 1940s a black sat on the city council of Fayetteville, and throughout the next two decades individual blacks held office on several different elected city councils throughout the state's Piedmont region.[32]

In 1948, after the Dixiecrat walkout at the Democratic convention in protest of President Truman's civil rights plank, North Carolina was the only Southern state to give the Democratic president a majority of its votes at the convention and in the November election.[33] As in the politics of segregation throughout the region, some honorable leaders in North Carolina, such as Frank Graham in 1950, lost public office because they counseled moderation. The two North Carolina congressmen who did not sign the Southern manifesto in 1956 were not returned to Congress after the next election. However, the state usually selected the more moderate candidate, if only by a slim margin.[34] In fact, North Carolina politics did not brook a Herman Talmadge or a Ross Barnett in the 1950s and 1960s. North Carolina voters usually chose politicians such as Governor Luther Hodges, the "businessman in politics," who later served as secretary of commerce in the Kennedy and Johnson administrations, and Terry Sanford, who seconded the nomination of John F. Kennedy at the Democratic Convention in 1960. Serving from 1960 to 1964, Sanford was "one of the most liberal governors in the South in dealing with the racial issues."[35]

By the time the civil rights movement reached its high point, the contrast of style between North Carolina and other Deep South states was evident. As George Wallace stood in the schoolhouse door defying a federal court order for school integration with armed state troopers

wearing Confederate flags on their right shoulders surrounding him, Terry Sanford in North Carolina was opening the doors of experimental programs to attack poverty among blacks and whites in the state.

In 1965, when the Voting Rights Act passed Congress, North Carolina could point out that it was the only Southern state with at least a 20 percent black population that did not find all of its counties covered by all sections of the Act. Only 39 of the 100 North Carolina counties were covered by Section 5 of the Act and were required to submit voting changes to the Justice Department.

In the 1970s, North Carolina was one of the first Southern states to show signs of a two-party system in state and federal offices, and the first blacks to hold major offices since 1901 were elected. By the late 1970s black candidates had made serious if unsuccessful campaigns for congressional and state-wide offices and had entered the North Carolina legislature for the first time in this century.[36]

Although one more North Carolina county was covered under the Voting Right Act after 1972, the U.S. Comptroller General reported in February 1978 that North Carolina had received fewer objections to voting changes under Section 5 than any other Southern state.[37] As if to preserve its moderate image for the future, North Carolina state officials in 1980 assisted Greensboro in celebrating the twentieth anniversary of the first sit-in demonstrations at lunch counters. Inviting the four demonstrators back for the event, the state unveiled an historic marker on the Woolworth's building. The progressive spirit of North Carolina was thereby enshrined.

The Right to Help Govern

Almost all life-long Southerners know that racial discrimination has a long and mixed ancestry. In North Carolina and the South, it can be traced through two centuries as part and parcel of essential governmental policies and practices. Its history portrays how fear can smother the knowledge of past democratic achievements and perpetuate the worst traditions of folkways and stateways.

North Carolina's local democratic government owes its origins to the state's first government of blacks and whites. Although North Carolina counties existed since the American Revolution, county boards of commissioners were the creation of the state's Reconstruction constitution of 1868, which established the right to vote for blacks and a local system of democratic elective governments. Formulated by a convention dominated by black and white Republicans, the new constitution divided each county into several townships, which elected independent governing boards with powers to levy and collect property taxes and

other charges.[38] The county at-large elected a board of commissioners, composed of five members who were responsible for maintaining the jails, relief for the poor, supporting the county hospital, and licensing peddlers and others. The township boards were ultimately accountable to the county board, which also had powers to tax and retire the county's debt.[39] Before 1868 the North Carolina counties were governed by justices of the peace who were appointed by governors. The several justices in each county met in court and functioned by necessity as a board.

As the North Carolina Reconstruction government declined in 1895, Democrats used their uncertain margin of power to convene a new constitutional convention. Although the right of blacks to vote could not be removed,[40] the convention did empower the state legislature to create and amend county boards of commissions as it saw fit.

After amendments to the constitution were approved by popular vote, the Democratic General Assembly quickly moved to reorder local government. Justices of the peace were once again created as the county's primary officers with the right to appoint members of the boards of commissions. No major actions by the boards could be taken without the approval of the justices, who were appointed by the legislature.[41]

While also appointing other major county officers, such as clerks of the courts and treasurers of the counties, the legislature made major changes in the laws concerning voting. In each county, elections were placed under the local control of the justices of the peace, who appointed the registrars and judges of the elections for each precinct. With the power to abolish, alter, or create new polling places,[42] the justices were required to appoint election judges from different political parties, "where possible," a term that apparently permitted considerable partisan discretion. Moreover, in 1889 the Democratic legislature provided that, when the election judge had to be replaced for any reason, his successor need not be from a different party than the other judges.[43]

Another 1889 amendment stated that the registration of a voter was invalid unless it specified "as near as may be" the age, occupation, place of birth, and place of residence of the voter. The registrar was empowered to revise the registration books at will and only on the Saturday shortly before the Tuesday of the election were the books open for public inspection. If a citizen discovered that the registrar had removed his name, the burden of proof was on the citizen to demonstrate that he was properly qualified. Finally, the Democratic legislature provided that unchallenged voters would hand their marked ballots to the election judges, who sat often on a platform high above the voters' heads and who placed the ballot in one of several boxes, each marked for a different candidate.[44]

This structure and method of elections remained for nearly 20 years, until agrarian populism bolted from the Democrats throughout the South and in 1894 gave the Fusionists, black and white Republicans, and white Populists, control of the state legislature. Once more the General Assembly dismantled the Democrats' scheme of local government. The powers of the justice of the peace were removed and county commissioners were restored as the county's primary, elective officers. Other county officials, such as clerks of the courts, sheriffs, and constables, were also popularly elected.

In the new Fusionist system, the number of county commissioners elected at-large was reduced to three. However, the 1895 state statute provided for a unique means of minority representation. If five registered voters were supported by a petition of 200 other registered voters in an affidavit stating that they believed the elected commissioners could not manage properly the business of the county, the superior judge was required to appoint two additional commissioners from a party other than the one of the majority of commissioners.[45] If such a procedure was instituted, no funds could be spent or debts incurred without the approval of four of the five commissioners. The law was amended two years later to require 12 voters, supported by the same number of petitioners, who would affirm that they had examined the records of the county before signing the affidavit. Provision was made for a hearing before a judge to determine if there had been mismanagement of the county's business in any area.[46]

Because the coalition between black and white Republicans and Populists was a marriage of convenience, this remarkable mechanism may have been a means to check each group's misuse of their own political union. Nevertheless, the provisions for minority representation permitted even Democratic voters a means of redress.

The Fusionist legislature also repealed the Democratic election laws. The elected clerk of the superior court was given responsibility to establish and alter voting places. While some discretion was permitted, the clerk was required to have at least one polling place for every 350 voters in the county.[47] The clerk was also empowered to appoint the registrars and judges for elections. However, in each of the counties' precincts, a registered voter from each existing political party was to be appointed as a registrar and another as a judge. Realizing the importance of the election judges, the Fusionist legislature required that the clerk choose persons from a specific party only with the approval or recommendation of the chairman of the state executive committee of that political party.[48]

In other areas the revised election law provided that a voter could

not be struck from the rolls "because of failure to specify age, residence, etc., unless it shows that upon the registrar questioning the elector, he declined to answer the questions pertaining to these matters."[49] The law established that the entry of a registered voter's name on the rolls created a presumption that the voter was properly registered and required that the registrar, not the voter, carry the burden of proof in any contest.

For the first time in North Carolina history, state law also addressed problems of intimidation and harassment of voters. By providing that no voter could be arrested on an election day except for treason, felony, or breach of the peace, and by setting a stiff fine for anyone convicted of discharging an employee, promising money, food, or liquor in return for a vote, or refusing service because of a man's vote, the North Carolina statute was an obvious attempt to protect the Populist and Republican voters, especially blacks in Democratic jurisdictions.[50]

The return to local elective democracy and more open elections was short-lived. In 1898 after a Democratic campaign of night riding through the east and riots in Wilmington (which may have left up to 100 blacks dead),[51] the Democrats regained control of the legislature and quickly revised election procedures. Revoking all election statutes passed by the Fusionists, the Democratic legislature created a state board of elections, which it would appoint, and provided that the board would appoint in each county three men of any party as the local board of elections. This board chose the registrar, who also could be of any party, and the judges of the election, who were to be of different parties.[52] The date of state and local elections was also moved to August, away from the date of national elections in November.[53]

The new law re-established a complex procedure for registration, including the right of the registrar to ask "other questions which may be regarded as material upon the question of identity and qualifications" of the applicant. The registrar was also permitted to require that two people vouch for the identity of the applicant.[54]

In an act captioned "To restore good government to the counties of North Carolina," the legislature once again elevated the justices of the peace as the chief officers of the county and subordinated the role of the county commissions. It did not, however, retain a uniform system for selecting the officers. In 32 counties the Democratic legislature permitted the popular election of county officials to continue. Most of these counties were Democratic. In the remaining 65, the Democrats provided for different methods of selection including the appointment of additional officers.

The legislature left nothing to chance or the elective process in

the 18 counties with a black majority. In one form or another, Democrats provided for the appointment of justices of the peace and the boards of commissioners by the legislature in 16 of the 18 counties. In one of the other two counties, Hertford, the legislature permitted three Republican commissioners, who had just been elected, to remain in office. However, the legislature appointed five additional Democratic members with whom the three Republicans were to serve. In Scotland County, which had just been created, two commissioners were appointed by the legislature and required to hold meetings with the boards of two surrounding counties, which had members appointed by the legislature.[55]

With registration, elections, and local government in safe hands, the Democrats moved to have voters approve the disfranchisement of blacks in an amendment to the state constitution. While Democrats considered different approaches, the final amendment closely followed the one adopted in Louisiana in 1898.[56] The amendment required an applicant to read and write any portion of the North Carolina Constitution in the English language but did not include the Louisiana clause, which required that an applicant show he understood any provision of the constitution to the satisfaction of the registrar. This element was considered too dishonest.[57] The amendment also required an applicant to pay a poll tax.

Two barriers to the acceptance of the amendment by white voters emerged after the legislature circulated the amendement. The grandfather clause for the educational requirements was to expire in less than ten years--in 1908--and present illiteracy rates among whites, especially in the western counties, were as high as 20 percent. In partial response, the Democratic governmental candidate Charles B. Aycock assured North Carolinians that his party was dedicated to the "education of every illiterate white child in North Carolina." At the time, Aycock was conspicuously silent on the education of black children.[58]

The second problem was somewhat mechanical. Some opposing Republicans and Populists were apparently gaining white sympathy for the position that the amendment was only half right. While claiming that the amendment rightfully removed blacks from the political arena, some opponents of the amendment claimed that the proposed method of disfranchisement would hurt whites. In response, the legislature met in special session inserting a clause in the amendment to bar any attempts to approve or disapprove different sections or parts of the amendment at the polls.[59]

Black leaders had no problem understanding the effects of this amendment. They knew that in the hands of Democrats the educational requirement would end black voters' effective participation in North

Carolina government. J. Y. Eaton, a black from Vance County, did not let the irony of the state's attempts at disfranchisement pass without comment:

> Wasn't it a law put upon the statute books in North Carolina in 1831 making it a crime for a Negro to learn to read and write? This law was in force until 1865. Now 33 years afterwards, you're making the results of your own wrong, the pretext for disfranchising the Negro.[60]

The amendment was approved by the North Carolina voters, although contemporary observers and historians of the period attribute the vote to fraudulent elections and outright violence. In all 18 black counties, for example, voters approved the amendment, although the same counties had not voted Democratic in any of the previous four major elections.

While the Democratic party bemoaned the existence of an ignorant black electorate as too great a temptation for white manipulation, black dominance was the shibboleth for disfranchisement and black public office-holding was its ultimate expression. After the 1868 U.S. Constitution conveyed franchisement to blacks, white Democrats sought black votes whenever political arithmetic required it. Between 1874 and 1894, when Democrats maintained control of the North Carolina state house and legislature, they sought black votes in state-wide elections. Of course, they were hampered by the fact that most blacks were Republicans, and Democrats often had to resort to manipulation of voting rules or ballots to make returns add up to victory.[61] Even in the short era of the Fusionist government, when racial lines were drawn tight, some local Democrats sought black votes and occasionally were successful.[62]

Despite their interest in getting black votes, Democrats had no interest in blacks holding office under any party label. Democratic campaign literature in 1898 was short and direct on this point: "The Democratic Party is the white man's party, and it is against its creed that a Negro should be in authority over a white man."[63]

After the Fusionist interregnum brought an increase in the number of local black officials, especially in the Black Belt, Democrats railed about black dominance as they pushed the disfranchising amendment. The Democratic Handbook of 1900 portrayed that period of history in the Black Belt as years of anarchy when women feared for their lives.[64] Democratic State Representative William Kitchin said, "What is Negro dominance? Ask the tax payers who have felt its evils. Go to New Hanover and ask its chamber of commerce whose business was paralyzed. Ask the ladies who for months dared not walk the streets of Wilmington at mid-day. When the great controlling element is the Negro vote, and when that vote and its influence name the officials and dictate the policy of a town, city, or county, then it is dominant."[65]

These sentiments pinpointed the area of greatest concern and the places where blacks controlled local governments. Echoing these sentiments the major sponsor of the disfranchising amendment, Bill Winston, a white state legislator from the Black Belt, asked his colleagues in the closing moments of the debate, "Have we so soon forgotten New Bern, Greenville, Tarboro, Wilmington?"[66]

Apparently, several Populist leaders also had not forgotten. Black public office holding was opposed by some Populist leaders even before the constitutional amendment was proposed. When the coalition of Republicans and Populists was emerging, more than one Populist leader opposed blacks on the Fusion ticket at any level. Even the Republican governor in 1896, Daniel L. Russell, and other whites in the Republican Party preferred to have black voters but not black colleagues. In answering charges about "Negro government" Governor Russell stated, "I have appointed in the two years to civil office 818 persons, of whom no more than eight were colored."[67]

When all was said and done, the effect of the constitutional amendment on black voting was profound and immediate although not absolute. In the first election following the passage of the amendment, voter participation dropped precipitously, especially in black populated counties.[68] Most voters who failed to go to the polls were black and now ineligible. By 1902 the number of black registered voters in Warrington township had dropped to 12 voters, with perhaps as many as 600 black males over 21 potentially eligible to vote in the precinct.[69]

With these clear signals, white Democrats soon were able to permit local elections in all county governing boards.[70] Although Republican strengths remained formidable in some western counties and in parts of the Piedmont, the legislature no longer spent time gerrymandering local district lines of cities in the eastern counties in order to isolate local black voting strengths, as it had done.[71] As Jim Crow laws began segregating most aspects of public life in North Carolina,[72] and the registration of blacks remained merely a handful of Republicans in Democratically controlled counties, state-wide political competition virtually ended and the state Democratic machinery began to relax its grip.

In 1908 the grandfather clause was permitted to expire. Thirteen years later, the state repealed its poll tax and by 1930 numerous blacks were allowed to qualify to register as Republicans, without comment.

Throughout this period of settling segregation, there was always great interest or knowledge about the numbers on the registration rolls. When the Raleigh News and Observer noticed several blacks were registering to vote as Democrats, the editor, perhaps discomforted by the Supreme

Court's series of cases outlawing the Texas all-white primary, wrote of the 375 blacks recently registered as Democrats:

> The Negro in North Carolina has been a Republican since he was enfranchised. He's a Republican whenever his vote will help that party. The attempt to introduce him as a disturbing element in the Democratic primary is a wrong alike to the Negro and the Democratic. This is the first time politicians have induced Negroes to come into a state primary to kill hundreds of the votes of white Democrats. No matter who is guilty, the Democrats of North Carolina will not tolerate this unauthorized departure from a policy that has been in existence since 1868. [Emphasis added][73]

Thirty years earlier the same newspaper had published:

> Last November it was only by such a campaign that exhausted every resource of the white men in the state that white supremacy was secured. That victory was a signal one, but as long as there are 100,000 ignorant Negro voters entitled to kill the vote of an equal number of intelligent white men, just so long are we in danger of being remanded to the terrible conditions from which we have escaped. [Emphasis added][74]

It was left to the editor of the Fayetteville Observer to portray the difference between 1900 and 1930. Remembering one version of the disfranchisement movement, the editor said:

> Aycock swapped the North Carolina Negro an education for a generation of nonparticipation in politics. Whether we like it or not that swap is now bearing fruit. Every year the Negro in North Carolina under our system of universal education is becoming a more intelligent citizen. Every year more and more Negroes are able to hurdle the intellectual barrier set up at downfall of the Fusion regime. Frankly, we wish the Negro could remain forever the happy non-political citizen he has been for the past generation, but frankly we do not see how this condition can be prolonged.[75]

Although the Fayetteville editor foresaw the day of black voter participation, registration figures in the state for blacks in 1940 show that the day of reckoning was not at hand. While leading most other Southern states, only 10 percent of the black voting age population were registered. The figure was probably lowest in the counties with the highest black populations.

With the advent of the New Deal, the Democratic party in the South began to appoint blacks to positions where they could govern other black citizens. Just as black policemen were employed to keep law and order in black sections of North Carolina cities, Raleigh, North Carolina appointed two black registrars and two black judges of elections for two black precincts in 1941.[76] In some cities where the number of workers of the governing board exceeded five and residential segregation existed, individual blacks were elected to city councils.

Instances of arbitrary denial of the right to register continued in some jurisdictions, but throughout this time no Democratic office holder feared the existing numbers of black votes and no legislator hesitated

to change the method of election or the number of members of county commissions. Between 1925 and 1940, for example, there were more than 74 local acts changing voting procedures throughout the state.[77]

When the Supreme Court decided in 1944 that no form of Democratic white primary would be permitted in Texas, North Carolina Democrats took the news calmly, since it had not been a local device. Although a cause of consternation, the civil rights plank in the national Democratic platform of 1948 caused no major defection from the Democratic ranks in North Carolina. It was in 1954, not 1944, that the issue of schools, not ballots, began to draw out racial fears and inaugurate a new era of massive resistance.

Decades of "racial harmony" in North Carolina did not prevent the legislative stampede to resist the Supreme Court when it decided Brown v. the Board of Education in 1954. Following Southern practice, North Carolina began to employ various legal strategies to protect segregationist practices and policies and, while Governor Hodges counseled moderation, he supported legislation arming local officials in their efforts to subvert integrated schools.

After receiving the recommendations of an all-white special legislative commission, the General Assembly enacted legislation removing responsibility for the assignment of pupils and buses from the state board of education, which the legislature appointed, to local school boards, which the legislature also appointed. Legislation provided for the closing of public schools and the start of private schools if necessity required.[78] Couched in language that apparently offered compliance with Brown, the law removed the mention of "race" from the statutes and deleted the requirement that student textbooks continue to be segregated. The act did not, however, put an end to the notion or practice that white students ought not be contaminated by touching a schoolbook used by a black child. While removing the expressed mandate that textbooks be segregated on the basis of race, the statutes now required that they be distributed as they had been in the past, to the extent possible.[79]

North Carolina's legislative response to Brown was quick and effective, since it spread the area of decision-making to more than 100 local boards, which the courts would have to address one by one. Since the legislature appointed members of local school boards, they could surely be trusted to distinguish between the intent and the letter of the new North Carolina law.

As resistance to school integration escalated, opposition to growing black political participation hardened. After a single black was elected in 1953 from an almost all-black precinct in Wilson City and re-elected

in 1955, the legislature amended the city charter to provide for at-large voting instead of single-member districts. The city council soon became all-white again.[80]

While passing anti-integration legislation for the schools, the legislators enacted a law prohibiting "bullet" voting in 14 North Carolina counties and their cities. The law applied almost exclusively to counties with large black populations in the eastern section of the state and disqualified any vote that was cast only for one candidate in a multimember election where more than one candidate was to be elected. The anti-single shot law, which later was amended to apply only to primary elections, kept black voters from aggregating their voting strength to elect at least one responsive candidate.[81]

In the same year that saw the first national civil rights law in modern times, the legislature turned aside a bill that would have made local school boards elective instead of appointive. In 1957 with national laws providing for the Attorney General to litigate voting issues, the issue of control of local governing boards was again an active racial issue.[82]

In 1960, Beverly Lake, a law professor and former assistant attorney general, who had filed a brief supporting the school board in the Brown case, made an aggressive defense of segregation in a campaign against Terry Sanford. Lake lost but secured 44 percent of the vote. Four years later, Lake again ran for governor and, although he finished third, his support of Dan Moore was instrumental in the defeat of the Sanford-backed candidate.[83]

In 1964, North Carolina politicians received the decision of the U.S. Supreme Court in Reynolds v. Sims, which held that both houses of the Alabama state legislature were required to reapportion on the basis of equal population.[84] While the case concerned only state legislative and congressional reapportionment, it sparked litigation challenging the reapportionment of city and county governments in North Carolina and elsewhere.[85] Soon thereafter Congress passed the Voting Rights Act, with its coverage of 39 North Carolina counties under Section 5 of the Act and its ban on literacy tests. The right of blacks to help govern was gaining momentum.

The legislatures' first response to these federal developments reversed, in large part, a tradition of more than 60 years while following the historical means of resisting black voting in the last century and school integration in the last decade. The General Assembly relinquished its central powers and authorized some local governments to use their own discretion in determining local forms of government.

In 1966, in special session, the General Assembly authorized 49

boards of county commissioners, which had some form of representation or residency required by districts, to redraw present boundary lines with an equal number of people in each district "as nearly as practicable" or to adopt an at-large election system.[86] Although no county was compelled to act, the legislature authorized each of the 49 to do so, at least 60 days before the primary election, if the county board found that citizens were denied "equal representation."

Although forfeiting the legislature's power to control individually the method of election in each county, the statute did not authorize any change in commissioners. Also, the legislature did not delegate the authority to alter any element of election procedures or forms of government for the 51 counties with existing at-large elections.

Twelve counties took immediate steps. Six converted to at-large elections without districts and six redrew district lines.[87] Seven of the 12 counties had a 25 percent or more black population or were covered under the Voting Rights Act and four of the seven chose to convert to at-large procedures.

In the regular session the following year, the state legislature recodified the state election laws and required new record-keeping for registration. 30 counties--most with substantial black populations -- required all voters to reregister.[88] While it had resisted uniform legislation in the past, in 1969 the General Assembly provided for the election of school boards. In many instances the boards were already elective due to legislation. In any case, school boards controlled by the state-wide act were to be elected at-large.

In the shadow of legislative action, registration of black voters in North Carolina had begun to slow considerably and by 1967 four other Southern states had surpassed North Carolina in the proportion of black registered voters.[89] By 1970, the gains in the percentages of black registered voters in the state almost came to a halt.

With lagging black registration and increased adoption of at-large procedures, the anti-single shot voting law was challenged as a barrier to effective black voter participation. According to the North Carolina Civil Liberties Union, which challenged the anti-bullet law, blacks seeking office between 1968 and 1970 were six times more likely to win in counties without anti-single shot voting laws than in those with them. At the time of the ACLU lawsuit, 19 counties barred single-shot voting in elections for county commissions--16 of them had significant black populations. (See Table 2.) While 12 of the counties were covered under the Voting Rights Act, the anti-single shot law predated 1965 and was not within the purview of the Act.[91]

After the law was struck down by federal court in 1971,[92] blacks

were elected to the county commissions for the first time in this century. However, gains were not stupendous; the number of black county commissioners by 1975 was less than 10.

Table 2. Counties with Anti-Single Shot Voting Provision in 1971 by Black Percentage of Population and Registration

Counties	% Black Population of Total Population 1970	% Black Population of Total Registration 1966	1980
Bertie*	56.6	40	45
Bladen*	39.0	21	33
Catawba	8.0	7	6
Chowan*	42.0	19	29
Columbus	29.6	25	24
Cumberland	23.9	22	23
Franklin*	41.7	15	30
Greene*	47.0	15	35
Halifax*	48.0	22	33
Jones	45.0	26	39
Lenoir*	36.8	19	25
Martin*	44.9	21	32
Northampton*	59.0	40	52
Onslow*	14.0	15	14
Pender	43.7	23	33
Perquimans*	41.5	30	29
Sampson	34.5	25	26
Surry	5.0	4	4
Wayne*	33.2	22	22

*County is under coverage of Section 5 of Voting Rights Act.

Sources: General Population Characteristics, North Carolina, 1970 Census of Population (October 1971); Voter Registration in the South, Summer 1966, VEP of Southern Regional Council (1966); Registration Statistics: State of North Carolina, State Board of Elections (October 6, 1980); North Carolina G.S. 163-151 (2d) and (3)b.

In 1974 staff members of the U.S. Commission on Civil Rights conducted field investigations and found that black voters continued to face economic reprisals and intimidation[93] and "the use of at-large elections ... severely limited the ability of blacks to be elected to county commissions, school boards, and town councils."[94]

Providing returns from recent primary elections for county offices in the northeastern part of the state, the Commission's report documented the continuance of racial bloc voting[95] and found that at-large voting schemes diluted blacks' ability to put sympathetic and responsive candidates--all black candidates--in office.

Five years later, with 40 counties under the preventive protections of Section 5, North Carolina had only five additional black members of county boards, and all came from counties with 25 percent or more black population. With 486 county commissioners in the state, barely more than 2.5 percent of them were black, and in no county did black commissioners outnumber whites.

"Smile with an Intent to Do Mischief"*

While Justice Stewart admonished that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful,"[96] the history of racial discrimination in voting in North Carolina intimates that the absence of blacks in public office is not the offspring of immaculate conception. Perhaps the worst manifestations of race hatred and segregation have disguised the fact that in North Carolina, and perhaps other places, the most effective methods of resistance may not be blatant at all.

Between 1965 and 1980, in the face of the most stringent executive procedures and the development of the most sympathetic case law on voting, white North Carolina officials in the county courthouses and the state assembly maintained a quiet campaign of resistance in hauntingly familiar ways. As in the past, the events unfold from the pages of work of the North Carolina legislature.

In an analysis of the acts of the North Carolina legislature, 193 separate enactments have been identified that concern voting changes in the 39 counties covered under Section 5 of the Voting Rights Act. They represent a considerable dedication of legislative time to matters of local governance and electoral schemes. Compared to the number of similar enactments passed by the General Assembly for all 100 counties from 1925 to 1940, during disfranchisement, these figures represent twice as many changes for less than half the number of counties. It also appears tnat this remarkable interest in local elections and forms of government occurred in the first five years after passage of the Voting Rights Act.

Although the legislature has been greatly interested in voting changes in 40 of North Carolina's counties, it and the local government have not been eager to inform the Justice Department of their work. Justice Department records verify that barely 20 percent of these legislative acts have been submitted for review under the requirements of Section 5. (See Table 3.) Although there is some margin of error

*Robert Burton

Table 3. Laws Affecting Local Electoral Schemes Passed by North Carolina Legislature, 1965-1979
Analysis of Laws in Covered Jurisdictions under Submission Requirements of Section 5, Voting Rights Act

Year	Total Number of Legislative Acts	Number of Acts Submitted	Number of Acts Approved
1965	36	2	2
1967	30	4	2
1969	22	6	5
1971	28	6	6
1973-74	33	9	8
1975	17	5	4
1977	12	4	3
1979	15	3*	1
Totals	193	39	31

*Action pending before U.S. Justice Department

SOURCES: Session Laws of North Carolina, 1965-1979; print-out Index of Section 5 Submissions as of June 1980 by Location and Date, U.S. Justice Department.

because of the imprecise means of identification of enactments on listings by the Justice Department,[97] the overwhelming majority of legislative changes has not been submitted for review and does not comply with the law. Most of these changes were made as long as ten years ago and are probably in full implementation at this time.

The failure to submit changes by local governments and legislative officers cannot be attributed to a lack of knowledge about requirements of the Voting Rights Act. The Justice Department has received submissions about changes in the form of legislative acts, annexations, or revised practices about each of these counties under the Act. Moreover, 39 of the legislative acts, which cover at least 15 of the 40 counties, have been submitted, which indicates[98] that selective judgments have been made about changes that are submitted for review. (See Table 3.) Of the 39 acts submitted between 1965 and 1979, 31 (or 80 percent) have been approved by Justice, and the figure may be higher because some submissions are still pending.[99]

A possible explanation for what appears to be massive noncompliance is that local governments or the officers of the General Assembly do not consider the legislative acts to be "changes" relating to voting or electoral schemes. It may also be possible that white officials do not believe that all the enactments concern voting, although clearly each touches upon such matters as terms of office, methods of selection, and procedures for voting. Since it can be assumed that even the most inefficient legislative body would not pass 154 separate local acts to simply restate existing law and all public officials are aware of the connection between voting and elections, a benign explanation for these nonsubmissions has not been readily apparent.

Throughout North Carolina during the last 15 years, changes have occurred in practices relating to the methods of election, the number of commissioners, and the terms of their office. The trends have shown increasing preference for at-large elections and decreasing preference for nominations and elections by districts. (See Table 4.) At the same time, county commissions have shown a marked trend to increasing their numbers. For example, in the 100 counties of North Carolina in 1965, 22 had a total of three members; by 1978 only 14 retained that number.

Changes in the terms of office show the greatest shifts. In 1965, 29 counties had straight two-year terms. By 1978 the number had dropped to four. The preference has been for staggered terms: in 1965, 48 counties preferred some form of staggered term; by 1978, 69 staggered their commissions' terms.

Changes in any of these areas vitally affect voting. For blacks who are a minority among registered voters in any jurisdiction, multi-member, at-large elections can dilute voting strength, and a small number of elective county commissioners decreases the opportunity for

Table 4. Method of Election for North Carolina County Commissions Changes in Practices, 1965-1978

Method of Election	% of Counties 1965	% of Counties 1978
At-Large Election	52	56
At-Large with Required Residency in District	36	32
Nominated by Districts; Elected At-Large	10	4
Elected by Districts	2	3
At-Large and At-Large with Residence Requirement	0	4
At-Large and District Elections	0	1
Total	100	100

Number of Members on North Carolina County Commissions Changes in Practices, 1965-1978

Number of Members	% of Counties 1965	% of Counties 1978
7 members	2	5
6 members	3	4
5 members	73	77
3 members	22	14
Total	100	100

Terms of Office in North Carolina County Commissions
Changes in Practices, 1965-1978

Term of Office	% of Counties 1965	% of Counties 1978
2-year term	29	4
4-year term	20	17
4-year staggered term	47	69
6-year staggered term	1	0
Combination	3	10
Total	100	100

Sources: Cases and Material on Local Reapportionment, Institute of Government, UNC, Chapel Hill (December 15, 1965); Form of Government of North Carolina Counties, 1978, Institute of Government, University of North Carolina, Chapel Hill (1978).

blacks to aggregate their voting strength. While the term of office obviously decides the frequency of elections, the staggering of terms can lessen the number of members who would be before voters in any election.[100]

On these presumptions, the analysis of electoral changes between 1965 and 1978 in North Carolina county governments shows a mixture of effects on black voting. (See Chart 1, end of chapter.) A majority of county governments in the state made changes in one fashion or another in their electoral schemes. Counties with significant black population or under coverage of the Voting Rights Act were not disproportionately represented among the counties making changes in these three areas.[101] This group of counties, however, did make fewer positive changes and more negative changes for black voting than did other counties in the state. (See Table 5.) In methods of election, 10 of the 13

Table 5. Effects of Voting Changes in North Carolina County Governments 1965-1978
Breakdown of Effect on Minority Voter Participation
According to Category of County

	Method of Election				Number of Members				Terms of Office			
	Positive		Negative		Positive		Negative		Positive		Negative	
	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)
25% Black Populated or Section 5 Counties	1	(25)	10	(76)	6	(43)	0	(0)	0	(0)	11	(42)
Section 5 Counties	1	(25)	8	(62)	5	(36)	0	(0)	0	(0)	8	(31)
Other	3	(75)	3	(24)	8	(57)	1	(100)	0	(0)	15	(58)
Total Number	4		13		14		1		0		26	

county commissions that made negative changes were those with reason to be most concerned about black voting strength. Eight of the counties are covered by Section 5 of the Voting Rights Act. On the other hand, only one of four counties making positive changes was in this group of black counties.[102]

However, black counties followed the trend of increasing the number of members of their boards, a change that would have a positive effect on minority voting. Of the 14 boards that increased membership, six were black counties and five were under the Voting Rights Act. On the last element of changes, the term of office, all counties preferred staggered terms. Of the 26 changing to staggered terms 11 were black counties and eight of those were under the Act.

While analysis suggests that black counties made substantial moves in some areas to negate black voting strength, the pattern does not appear to be consistent. In fact, of the changes that were made in electoral schemes only by black counties, more appeared positive than negative. Yet no one element of an electoral scheme stands alone, and only in combination with others and in the context of local black voting strength can the full impact of any scheme be understood. For example, in Blandon County where 39 percent of the population is black, an at-large procedure predates 1965. Since the Voting Rights Act, the county has increased the number of members on its board but has changed the term of office from two straight years to four staggered years. The effects might be considered the same in 1978 as in 1965, since the two changes would balance out, but the political arithmetic of voting does not add up in that fashion.

In Blandon and in other counties one positive change may be overcome by a more decisive negative change. (See Chart 2, end of chapter.) In Blandon in 1965, blacks constituted 39 percent of the population and 21 percent of total registered voters.[103] In 1965 blacks had an opportunity at every election to vote for five members in an at-large scheme. After 1971, with the elimination of the anti-single shot law, Blandon voters could use bullet ballots to improve their chances of electing a sympathetic candidate. By 1978 the change to staggered terms not only nullified the positive effect of increasing the number of commissioners but also lessened by two the number of positions for which voters could cast ballots in any election. Hence, the effects of the voting changes in Blandon County have been to dilute, substantially, black voting strength.

In fact, of the 50 counties that had 25 percent or more black population or were under Section 5, 18 reduced significantly the maximum number of candidates to be elected in any at-large election for county commission in any election year. (See Chart 2 and Chart 3, end of chapter.) Of those 18, eight are covered under the Voting Rights Act. Remarkably, only two black counties increased the number of positions for any election year, and both added an additional at-large position to an electoral scheme that already had candidates elected at-large. For example, Richmond County changed from electing two commissioners at-large

with residence requirements and one commissioner without a requirement of residence to an election scheme with two at-large commissioners and two other at-large commissioners with residence requirements.

There are also ten black counties that moved away from district requirements for residence or single-member districts. In Onslow, a county covered by Section 5, the 1965 electoral scheme provided for five members of the county commission who were nominated by districts and elected at-large. By 1978 the scheme provided for only three commissioners to be elected in any election and all were nominated and elected at-large.

As a matter of fact, of the 50 black counties, only two provide for elections by districts. In Camden County, two candidates are elected from districts and one from the county at-large; in Washington, three candidates run from separate districts. These exceptions to the rule may be no exceptions at all, however. In both counties the distribution of population within districts shows that probably no district, as presently constituted, has a majority black population.[104]

Given the presence of racial bloc voting, the overall effects of these changes in electoral schemes are apparent when correlated with the percentage of black registered voters. In most jurisdictions every registered black voter would have to turn out to the polls and use his or her single-shot vote in order to have a chance of electing a responsive candidate, unless whites forgot the election day. In 37 of the 60 counties the turnout of all registered voters to exercise a single-shot vote would not be sufficient mathematically to assure the election of a responsive candidate by their own votes.[105] In effect, short of a political miracle, blacks are locked out of the political system.

Of the 11 counties that have a black elected official, only two have more than one. Both have at-large procedures, but both also have five elected members who appear before voters in every election year. In Durham and Jones counties the methods of election that existed in the first county commissions in North Carolina are the methods that now permit the greatest representation of black voters.

Finally, most black counties that changed their electoral schemes[106] from 1965 to 1978 are counties where blacks either increased their representation substantially in the registered voting list or where blacks constitute more than 40 percent of registered voters. Therefore, changes occurred where the political arithmetic showed threatening signs of increased black voting participation.

A couple of years ago Nashville Tennessean publisher and editor John Seigenthaler spoke at a meeting on Southern politics. "For decades,

Southerners of good will have pleaded for moderation," he said. "And finally, after years of pleas, it has arrived. Now that we've got it, God save us from it." While allowing for a little Southern hyperbole, the sentiment captures the paradoxes of the case study of North Carolina's political history: one of the few Southern states that has been moderate in race relations has been most effective in belittling the voting strength of a sizable black population.

The contradictions are, perhaps, somewhat illusory because of the definitions of terms. Racial moderation usually has been gauged in Southern history by the absence of violent white response and the presence of any exception to absolute segregation. However, such standards have been imprecise even to those who have observed only casually the daily intimacy of Southerners of all races in a legally segregated society. Segregation by governmental action has masked the fact that black participation in society has not been the elementary objection of whites. Black influence and black control in white affairs, including the affairs of government, have been at the core of white fears and racial discrimination in the governments of the South.

Because of the possibilities of "black dominance" since the end of slavery, the political history of North Carolina involves consistently the themes of reducing the voting potential of blacks. Because the task has been most difficult in areas with large black populations, the themes have been most pronounced in North Carolina's eastern part. As recent analysis shows, they still are.

In these black counties the most useful means of reducing black influence in government has not been disfranchisement of black voters, although that technique has been the most enduring one. Especially in eras when the franchise has been available, the most useful means has been the manipulation of electoral schemes. It was, in fact, control of the forms and methods of government that enabled voter disfranchisement and the era of Jim Crowism.

In the late 1800s the prevention of black influence was accomplished by returning control of local governments to the hands of the white legislature. At times the electoral process had to be manipulated instead of replaced because of apparent support of elective government even among whites in local areas. Often tagged with the name of good government, those techniques from the turn of the century are at work today in eastern North Carolina.

The difference in governmental response in various eras is tied together by the remarkable willingness of Southerners "to make do with what they have." Immediately before disfranchisement and since its demise, that willingness has included taking forms of government and

adapting them so as to prohibit black dominance. In recent years this resistance has been most effective by transferring decision-making to the local level.

Regardless of moral judgments, the ingenuity of this resistance has been more a tour de force than a show of force. For example, the modern use of at-large elections in North Carolina county governments has been an effective barrier to black voting strength despite some positive changes. Ironically, the form of democratic government born in Reconstruction is today blocking black voting strength. Aided by out-migration, the elimination of 14 majority black counties since 1910 has allowed for this shaping of at-large electoral schemes in most counties as the primary means of restricting access to democratic government.

At least four members of the U.S. Supreme Court, if not more, failed to recognize these modern applications and themes of Southern political reality in Mobile. Their interpretation of the Fifteenth Amendment as a mere estoppel against official actions that keep voters out of the polls is a fatal misunderstanding of the historically effective means of weakening the franchise.

The plurality opinion is perhaps most egregious in denying any relevance to the numbers of black office holders. While Justice Stewart is correct that no one is entitled constitutionally to any office, an understanding of the nature of governmental discrimination in voting gives a keen appreciation of the utility of black office-holding and potential black office-holding in identifying the motivation of whites to dilute black voting strength.

The impact of Mobile is chilling for those who challenge the modern forms of voting barriers. It casts abroad in the courts a perspective, as well as a holding of law, that will erode the importance of equal representation in government. But most devastating of all is that the opinion misstates reality to the American people.

The Court and Congress have not halted the momentum of resistance to the enfranchisement of blacks with their opinions and enactments. If the actions of the North Carolina General Assembly and local governments in the state in the last 15 years represent the best or even the average conduct of Southern states, official lawlessness and political skulduggery continue to retard the democratic process throughout the region. The record of North Carolina county governments from 1868 to 1980 offers evidence for no other conclusion.

The intent of those officials who deny voting rights in modern times

is not expressed in the malicious language of the past. In North Carolina such language was seldom used in any period except at the most uncertain times. Still, in almost every change of local county government in North Carolina over the last 100 years, the effect on black voting has been a consideration, if not the motivating factor. If the Supreme Court fails to acknowledge such conduct as unconstitutional, its failure to grasp the historic nature of racial discrimination will have a tragic, sustaining effect in American law and on the principles of equality in American life.

Chart 1

Voting Changes and Effects in North Carolina County Governments, 1965 to 1978

List of counties with electoral changes
and the effect on minority voter participation

County (25%+ black pop.)	Method of Election 1965	1978	effect	Number of Members 1965	1978	effect	Term of Office 1965	1978	effect
Ashe	AL	AL	0	3	5	+	4	4S	-
Avery	AL	AL	0	3	5	+	2	2/4S	0
Bladen (39)*	AL	AL	0	5	5	0	2	4S	-
Brunswick (29.6)	DAL	DAL	0	5	6	+	2	4S	-
Cabarrus	AL	AL	0	5	5	0	2	4S	-
Camden (37)*	DAL	D/AL	-	3	5	+	4S	4S	0
Chatam (30.4)	ND/AL	DAL	-	5	5	0	4S	4S	0
Cherokee	D	D	0	6	3	-	4	4	0
Cleveland*	DAL	AL	-	5	5	0	4S	4S	0
Cumberland*	DAL	AL	-	5	5	0	4S	4S	0
Edgecombe (47.5)*	DAL	AL	-	5	5	0	4S	4S	0
Gaston*	DAL	DAL	0	6	7	+	4S	4S	0
Halifax (48)*	DAL	DAL	0	5	6	+	2	4S	-
Harnett*	ND/AL	DAL	-	5	5	0	2	4S	-
Henderson	AL	DAL	+	3	5	+	4	4S	-
Hertford (55.2)*	DAL	DAL	0	5	5	0	4S	4S	0
Hyde (41.3)	DAL	DAL	0	3	3	0	2	4S	-
Iredell	AL	AL	0	5	5	0	2/4S	2/4S	0
Lincoln	ND/AL	AL	-	5	5	0	4	4	0
Madison	AL	AL	0	3	3	0	2	4	-
McDowell	AL	AL	0	3	5	+	4S	4S	0
Mitchell	AL	D	+	3	5	+	2	4S	-
Montgomery	ND/AL	AL/DAL	-	5	5	0	4S	4S	0
Northampton (59)*	DAL	DAL	0	5	5	0	2	4S	-
Onslow	ND/AL	AL	-	5	5	0	2	4S	-
Pamlico (33.1)*	DAL	DAL	0	5	5	0	2	2/4S	-
Pasquotank (37.7)*	DAL	AL/DAL	-	5	5	0	4S	4S	0

*County under Section 5 of Voting Rights Act.

Chart 1 (Continued)

County (25%+ black pop.)	Method of Election 1965	1978	effect	Number of Members 1965	1978	effect	Term of Office 1965	1978	effect
Pender (43.7)	D	DAL	-	5	5	0	4S	4S	0
Person (32.3)*	AL	AL	0	5	5	0	2	4S	-
Pitt (34.6)*	DAL	DAL	0	5	6	+	4S	4S	0
Polk	AL	AL	0	3	3	0	2/4S	2/4S	0
Richmond (26.3)	DAL/AL	DAL/AL	0	5	6	+	4S	2/4S	-
Robeson (25.8)*	ND/AL	ND/AL	0	7	7	0	4S	4S	0
Rowan	AL	AL	0	5	5	0	2	4S	-
Rutherford	ND/AL	ND/AL	0	5	5	0	2	4S	-
Sampson	AL	AL	0	5	5	0	4	4S	-

*County under Section 5 of Voting Rights Act.

Chart 2

Barriers to Black Political Participation in North Carolina 1965 to 1980

In Counties with 25% or More Black Population (1970)

Changes Over Time in Black Registration, Black Elected Officials, and Electoral Schemes

Counties	Total Pop. 1970	Black Pop. as % of Total Pop. 1970	Black Registered Voters as % of Total Registered Voters 1966	1980	Electoral Schemes Maximum No. of Positions and Methods of Election for County Commission in any Election Year 1965	1978	Black Elected Officials on County Commission 1975	1980
Anson*	23,488	46.4	20	33	3 AL	3 AL	0	0
Beaufort*	35,980	33.2	10	20	5 DAL	5 DAL	0	0
Bertie*	20,528	56.6	40	45	3 DAL	3 DAL	0	0
Bladen*	26,477	39.0	21	33	5 AL	3 AL	0	0
Brunswick	24,223	30.0	25	20	5 DAL	3 DAL	1	0
Camden*	5,453	37.0	18	26	3 DAL	2 D/1 AL	0	0
Caswell*	19,055	48.0	31	37	3 DAL	3 DAL	0	1
Chatham	29,554	30.4	6	21	3 ND/AL	3 DAL	0	1
Chowan*	10,764	42.0	19	29	3 DAL	3 DAL	0	0
Columbus	46,937	29.6	25	24	3 DAL	3 DAL	0	0
Craven*	62,554	25.4	22	21	5 DAL	5 DAL	0	0
Currituck	6,976	26.4	13	11	3 DAL	3 DAL	0	0
Duplin	38,015	34.2	17	25	3 ND/AL	3 ND/AL	0	0
Durham	132,681	32.5	31	24	5 AL	5 AL	2	2
Edgecombe*	52,341	47.5	23	39	3 DAL	3 AL	0	0
Franklin*	26,820	41.7	15	30	3 DAL	3 DAL	0	0
Gates*	8,524	53.4	30	43	3 DAL	3 DAL	0	0
Granville*	32,762	43.7	20	35	3 DAL	3 DAL	0	0
Greene*	14,967	47.0	15	35	3 AL	3 AL	0	0
Halifax*	53,884	48.0	22	33	5 DAL	3 DAL	0	0
Hertford*	23,529	55.2	40	44	3 DAL	3 DAL	1	1
Hoke*	16,436	44.2	32	41	3 AL	3 AL	0	1
Hyde	5,571	41.3	17	29	3 DAL	2 DAL	0	0
Jones	9,779	45.0	26	39	5 AL	5 AL	1	2
Lenoir*	55,204	36.8	19	25	3 AL	3 AL	0	0

Chart 2 (Continued)

Counties	Total Pop. 1970	Black Pop. as % of Total Pop. 1970	Black Registered Voters as % of Total Registered Voters 1966	1980	Electoral Schemes Maximum No. of Positions and Methods of Election for County Commission in any Election Year 1965	1978	Black Elected Officials on County Commission 1975	1980
Martin*	24,730	44.9	21	32	3 DAL	3 DAL	0	0
Nash	59,122	35.7	15	19	3 AL	3 AL	0	0
Northampton*	24,009	59.0	40	52	5 DAL	3 DAL	1	1
Pamlico	9,467	33.1	20	29	5 DAL	3 DAL	0	0
Pasquotank*	26,824	37.7	26	30	3 DAL	1 AL/2 DAL	0	0
Pender	18,149	43.7	23	33	3 D	3 DAL	0	0
Perquimans*	8,351	41.5	30	29	3 DAL	3 DAL	0	0
Person*	25,914	32.3	18	26	5 AL	3 AL	1	1
Pitt*	73,900	34.6	16	21	3 DAL	3 DAL	0	0
Richmond	39,889	29.3	20	23	1 AL/2 DAL	2 AL/2 DAL	0	1
Robeson*	84,842	25.8	-	24	4 ND/AL	4 ND/AL	0	0
Sampson	44,954	34.5	25	26	5 AL	3 AL	0	0
Scotland*	26,929	33.7	25	27	3 DAL	1 AL/3 DAL	1	0
Tyrrell	3,806	43.4	28	31	3 DAL	3 AL	0	0
Vance*	32,691	42.3	24	34	3 AL	3 AL	0	1
Warren	15,810	59.9	49	52	5 DAL	3 DAL	0	1
Washington*	14,038	41.4	25	25	3 ND/AL	3 D	0	0
Wayne*	85,408	33.2	22	22	3 AL	3 AL	0	0
Wilson*	57,486	36.7	20	20	5 DAL	4 AL	0	0

*County under Section 5 of Voting Rights Act.

-Not available for black voters in 1966.

Chart 3

Barriers to Black Political Participation in North Carolina 1965 to 1980
In Counties with 25% or More Black Population (1970) but Covered by Section 5 of the Voting Rights Act:
Changes Over Time in Black Registration, Black Elected Officials, and Electoral Schemes

Counties	Total Pop. 1970	Black Pop. as % of Total Pop. 1970	Black Registered Voters as % of Total Registered Voters 1966	1980	Electoral Schemes Maximum No. of Positions and Methods of Election for County Commission in any Election Year 1965	1978	Black Elected Officials on County Commission 1975	1980
Cleveland	72,556	20.0	18	14	3 DAL	3 AL	0	0
Jackson	21,593	1.0	8	1	3 AL	3 AL	0	0
Lee	30,467	23.0	19	16	3 AL	3 AL	0	0
Onslow	103,126	14.0	15	14	5 ND/AL	3 AL	0	0
Rockingham	72,402	20.0	18	22	3 AL	3 AL	0	0
Union	54,714	19.0	18	11	5 AL	3 AL	0	0

NOTES ON CHARTS 1, 2 AND 3

Symbols for Electoral Schemes:

Method of Election

AL is an election-at-large where all voters in the county vote for candidates.
DAL is an election-at-large where candidates must reside in a district.
ND/AL is an election where candidates are nominated from districts and election at-large.
D is an election where candidates are elected by voters in different districts.
NOTE: Some counties combine different methods of election.

Number of Members:

The numerical figure represents the maximum number of positions on the county commission to be filled in any election year.

SOURCES: General Population Characteristics, North Carolina, 1970 Census of Population, October 1971; Voter Registration in the South, Summer 1966, VEP of Southern Regional Council, 1966; Registration Statistics: State of North Carolina, State Board of Elections, October 6, 1980; National Roster of Black Elected Officials, Joint Center for Political Studies, July 1975 and April 1980; Form of Government of North Carolina Counties, Institute of Government, University of North Carolina, Chapel Hill, August, 1978; Cases and Materials on Local Reapportionment, Institute of Government, University of North Carolina, Chapel Hill, December 15, 1965; Chart 1.

NOTES

1. If disfranchising clauses are re-established in the future, the language of certain sections of this act will be invaluable for excluding voters by requiring an "understanding" test. See, for example, 42 U.S.C. 1973a in which one sentence runs for 21 lines on the page of the U.S. Printing Office stationery. Despite its own disservice to readable prose, amendments to the act have provided, for the first time in major national legislation, that forms and information relating to the electoral process, including ballots, should be written in more than one language where English is not universal and illiteracy is high. See P.L. 94-73 Section 203(a) and (b).

2. Robert Sherrill. Gothic Politics in the Deep South. New York, 1968, pp. 192-193. Also for history of events leading up to the Voting Rights Act see Charles V. Hamilton. The Bench and the Ballot: Southern Federal Judges and Black Voters. New York, 1973; and Donald S. Strong. Negroes, Ballots, and Judges: National Voting Rights Legislation and the Federal Courts, University of Alabama, 1968.

3. 1980 Roster of Black Elected Officials. Joint Center for Political Studies (Washington, 1980).

4. One example is the election of the first Hispanic mayor of San Antonio, Texas, and of a major city in the United States.

5. See Gomillion v. Lightfoot, 364 U.S. 339 (1960); and Robert B. McKay. Reapportionment: The Law and the Politics of Equal Representation. New York, 1965.

6. Mobile v. Bolden, 100 S.Ct. 1490 at 1499 (1980).

7. Atlanta Journal, April 30, 1980.

8. 100 S.Ct. 1490 (1980).

9. Ibid., p. 1502

10. Ibid., p. 1503-1504.

11. There have been 100 voting cases filed in federal court during the 8-month period; however, almost 80 percent of them are cases which arise out of disputes about a candidate's access to the ballot or the returns of voting in November. Because 1980 was an election year, these cases have unusually inflated the number of voting cases commenced since Mobile.

12. "All civil rights voting cases (441) filed in the district courts in July 1980 to February 1981," computer print-out, Administrative Office of the U.S. Courts, April 7, 1981.

13. See McMillan v. Jenkins, F.2d (5th Cir. 1981) and contrast with Lodge v. Buxton, F.2d (5th Cir. 1981).

14. Of course, Mobile did dampen any strong hope that Section 2 of the Act would be a remedy beyond what the 15th Amendment requires.

15. Summary of Section 5, mimeographed, Justice Department, 1981.

16. Reginald Stuart. "Alabama Blacks Fear Losing the Voting Rights Act," New York Times. April 14, 1981, p. 1.

17. See Justice Hugo Black's dissent, South Carolina v. Katzenbach, 383 U.S. 301 (1966).

18. See "Congress Clears Voting Rights Act Extension," 1975 Congressional Quarterly Almanac, pp. 521-533.

19. See, for example: C. Vann Woodward. The Strange Career of Jim Crow. Oxford, 1966.

20. V. O. Key, Jr. Southern Politics. New York, 1949, p. 206.

21. C. Monroe Work. Negro Yearbook: 1931-1932. Tuskegee, 1932, p. 111.

22. George M. Fredrickson. The Black Image in the White Minds. New York, 1971, pp. 43-70.

23. Key, p. 207.

24. H. L. Lefler. North Carolina History Told by Contemporaries. Chapel Hill, 1934, p. 410, quoted in Key, p. 209.

25. Jesse Parkhurst Guzman. Negro Yearbook: 1941-1946. Tuskegee, 1946, p. 261.

26. Work, p. 293.

27. Guzman, p. 318.

28. Work, pp. 203-206.

29. C. S. Huntington Bobbs, Jr. North Carolina: Economic & Social Profile. Chapel Hill, 1956, p. 358.

30. Work, p. 97.

31. Donald A. Matthews and James W. Prothro. Negroes in the New Southern Politics. Chapel Hill, 1966, p. 148.

32. William H. Towe. Barriers to Black Political Participation in North Carolina. Atlanta, 1972, p. 13.

33. Preston W. Esdall and J. Oliver Williams. "North Carolina: Bipartisan Paradox," in William C. Havard, ed. The Changing Politics of the South. LSU, 1972, pp. 368-369.

34. Jack Bass and Walter DeVries. The Transformation of Southern Politics. New York, 1976, pp. 218-117; and Newman V. Bartley and Hugh D. Graham. Southern Politics in the Second Reconstruction. Baltimore, 1975, pp. 76-77, and pp. 93-95.

35. Bass and DeVries, p. 231.

36. North Carolina Manual, Raleigh, 1973, p. 662.

37. Voting Rights Act -- Enforcement Needs Strengthening. Report of the Comptroller General of the United States. February 6, 1978, p. 57.

38. Joseph S. Ferrell. "Area Representation in North Carolina County Government," Popular Government. September, 1966, p. 22.

39. Ibid.

40. It is doubtful that the convention had the votes to both adopt a disfranchising provision and have it ratified in a vote of the people; moreover, the Compromise of 1876 and the presidential race between Tilden and Hayes had not yet been consummated and, for the moment, North Carolina Democrats had every reason to fear federal intervention if blatant actions were taken against blacks.

41. Helen G. Edmonds. The Negro & Fusion Politics in North Carolina, 1894-1901. Chapel Hill, 1951, p. 9.

42. Edmonds, p. 68.

43. Ibid.

44. North Carolina Public Laws, 1889, Chapter 287, 289-291; Edmonds, p. 69.

45. North Carolina Public Laws, 1895, Chapter 159, 218. Also see Edmonds, pp. 69-79.

46. North Carolina Public Laws, 1897, Chapter 185.

47. Edmonds, pp. 71-72.

48. Ibid. There were three parties recognized in North Carolina at the time. Parties were recognized according to the number of votes in the last general election.

49. North Carolina Public Laws, 1895, Chapter 216.

50. North Carolina Public Laws, 1895, Chapters 226-231.

51. See Edmonds. "The Wilmington Race Riot," pp. 158-177.

52. Edmonds, p. 184.

53. William Alexander Mabry. The Negro in North Carolina Politics Since Reconstruction. Durham, 1940, p. 68.

54. Edmonds, p. 184, and Mabry, p. 63.

55. Edmonds, pp. 185-187.

56. Edmonds, p. 197.

57. Mabry, p. 59.

58. Quoted in Mabry, p. 69.

59. Mabry, p. 70.

60. Quoted in Edmonds, p. 181.

61. Mabry, p. 28, and Edmonds, p. 55.

62. Mabry, p. 27.

63. Quoted in Mabry, p. 29.

64. Quoted in Mabry, p. 67.

65. The North Carolina Suffrage Amendment: Speech of Honorable William W. Kitchin of North Carolina in the House of Representatives, May 3, 1900, quoted in Mabry, p. 68.

66. Quoted in Edmonds, p. 182.

67. Governor's Biennial Message, the General Assembly Session of 1899, p. 23.

68. J. Morgan Kousser. The Shaping of Southern Politics. New Haven, 1974, pp. 193-195. Also see Work, p. 114.

69. See Mabry, p. 77, and Negro Population, 1890-1915, Bureau of Census, pp. 784-785.

70. Ferrell, pp. 20-22.

71. See, for example, Edmonds, p. 181, and Mabry, p. 19.

72. A contemporary observer of disfranchisement and segregation in North Carolina observed that while the "white man's" government was in full blast and the legislature had introduced a Jim Crow car law that would pass, someone had introduced a "Jim Crow bed law" that would never pass, he thought. As a matter of fact, the North Carolina legislature did forgo a law penalizing miscegenation.

73. Raleigh News and Observer, June 2, 1930, quoted in Work, p. 106.

74. Raleigh News and Observer, February 10, 1899, quoted in Mabry, p. 61.

75. Fayetteville Observer, May 24, 1930, quoted in Work, pp. 107-108.

76. Guzman, p. 266.

77. Popular Government, February 3, 1949, p. 39; Towe, p. 8.

78. Joseph P. Hennesse. "Public Schools," Popular Government. June, 1955, p. 25.

79. Ibid.

80. Towe, p. 8.

81. North Carolina General Statutes 163-151(2) and (3).

82. Popular Government, September, 1957, p. 43.

83. Bartley and Graham, p. 76.

84. 377 U.S. 363 (1964).

85. See State ex rel. Sonneborn v. Sylvester, 26 Wis.2d 43 (1965), and Joseph S. Ferrell, "Local Government Reapportionment," Popular Government, February, 1966, pp. 8-10.

86. N.C.G.S. 1.53-5.1 (1966 Supp.).

87. Ferrell, Popular Government, September, 1966, p. 19.

88. Towe, p. 38.

89. Matthews and Prothro, p. 148.

90. North Carolina ACLU newsletter, quoted in Towe, p. 35.

91. Of the three counties without significant black populations, Onslow was covered by the Voting Rights Act and the other two are Democratic counties with very substantial numbers of registered Republican voters.

92. Dunston v. Scott, 336 F. Supp. 206 (1972).

93. The Voting Rights Act: Ten Years Later. A report of the U.S. Commission on Civil Rights. Washington, January, 1975, p. 196.

94. Ibid., p. 306.

95. Ibid., pp. 309-311.

96. 100 S.Ct. 1490 (1980) at 1503.

97. In order to check for programming errors in the Justice Department's print-out of submissions, the 1980 version of the print-out was compared with the 1978 version to confirm that all submissions listed in the earlier year were still listed two years later. They were.

98. The Department of Justice makes no affirmative efforts to identify changes and relies exlusively on local and state governments, as well as citizens, to bring changes to its attention. The Department has claimed in the past that it does not have the resources nor the duty under the Act to discover what has been submitted. The Act provides no penalties for failure to submit.

99. Table 3 and Appendix VIII of the 1978 Report of the Comptroller General differ on the number of submissions to which Justice has filed an objection. Table 3 illustrates eight objections and the GAO report lists nine objections between 1965 and 1976. The difference lies most likely in the designation of those acts which were withdrawn by local authorities after the Justice Department objected. In addition, the two charts also differ in the meaning of the listing of years. Table 3 lists legislative acts according to the year they were passed by the North Carolina General Assembly. The GAO report lists submissions by the year they were received by Justice.

100. For some discussion of these effects see John F. Banzhaf, "Multi-member Electoral Districts -- Do They Violate the 'One Man, One Vote Principle,'" Yale Law Journal, 75:1309, and The Voting Rights Act: Ten Years Later.

101. Chart 1 assumes that any voting scheme that has districts for election or simply residence of candidates helps prevent dilution of black voting strength. There can be exceptions to the rule (for example, where a black population is so concentrated in one area that only black candidates can run from one district) and residence requirements in districts are not usually a substantial enhancement. As Judge Frank M. Johnson stated, "Residence requirements do, in some measure, reduce the dilution of minority political power by requiring geographic spread of candidates. However, such requirements do no more than reduce, minimally, the racial dilution effect of a multi-member districting system. While that reduction is salutary, its effect may easily be negated by the fact that a majority of the voters ultimately prevail on the election of each individual candidate citywide. While geographic array may thus be ensured, a racial or political array may still be defeated by the vote at-large. Thus, while the residence requirement is a factor . . . , it is not by any means a conclusive factor." Yelverton v. Driggers, 370 F. Supp. 612 (1964) at 619.

102. Counties with 25 percent black population or under the coverage of Section 5 -- the same in most instances--will be referred to as black counties for convenience.

103. The listing of registered voters in Chart 2 is not the traditional format. For most gauges of registered voters, the percentage of blacks is based upon the number of registered voters as a percentage of the total voting age population. In this instance, the registration figure is the number of blacks as a percentage of the total number of registered voters.

104. See Census of Population, 1970, Subcounty Data, North Carolina.

105. The analysis assumes a turn-out in proportion to the registration. In fact, black turn-out is customarily lower.

106. It also appears that the 1966 special session reapportionment legislation authorizing local changes to at-large systems was not submitted to the Justice Department.

Senator THURMOND. Prof. Donald L. Horowitz, professor of law, public policy studies and political science, Duke University is our next witness.

Professor Horowitz, come around.

Mr. HOROWITZ. Thank you, Mr. Chairman.

Senator THURMOND. We will be pleased to hear from you, Professor Horowitz. I believe you have a rather long statement. Is it agreeable to you to put it in the record and then just let you summarize it in 10 minutes?

Mr. HOROWITZ. Yes, sir, that is what I had intended. I have a summary that lasts about 12½ minutes which I shall try to condense to 10 minutes.

Senator THURMOND. All right.

STATEMENT OF DONALD L. HOROWITZ, PROFESSOR OF LAW, PUBLIC POLICY STUDIES AND POLITICAL SCIENCE, DUKE UNIVERSITY

Mr. HOROWITZ. Mr. Chairman, I am grateful for the opportunity to express my views on the House amendment to section 2 of the Voting Rights Act.

To someone like me, who has spent a lot of time analyzing the unintended consequences of public policy, the Voting Rights Act stands out as a remarkable achievement. Here is a statute that declares the intention to abolish discrimination in voting and, in a decade and a half, has gone a considerable way to doing just that.

I refer not merely to changes in black voter registration which are cited in my statement and are, in fact, extraordinary, but also to changes in black officeholding which are, in many ways, more extraordinary. The figures for black officeholding in some Southern States are also given in my statement but let me just pull out one of them—Mississippi.

In 1968, Mississippi had 29 black elected officials. In 1980, Mississippi had 5,300 black elected officials. Who could have thought in 1968 that those would have been the figures for Mississippi barely

more than a decade later? Mississippi is, in this respect, not atypical.

No one asserts that the job is done, that the obstacles to minority participation have evaporated, or that Congress can smugly conclude that discrimination in the political process is a thing of the past. If that were true, there would be no need to extend the life of the Voting Rights Act, and few informed observers believe this to be the case. However, it does seem plain that the Voting Rights Act has, in conjunction with some other forces, set in motion a considerable political change in the South and a change very much in the direction intended by the legislation. It is against that background that we consider the amendment to section 2, which would use a results or effects standard in judging whether the right to vote has been abridged. I want to make several points about this proposed change: First of all, that it is not necessary; second, that the comparable effects standard under section 5 is there for a very good reason, whereas section 2 performs a quite different function, and it is a mistake to import that standard from one section to the other; third, that the consequences of the effects standard of section 5 are not to be commended as a policy that should apply to every town and locality in the United States, as section 2 would; and, fourth, that the amendment is based on a mechanistic premise about the right to vote and would produce unfortunate consequences for our democracy.

That is a tall order.

To begin with, the amendment is not necessary in two different senses. First, contrary to what the House report says, there is no need to remedy any ambiguity created by the *Bolden* case because *Bolden* created none. It simply reaffirmed that under section 2, as under the 14th and 15th amendments, intentional discrimination is required to make out a violation.

The Supreme Court has never deviated from this standard in a section 2 case, so the ambiguity is on the other foot, as it were. It is created by the House amendment, which then has to have a proviso to say that racial proportionality is not what is required by the amendment. Well, if not, exactly what does the amendment require? I will come to that in a moment.

Second, the amendment is not necessary because in covered jurisdictions, section 5 already has an effects standard, and in noncovered jurisdictions which have no history of electoral discrimination or of dubious practices, intentional discrimination ought to be the standard of proof. That is not to say that intentions cannot be inferred from the circumstances, and I quite agree with Mr. Chambers on that point. I, for one, would be prepared to infer them in a proper case but the point here is, so would the Supreme Court and the lower courts. The Supreme Court has done exactly that in *White* v. *Regester,* in the earlier *Gomillion* case under the 15th amendment, and the lower courts have equally done so.

The truth of the matter is that there are many good, racially neutral reasons for electoral practices and for annexations of territories adjacent to cities, and they ought not to be subjected to a standard that, as I shall show, comes down in the end to ethnic or racial proportionality.

Second, the effects standard of section 5 is there because the covered jurisdictions needed it in order to prevent subterfuges from being adopted after 1965 that would cancel out the gains made in covered jurisdictions in the South. Section 2, on the other hand, applies to the entire United States. It has none of the safeguards of section 5. There is no preclearance procedure by which administrative discretion can be used to exempt a jurisdiction from the strictures of a section 5 finding, and it has no possibility whatever of bailout. That should be borne very carefully in mind by the subcommittee.

Section 2 would apply an effects standard to every State and locality in the United States, and even more important, it would apply that standard to existing electoral arrangements, in fact, to those that go back 50 or 100 years.

How, then, will we know when such an electoral law has a discriminatory effect, if this section is enacted? In section 5, which applies only to changes in electoral law, we would know that by comparing minority representation the day before the change with minority representation the day after.

With section 2, on the other hand, there is no before and after because it applies not merely to changes but to existing electoral law. The only way to judge the effect will be to see whether minority voters have representatives in proportion to their population in that jurisdiction. By what other standard could one possibly judge dilution under section 2?

Therefore, despite the pious protestations of the proviso to the amendment to section 2, ethnic and racial proportionality will likely become the test of a discriminatory effect under section 2 because it will be the only way to judge a discriminatory effect—this, I repeat, even though there is no showing that section 2 now is inadequate to cope with discrimination in noncovered jurisdictions, and even though section 5 is there for a completely different purpose from section 2.

Third, the prohibitions of section 5 as it has been construed are absolute. No matter what other purposes are served by an electoral provision, if it works a dilution of minority voting strength, it is unlawful. That is the *City of Rome* case in the Supreme Court.

Would the same be true under the amended section 2? My guess is that it would. Regardless of the racially neutral purposes of an annexation or of an electoral provision, it will be invalidated if a dilution is found. That is the operational meaning of the term "effects" or "results." Do we wish to write such an absolute standard into section 2?

Fourth, I said earlier the amendment is based on mechanistic premises about the right to vote and it would produce unfortunate consequences. In fact, a very narrow view has been taken in section 5 cases of the meaning of a dilution of voting strength. It means, in those cases, the racial or ethnic identity of the representatives who are elected compared to the racial or ethnic identity of their constituents. It does not mean the power of their constitutents or the influence of the group that elected them.

This is—I might say parenthetically, this amendment to section 2—a wonderful amendment for prospective black elected officeholders. It is a very bad amendment for their constituents.

Therefore, a 30-percent black minority in a city, if it has single-member constituencies on a residential basis and it elects, say, 3 out of 10 councilmen, has had no dilution. It is in conformity with section 2, as amended, even though those three minority councilmen are utterly powerless on the council.

However, a city run on an at-large system of elections where all the voters vote for all the prospective councilmen, and which have keen competition between two parties or factions for the votes of everyone, where the same 30-percent minority has no guarantee of electing any specific number of black representatives but does not have a guarantee of being appealed to by both parties or factions which seek its vote, that minority has real influence. It has real power but its strength would be held to be unlawfully diluted under the amendment.

I ask the subcommittee, which 30 percent is the worse off, the 30 percent with the three powerless representatives on the council or the 30 percent whose votes are crucial to the victory of all of the candidates? I would urge this subcommittee to avoid any provision which permitted majorities to say to minorities, "You have your own guaranteed seats and representatives. Don't trouble us." This subcommittee should attempt to integrate minorities into the political process by encouraging candidates to appeal to minority voters at the polls, not by providing minority voters their own segregated seats.

Finally, there are two likely long-term effects of the amendment that would, in my view, be deplorable. The first is that the amendment cuts back on the individualistic premises of the reapportionment cases—one person, one vote–and it inches us along toward a corporate concept of electoral democracy.

The fundamental democratic conception of shifting majorities is based on the creation of majorities by the expression of individual wills. The majority is composed of single voters making an aggregate choice. Of course, we know that racial and ethnic identity has much to do with voting behavior but it is wrong to make it have everything to do with voting behavior, so that political ethnicity ultimately smothers democratic choice and threatens democratic institutions.

I shall take another 30 seconds, with your indulgence, Mr. Chairman.

The second long-term effect of this amendment is, paradoxically, to make it harder to identify, condemn, and redress discrimination. The amendment muddies the meanig of discrimination. It calls something discrimination which is not discrimination at all: namely, disparate results in the electoral process, and a certain limited kind of disparate result at that.

This playing with words is not harmless. Law is debased when the language which constitutes its currency is devalued. The late Hannah Arendt, speaking of the attempt to pin collective guilt on all of the German people in connection with Nazi atrocities, made the following statement: She said, "Where all are guilty, none is."

The same principle applies here. We should not call something discrimination which manifestly is not discrimination, lest those who practice real discrimination come to be regarded as no worse than those who do not.

Thank you, Mr. Chairman.

Senator THURMOND. You made a very fine statement. We are very pleased to have you here.

I will now call upon counsel for the subcommittee to propound some questions.

Mr. MARKMAN. Thank you, Professor Horowitz.

You ask in your statement by what other standard could dilution be judged other than by a proportional representation standard? Well, I believe that Mr. Chambers, who preceded you, indicated it could be judged by the *White* v. *Regester* test. Do you agree with him on that?

Mr. HOROWITZ. Indeed, I do, Mr. Markman. The *White* v. *Regester* test is still alive and well, as I read the line of decisions all the way from *Whitcomb* v. *Chavis* to *White* v. *Regester* to *Bolden*. There is nothing in *Bolden* that is incompatible with the *White* v. *Regester* standard and, of course, the totality of the circumstances could be taken into account.

If, for example, a city were to experience a large influx of black voters, and if it should at that time change its electoral system to disadvantage black voters, clearly that is a circumstance that looks suspicious if there were previously no discussion of changing the electoral system until a large influx of black voters appeared at the polls. That is a suspicious circumstance. There is no doubt in my mind that under existing law and after the *Bolden* case, that the courts would take that into account in deciding whether in fact there had been discrimination.

Mr. MARKMAN. Well, why aren't the *White* v. *Regester* standards also adequate for evidencing discrimination under a results test?

Mr. HOROWITZ. Well, *White* v. *Regester* does not have to do with results. It has to do with those circumstances intended to infer intentional discrimination. Now the results test short circuits that evidence.

I said a moment ago that the proposed amendment is a very good one for prospective black officeholders but not for their constituents. It is also a very good one for plantiffs' lawyers in voting rights cases because it does not require them to produce very much evidence.

However, mind you, we are not talking now about covered jurisdictions; we are talking about jurisdictions with no history of discrimination or of suspicious electoral practices. What this amendment would permit plaintiffs' lawyers to do in those cases is to produce very little evidence in order to make out a violation.

The evidence that they would likely produce would be a disparity between black—or minority, whatever the minority is—voters and the number of, proportion of black representatives on the council or legislature. This is all they would have to do to make out a violation, despite what the proviso says, because there is no other way to gage a dilution. *White* v. *Regester* is a much more careful, circumspect set of standards, and it is the one I prefer.

Mr. MARKMAN. Well, an alternative explanation for the means by which we determine dilution is simply to look at the totality factors and determine whether or not those factors evidence that minority groups have "equal access to the political process", or

whether or not they have an "equal opportunity" to participate in the political process. Aren't those satisfactory standards?

Mr. HOROWITZ. I think they are satisfactory standards, Mr. Markman. They are the ones that we should stay with in noncovered jurisdictions. Section 5 as to covered jurisdictions is an entirely different matter, as I said.

Mr. MARKMAN. You refer to the proposed results test in section 2 as a "mechanical" test, I believe.

Mr. HOROWITZ. Mechanistic, I said.

Mr. MARKMAN. Mechanistic.

Mr. HOROWITZ. It is a mechanistic concept of the meaning of the vote because it equates the effectiveness of the vote with how many representatives a particular minority group elected that had the same ethnic or racial identity as the electors. It is mechanistic in the sense that it tests effectiveness by the ethnic or racial identity of the representatives, not by whether the constituency, by whether the group, the voters, have power or influence.

As long as you elect representatives of the same ethnic or racial identity, you are home free under the amendment to section 2. You may have absolutely no power or influence in that jurisdiction. We ought to be concerned with power and influence if we are concerned with the effects of the vote.

Mr. MARKMAN. Wouldn't proponents of the results test suggest, however, that you are oversimplifying their test? You are oversimplifying it by looking at one component of their test. You are not recognizing that fact that you do consider the totality of circumstances in making the section 2 evaluation.

Mr. HOROWITZ. I am simplifying it. I am simplifying it in exactly the way in which the courts are going to simplify it if it is enacted.

Mr. MARKMAN. Could you elaborate on that, please?

Mr. HOROWITZ. As I said before, section 2 applies to noncovered jurisdictions, which is to say it applies to all of the States and localities of the United States. It does not apply merely to jurisdictions which have some history of discrimination.

Since that is the case, we have to then consider what the courts are going to judge a dilution by. The standard is a dilution of voting strength. That is the standard under the effects test of section 5; it is the standard that is going to be applied under section 2 if this amendment is passed.

When the courts come to judge a dilution, they will likely have no before and after to compare. They will be perhaps judging, as the *Mobile* v. *Bolden* case had to judge, an electoral provision that went back to the year 1911 when minority voters presumably were not even voting in the city of Mobile.

Therefore, what standard will they have to judge a dilution by? They will not be able to look at the day before a change and the day after. There may not be a chance. Accordingly, what the courts are going to have to do is to look at the proportion of minority voters in a given locality and look at the proportion of minority representatives in a given locality.

That is where they will begin their inquiry; that is very likely where they will end their inquiry, and when they do that we will have ethnic or racial proportionality. We will have a certain sort of voting strength but we may not have minority political power or

influence. On the contrary, what we shall have is exactly the opposite—segregated seats—segregated seats, and when we speak of minorities and segregation, what we mean is, lack of power, lack of influence. I think the amendment in section 2 is unfortunate for exactly these reasons.

Mr. MARKMAN. Why do you say that the courts will end their inquiry at that point, given the very explicit disclaimer language in section 2?

Mr. HOROWITZ. Because there is no control over which plaintiffs are going to bring suit in which jurisdictions, and there is no assurance that there will be any circumstances at all conducive to a finding of discrimination. All you would need to show is the disparity I refer to, in order to make out at least a plausible case of a violation of section 2.

Mr. MARKMAN. Do you believe that minority groups should be entitled to an effective vote rather than simply the mechanical opportunity of being able to register and cast their ballot?

Mr. HOROWITZ. Yes, but I would not define an effective vote in the limited, narrow, mechanistic way in which the amendment to section 2 defines it.

Mr. MARKMAN. Thank you, Professor Horowitz.

Thank you, Mr. Chairman.

Senator THURMOND. Professor Horowitz, we want to thank you again for your presence here and for your splendid testimony.

Mr. HOROWITZ. Thank you, Mr. Chairman.

[The prepared statement of Mr. Horowitz follows:]

PREPARED STATEMENT OF DONALD L. HOROWITZ

I am Donald L. Horowitz, Professor of Law, Public Policy Studies, and Political Science, Duke University. I am a lawyer and political scientist, having spent the largest part of my career in two fields pertinent to these hearings: ethnic and racial relations, on the one hand, and the role of courts in the making and implementation of public policy, on the other.

My testimony will be confined to the House version of section 2 of the proposed Voting Rights Bill. Section 2 deals with voting qualifications and electoral practices. Since the inception of the Act, section 2 has forbidden the enforcement of any voting qualification or electoral practice "to deny or abridge the right of any citizen of the United States to vote" on discriminatory grounds. The House amendment would substitute for this language a prohibition on voting qualifications and electoral practices applied "in a manner which results in a denial or abridgement" of the right to vote on discriminatory grounds.

The key word here is "results," and I intend to analyze the likely impact of this change in existing legal doctrine. Toward the conclusion of the discussion, I shall want to say some things about the meaning of the "right to vote;" about the relationship of electoral systems to the representation of ethnic interests; and about the relationship of demographic change to policy change. These highly significant considerations have, I believe, been generally neglected in

discussions of the Voting Rights Act. But, before I venture into that terrain, I want to set my discussion in the context of the Voting Rights Act and what it has wrought.

I. The Voting Rights Act and Its Effects

For someone like myself, who has spent much time analyzing the unintended consequences of public policy, the Voting Rights Act stands out as a remarkable achievement. Here is a statute that declares the intention to abolish racial discrimination in voting and, in the course of a decade and a half, has gone a considerable way toward fulfillment of that objective. The results so far can be seen in progress made in minority registration and officeholding.

The figures on black voter registration in the Southern states are extraordinary. Georgia, Louisiana, and Mississippi have all been above the national average in registration for more than five years. Four of the Southern states (Alabama, South Carolina, North Carolina, and Virginia) hover around the national average. Before the Voting Rights Act, none of these states was at the 50 percent mark in black registration. Alabama was at 23 percent of eligible black voters, and Mississippi, lowest of all, was at 6.7 percent.

In officeholding, too, the results have been dramatic.[1] Between 1968 and 1980, the number of black elected officials increased tenfold

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[1] See Joint Center for Political Studies, National Roster of Black Elected Officials - 1980, reprinted in H. R. Rep. No. 227, 97th Cong., 1st Sess. 9 (1981).

(1,000 percent) in Alabama, while the number of elective offices remained about the same. In Georgia, there was a twelvefold increase in black elected officials, in the face of a nine percent decrease in the total number of elected offices. In Louisiana, there was a tenfold increase in black officeholders in the face of a slight decrease in total offices; in Mississippi, a thirteenfold increase; in North Carolina, a twenty-fivefold increase; in South Carolina, a twenty-onefold increase; in Virginia, only a fourfold increase. It goes without saying that, in each case, the percentage of black officeholders is far below the black percentage of the population; yet who could have imagined that, little more than a decade later, there would be some 5,300 elected black officials in Mississippi, which in 1968 had 29?

It is important to be very clear on the meaning of these developments. It is not asserted that the work of the Voting Rights Act is over, that obstacles to minority participation have evaporated, or that Congress can smugly conclude that discrimination in the political process is a thing of the past. If that were true, there would be no need to extend the life of the Voting Rights Act, and few informed observers believe this to be the case. But it does seem plain that the Voting Rights Act has, in conjunction with other forces, set in motion a considerable political change in the South -- a change very much in the direction intended by the legislation.

Now it seems to be a rule of American public policymaking that, if a process, institution, or policy demonstrates its capacity to fulfill one purpose, it will soon be given additional and quite different

functions to perform. It will then be taxed beyond its capacity. Its earlier success will then prove to be its undoing. This is what has now been proposed for the Voting Rights Act, and I intend to argue that this is both unnecessary and unwise.

II. The Proposed Amendment and the State of Current Law

As currently written, section 2 of the Voting Rights Act provides that no state or municipality may apply a "voting qualification or prerequisite to voting, or standard, practice, or procedure" in such a way as to "deny or abridge" the right to vote on grounds of race or color or linguistic affiliation. In City of Mobile v. Bolden, 446 U.S. 55 (1980), a four-member plurality of the Supreme Court held that, to demonstrate a violation of section 2, it is necessary to show an intent to discriminate. Justice White, dissenting, did not take issue with the need to show discriminatory intent, but concluded that it could be inferred from the record in Bolden. Id. at 94-103. A clear majority of the Court was thus in agreement that racially discriminatory effect alone is not sufficient to invalidate an electoral arrangement.[2] And the plurality opinion notes that the same standard applies under the Fourteenth and Fifteenth Amendments as it does under section 2 of the Voting Rights Act. Id. at 65-66. Indeed,

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[2]Indeed, the level of agreement on this proposition is even greater than I have depicted, for Justice Stevens, concurring in the judgment, is also in accord, and on this issue Justice Blackmun, concurring in the result, appears to agree with Justice White. Id. at 82-94, 80. Thus, the proposition commands the assent of seven Justices.

as the opinion points out, section 2 is simply a restatement of the nondiscrimination provision of the Fifteenth Amendment. Id. at 60-61.

It is asserted in the House report on the proposal presently before this subcommittee that the change sought in section 2 of the Act is required to "clarify ambiguities" created by the Supreme Court decision in Bolden.[3] The House report states that the amendment of section 2 would "restore the pre-Bolden understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."[4] This would appear to suggest that Bolden produced a change in the Supreme Court's view of the Act.

To suggest this, however, is very seriously to misrepresent the state of Supreme Court decisions under the Voting Rights Act and under the Constitution. To my knowledge, the Supreme Court has never endorsed the view that the "proper legal standard" under section 2 is anything other than discriminatory intent.[5]

A brief review of a few leading cases makes this quite clear. In Whitcomb v. Chavis, 403 U.S. 124 (1971), a district court had invalidated a multimember constituency arrangement for a state legislature on the grounds that, under it, disproportionately few legislators had been elected from an identifiable black ghetto area. After an exhaustive consideration of the evidence, the Supreme Court reversed, holding flatly that the standard is intent to discriminate:

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[3] H. R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981).

[4] Id. at 29-30.

[5] As noted below, however, section 5 is another matter.

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political process and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

403 U.S. at 149-50. There could hardly be a more decisive refutation of the position the House report says was the "proper legal standard" before Bolden.

To be sure, some electoral arrangements have been overturned by the Supreme Court on grounds of invidious discrimination. In each case, there has been a finding of intent to discriminate. For example, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court invalidated an attempt by a state legislature to redefine the boundaries of a city so as to exclude black citizens from voting in local elections. The Court found this to be intentionally discriminatory and violative of the Fifteenth Amendment. Similarly, in White v. Regester, 412 U.S. 755 (1973), the Supreme Court sustained a district court finding that certain multimember legislative constituencies in Texas were unconstitutionally discriminatory. In the course of its opinion, the Court made clear the intentional character of the discriminatory actions. "To sustain such claims," Mr. Justice White wrote in a portion of the opinion joined by all nine Justices, "it is not enough that the racial group allegedly discriminated against has not

had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the groups in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id. at 765-66.

Bolden, then, introduced no "ambiguity." On the contrary, it reaffirmed longstanding doctrine that the concept of discrimination entails more than merely disparate results by race or ethnic group. This doctrine has been applied, not only in the area of electoral discrimination but more generally in laying down constitutional standards applicable to governmental action impinging on ethnic and racial interests. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Jefferson v. Hackney, 406 U.S. 535 (1972).

The proposed amendment to section 2, then, far from "restoring" some "prior understanding," would produce a radical change in the Act. Just how radical is made clear by an examination of Allen v. State Bd. of Elections, 393 U.S. 544 (1969), the first Supreme Court case to construe the Voting Rights Act in any depth. Until Allen, a respectable body of opinion believed that the Act did not apply to any electoral practices except those that impinged on voter registration -- so limited was the scope of the Act thought to be. The majority in Allen pronounces this a close question and then opts for the broader view of the Act as being "on the whole" the one better supported by

legislative history. 393 U.S. at 566. In view of the closeness of such basic questions of coverage, it can hardly be thought that section 2, a very straightforward restatement of section 1 of the Fifteenth Amendment, could have been intended to dispense with proof of intent to discriminate. If that was the legislative intention, it was a very well kept secret at the time. Given the fundamental change the amendment of section 2 would produce, it becomes essential to scrutinize the proposed amendment carefully and to consider what its likely effects would be.

III. Section 2 and Section 5

Section 5, unlike section 2, currently contains a "purpose and effect" standard. That is, it judges voting qualifications and electoral practices by whether they "have the purpose" or "will have the effect" of denying or abridging the right to vote on discriminatory grounds. However, there are two crucial differences between section 5 and section 2. First, section 5 applies only to jurisdictions that fall within the coverage formula of section 4(b), whereas section 2 applies to all jurisdictions. Second, section 5 applies only to changes in electoral law, whereas section 2 applies to all electoral arrangements, including those that have been in force for many decades (Mobile's arrangements, challenged in Bolden, went back to 1911).

The rationale for the stricter standard of section 5 is clear. In states and municipalities with a history of discrimination or of enforcing qualifications conducive to discrimination, such as literacy tests, there was some ground for thinking that changes might be

enacted in order to perpetuate discrimination at the polls. In such jurisdictions, a change that had the effect of reducing black registration, for example, might be presumed discriminatory. In point of fact, judicial interpretation of the "effect" standard has gone much beyond this, and there is a serious question about whether the law of section 5 ought to be imported wholesale into section 2, with its completely different purpose, scope, and coverage. For, if section 5 standards are wri ten into section 2, they will apply to all electoral arrangements, old as well as new, in all jurisdictions in the United States.

The contrast between section 2 and section 5 is best revealed by contrasting Bolden, a section 2 case, with City of Rome v. United States, 446 U.S. 156 (1980), a section 5 case decided the same day as Bolden. The city of Rome, Georgia, had made changes in its electoral system, requiring majority votes to elect city commission members, reducing the number of wards from nine to three (each with three members), staggering the terms of commission members, and requiring commission members to reside in the wards from which they were elected. A different set of changes was enacted for the Board of Education, and the city had also annexed a large number of adjacent areas, incorporating them in the electoral boundaries of the city. Pursuant to the preclearance procedure of section 4(b) of the Act, Georgia being a "covered" jurisdiction, the Attorney General declined to approve many of the changes and annexations (most of which had white-majority populations). When the city brought suit, the district court found that the changes had no discriminatory purpose but did

have a discriminatory effect. That effect was to "dilute the effectiveness of the Negro vote in Rome." 446 U.S. at 183. Specifically, the ward and electoral formula changes reduced the chance that a black candidate could be elected by a plurality in a black-minority city, by forcing such a candidate into a runoff election in which white voters would be more likely to provide a majority vote for a white candidate. 446 U.S. at 183-84. The annexation of areas with a greater proportion of whites than the city previously had was also held to be an unlawful "dilution." 446 U.S. at 185-87. Section 5, the majority held, renders unlawful any electoral change that might produce a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral process." 446 U.S. at 185, quoting Beer v. United States, 426 U.S. 130, 141 (1976). And "effective exercise" means the likelihood of electing minority candidates.

It should be underscored that the prohibitions of section 5, as construed, are absolute. No matter what other goals and values are served by electoral changes, the changes are invalid if they "dilute" the effective voting strength of minorities. So, for example, if a city like Rome annexes an adjacent area to enhance its tax base or to fulfill an urgent development need in waste management or transportation, or to achieve economies of scale in the delivery of municipal services, or to serve any of the myriad purposes government might reasonably wish to serve by annexation, it may not do this if, as in Rome, the proportion of blacks to whites in the annexed area is lower than that in the annexing area and the electoral system is not altered somehow to compensate. This, despite the fact that there has been no

voting discrimination in such a city, as there had been none in Rome for at least 17 years.

Moreover, as the Rome case illustrates, the denial of preclearance to make electoral changes, followed by litigation to challenge that denial, can produce a delay of many years in holding municipal elections. In Rome, no elections had been held since 1974, because the city and the Attorney General were at a stalemate over the changes.

Perhaps these stringent consequences are necessary to root out all traces and vestiges of discrimination in covered jurisdictions under section 5. Perhaps they are necessary to prevent drastic electoral changes from cancelling out the political impact of black enfranchisement in the South after 1965. I have doubts that the Court's interpretation of section 5 in the Rome case accords with what was intended when the Act was passed, as well as doubts about whether such an interpretation is necessary for the purposes proclaimed. But let us put these doubts aside for a moment. Whatever the wisdom of this view of section 5, it is not the Court's view of section 2, as Bolden makes abundantly clear. The "effects" standard of section 5, as now construed, applies only to covered jurisdictions, and covered jurisdictions have a history of outright voting discrimination or of dubious voting practices coupled with historically low voter registration.

Finally, the stringent view of "effects" under section 5 is coupled with two sets of safeguards. First, preclearance provides administrative flexibility, so that the Attorney General can use his discretion in judging between permissible and impermissible changes in

electoral laws proposed by states and municipalities. Second, there is the so-called bail-out provision of section 4(a), whereby a covered jurisdiction may, by bringing a declaratory judgment action and proving that no "test or device" with a discriminatory purpose or effect has been used for a period of years, secure exemption from the preclearance requirement of section 5. (This provision, too, is the subject of amendments in the House version.) Consequently, the very rigid standards of section 5 are accompanied by safeguards in their application and in at least the possibility of exemption from them. No such safeguards would be available were the "effects" standard made part of section 2.

The House version of section 2 wisely disclaims any intention to enact a regime of ethnic or racial proportionality in officeholding. But if the "effects" standard is imported into section 2, this may be impossible to avoid. As we have seen, the effects standard under section 5 implies some concept of "dilution" of minority voting strength. Where, as in section 5 cases, there is a change in electoral arrangements, it is at least possible to gauge whether a "dilution" will occur by forecasting the likely impact of the electoral change and comparing it to the status quo ante. If there are more minority officeholders before the change than are forecast for after, then a dilution can be found. Section 2, however, applies to existing arrangements as well as to changes. Without a before and an after to compare, the meaning of a discriminatory result is impossible to gauge, unless it means representation below the level minorities "ought to have." And if one admits that such an objective standard of

representation exists, despite the absence of a before-and-after, it is a short step to ethnic and racial proportionality. The disclaimer of ethnic proportionality in the House amendment may ultimately come to nought.[6]

Again, therefore, the crucial differences between section 2 situations and section 5 situations manifest themselves: it is not wise to import section 5 standards into section 2, which applies nationwide and to longstanding electoral arrangements, as well as to changes in electoral arrangements. The proposed change in section 2 would go far toward making the whole of the United States a "covered jurisdiction."

IV. Section 2: Assumptions and Impact

Quite apart from the differences between section 2 and section 5 situations, there is a host of largely-unexamined premises surrounding the concept of "discriminatory effects." Chief among these is a very limited and mechanistic view of minority political power. The notion is abroad in the courts and in these halls that the only effective political representation of minorities is the actual election of minority representatives. Hence "dilution" of voting strength has come to mean, in operational terms, a likelihood of fewer minority representatives the day after an electoral change than the day before. This was not the original meaning of the term, which comes from the quite

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[6] See Abigail M. Thernstrom, "The Voting Rights Act: The Statutory Meaning of Electoral Discrimination," paper presented at the American Political Science Association meeting, September 3, 1981.

different context of the one-person, one-vote reapportionment cases. See Reynolds v. Sims, 377 U.S. 533, 555 (1964). There what it means is that a voter in one constituency has a smaller say in electing his representative than does a voter in another constituency, because the size of the constituencies is unequal and thus "malapportioned."

The transfer of the term dilution to ethnic and racial issues is unfortunate, because it implies a view of the vote that exalts "representation" at the expense of power and influence. Even at that, it is, as I have said, a curious view of representation that gauges it by whether an ethnic or racial minority has elected a few minority representatives. Consider what this constricted view implies. To begin with, it assumes minorities will be satisfied with minority representatives. And, by making minority representation the standard -- thereby favoring single-member residential constituencies and disfavoring at-large elections regardless of the configuration of party competition -- this view of dilution consigns minorities to a minority role and a segregated place in the political process. By that I mean that assured separate minority representation encourages local white politicians to say to the minority communities: "You have your own representatives. Don't come to us with your problems; speak to them." But, in the vast majority of cases, minority representatives will also be a minority in the city council or legislature, and a plea to them alone will be unavailing. At best, under such circumstances, it can be said that separate representation postpones interethnic and interracial political contact and bargaining until after the election results are in, when polarization may already have occurred and when a

minority on a local council may be powerless. In my judgment, it is preferable to seek ways in which that bargaining can take place before the election, while the results are uncertain and the marginal value of minority support for majority politicians who seek it is likely to be greatest.

Indeed, the point can and should be pushed a bit further. Assured separate representation is likely to have an important effect on the political process of a locality. It is likely to discourage appeals to the minority electorate by majority politicians. For the most part, minority votes will not count in election contests in which the contestants are both white. In those contests, there will be every incentive to appeal instead to anti-minority biases where majority-minority tensions are running high. It is no mere cliche to suggest that separate representation of minority interests, by reducing electoral incentives to appeal across ethnic or racial lines to minority votes, may well foster polarization.

Now there is a rejoinder to this argument that is not altogether without merit. It is this: In a great many localities, majority opinion is sufficiently homogeneous so that, almost regardless of the electoral system employed, there are no incentives to appeal for minority support. Where this is the case, at-large elections will generally leave minority voters poorly served. But there is, in turn, a good answer to this depiction of reality. It simply cannot be assumed that contests will not occur in which white candidates will consider it in their interest to seek minority votes. To put it dif-

ferently, even in the South, white cohesion is a variable, not a constant.

There is yet another variable that needs to be considered: demography. Those who argue on "dilution" grounds against at-large representation and against annexation do so because they believe minorities to be geographically compact and, more precisely, to be clustered in center-city areas. For the black population in metropolitan areas, this has largely been true, though it is less true for Mexican-Americans. But we should not overlook changes in population distribution that bear on this question. Some of these changes are extraordinary. From 1960 to 1978, the black population inside central cities in metropolitan areas grew by 79 percent. In the same period, the black population outside central cities in the same metropolitan areas grew by 134 percent, not quite twice as fast but much faster. Where residential concentration could be taken for granted in the past, it no longer can be.

The implications of this seem obvious. It is a mistake to lock the country into a system of minority representation that assumes racial clustering in perpetuity, that accordingly favors single-member constituencies, and that measures effectiveness of the vote by the proportion of minority representatives to minority population. That is the ineluctable trend under the "effects" standard, and that seems to me what the amendment to section 2 would do nationwide. On the basis of limited assumptions that are sound at some times and places but not at others, the amendment would create a body of law that is neither time-bound nor place-bound but uniform, once and for all.

Finally, there is a more general point to be made about this amendment and the future of race relations. In a good many countries that have been torn by ethnic and racial conflict, the electoral system has been one of the tools of amelioration. A range of electoral formulae and ballot structures has been employed to achieve a variety of conflict-reducing goals. The goals include inducing moderation on the part of a majority toward a minority, encouraging formation of multiethnic coalitions, and reducing majority voting cohesion. Different devices are apt for each goal, given divergent demographic and party structures.[7] But one thing is clear: if these conflict-reducing devices had to be tested by a rigid "effects" standard, they could not be implemented. The same is true for municipalities and states in the United States that might wish to use the electoral system constructively in the quest for a more just and satisfying relationship among ethnic and racial groups or, one might add, for other legitimate, racially-neutral purposes. The rigidity of the "effects" standard, as it is likely to be construed, will preclude a great many such innovations.

V. Conclusion

Having praised progress made under the Voting Rights Act and disparaged the amendment under consideration, I want to make clear that there are electoral changes in non-covered jurisdictions that

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[7] See my paper, "Ethnicity and Development: Policies to Deal with Ethnic Conflict in Developing Countries," A Report to the Agency for International Development, March 1981, pp. 35-63.

seem to me to pose threats to minority voting rights. In multimember constituencies, provisions designed to preclude "bullet voting" would be a fairly clear example. But I see nothing in section 2 as it is currently written that renders it inadequate to cope with such problems. See White v. Regester, supra. If the Voting Rights Act were not working, if the right to vote were habitually being thwarted, if minority representation were just a chimera, I would urge this subcommittee to try something new and more effective. That is not the situation we find ourselves in. Instead, we are urged to rewrite section 2 with no showing of need and with no apparent understanding that the new section, as it is likely to be construed in the light of section 5, comes close to mandating on a nationwide basis --in state and local elections, moreover -- single-member constituencies and practically reserved seats for members of ethnic and racial minorities. I find this a depressing prospect for our polity.

The matter goes much beyond the Voting Rights Act, for the proposed amendment to section 2 muddies the meaning of discrimination. As I have just suggested, there is in fact racially discriminatory behavior that takes place and needs to be identified, condemned, and redressed. The existing section 2 is aimed at that kind of behavior; the amendment is not. It calls something else -- namely, disparate results in the electoral process -- "discrimination," and it opens the way to findings of discrimination against states and municipalities that have been guilty of no such thing. In my view, this would be a deplorable result. The sanctions of the act should be reserved for discriminatory practices. Law is debased when the language which

constitutes its currency is devalued. The late Hannah Arendt, speaking of the need to identify those Nazis guilty of atrocities, once criticized the concept of the "collective guilt" of the whole German nation. "Where all are guilty," she said, "none is." The same principle applies here. We should be wary of calling something discrimination which manifestly is not discrimination, lest those who really practice discrimination come to be regarded as no worse than those who do not.

Senator THURMOND. Our next witness is James F. Blumstein, professor of law, Vanderbilt University School of Law.

Mr. Blumstein, would you come around? we are glad to have you with us, and you may proceed now, Mr. Blumstein.

STATEMENT OF JAMES F. BLUMSTEIN, PROFESSOR OF LAW, VANDERBILT UNIVERSITY LAW SCHOOL

Mr. BLUMSTEIN. Thank you, Mr. Chairman.

My name is Jim Blumstein, and I am a professor of law at Vanderbilt Law School. Unlike the previous speakers, I will speak from notes. I do not have a particular written text.

Senator THURMOND. Would you want your entire statement put in the record and then just speak from notes.

Mr. BLUMSTEIN. Please, Mr. Chairman. I have a prepared statement which I have provided to counsel.

Senator THURMOND. Without objection, that will be done.

Mr. BLUMSTEIN. As a matter of background, I do have some experience in the voting rights area. I was involved in the voter durational residency case, *Dunn* v. *Blumstein,* and I have been representing the League of Women Voters of Tennessee in an absentee balloting case, and have worked on voting matters with the National League of Women Voters, the National Municipal League, Common Cause, and the American Civil Liberties Union. I have worked with both the Democratic and Republican Parties on voting matters.

In my remarks, I would like to focus exclusively on the intent versus the effects issue in section 2. I have been asked to do that and I would like to concentrate my remarks exclusively on that question.

My conclusion, which I will state in advance, is that the intent standard should be retained as a matter of principle. I would say to the extent that the *Mobile* case is ambiguous—and I do not read it as being ambiguous but to the extent that it is ambiguous—then I think that the intent standard should be stated explicitly in the legislation.

Nondiscrimination is an important principle and nondiscrimination, as I hope to show, means intent, volition. A substantive effects standard must imply either no theory at all or an underlying

theory of some affirmative, race-based entitlements. In my opinion there has been no principled opposition to the intent standard; the opposition really comes on the basis of pragmatism, that is, the problem of proof.

Now there is some question on the problem of proof. Four Justices in the *Mobile* case believed that the intent standard there was satisfied, and *White* v. *Regester* is an example in which a plaintiff prevailed. We do not really know whether that case used an intent standard or not but it certainly has been interpreted that way. After the *Mobile* decision, there have been cases in which plaintiffs have prevailed under the *Mobile* standard.

Nevertheless, I think it is fair to say that pragmatism is a legitimate concern. We do not want to have something that is fine in theory and unworkable in practice. In my prepared testimony I have suggested a way of accommodating the important points of principle and the concerns of pragmatism.

I will focus on three issues in my oral testimony: first, the concept of the nondiscrimination principle; second, the theoretical implications of the substantive effects standard in the House bill; and, third, some of the practical consequences of an effects standard. First, let me talk about the nondiscrimination principle.

Under a nondiscrimination principle, a plaintiff must show that there is disparate treatment because of race. That is what nondiscrimination means and it is important, fundamental to recognize that there is a basic distinction between discrimination on the one hand and disadvantage on the other. Discrimination and disadvantage are not the same thing.

The law protects against lack of evenhanded treatment based upon race. This is the notion that some have called the fair shake concept. It is essentially procedural in its orientation and it is not outcome-oriented.

If you will indulge me in an anecdote, there is the old story about the Mississippi registrar that is lining up a bunch of farmers, three whites and one black, and they are administering the old literacy test. The registrar asks the white farmers to read from the U.S. Constitution; they do, and they are all registered.

The black farmer comes up and the registrar shows him a copy of the Peking Daily and says, "Can you read that?" The farmer, much to her surprise says, "Well, yes, I can." She says, in utter shock, "Well, what does it say?" He says, "Well, it says that blacks ain't going to vote in Mississippi this year."

That is discrimination. When you see that kind of disparate treatment where there is a clear distinction based upon race, that is what I see as discrimination.

A disadvantage, on the other hand, that comes from neutral government action, is not discrimination. Proof of disadvantage is, of course, relevant in inquiring into discrimination but disadvantage itself is not discrimination.

One of the key distinctions between discrimination and disadvantage is the element of volition, intent. In the absence of a classification clearly based upon race, intent is the way we distinguish between disadvantage and discrimination.

Now in my written testimony, I use a nonracial, nonvoting example to pinpoint this distinction. Take, for example, a university, a

major university that has a German department, and the German department requires that a new candidate for a position must be a native German. Because of the Nazis and the Holocaust, this would effectively exclude all Jewish candidates.

The rationale for the department is that the educational policy for teaching foreign languages requires someone who is native-speaking. Is this German department policy religious discrimination against Jews?

Well, there is not an easy answer to that question. You cannot determine that all of a sudden, since Jews are excluded from this activity, that therefore they are discriminated against. Certainly they are disadvantaged. How do we know whether the disadvantage is, in fact, discrimination?

Well, we begin to look at certain things like the history of this rule. Why was it adopted? Are the faculty members Nazis or former Nazis? Is there an educational importance to this rule? Are there reasonable substitutes? Basically, what you start asking yourself are questions focusing on the credibility, the good faith, the intent of the decisionmakers. Is it legitimate? Was it for bona fide reasons? If it is, then probably it is not discrimination. If it is done to thwart Jewish applicants, not to have any Jewish members of the department, then clearly it would be discriminatory.

If that is the nondiscrimination principle, let me turn then to the theoretical implications of this effects standard. What it does is focus analysis away from process. Nondiscrimination is a process concept. It looks to results or outcomes. Basically, it changes the notion from a fair shake to a fair share, a piece of the action based upon racial entitlements, and that is what I find objectionable.

The underlying philosophy must be either none at all or some affirmative race-based entitlements. Otherwise, how can an effects measure be appropriate? What is effects measuring if it is not measuring deviation from some norm? If the violation is measured by results, what is the violation? The violation must be that the adverse effects are meaningful only if we assume that there is a deviation from some underlying principle.

One can see this from the malapportionment area. We can prove malapportionment without proving intent. Why? Because we have an underlying normative standard: the one-person-one-vote rule. Deviation from that rule can be demonstrated by effects. But unless you have that normative underlying principle of one-person-one-vote, proof of deviation cannot be determinative. You must have some kind of an underlying concept of entitlements if you are going to make sense out of this effects standard.

Let me turn from the theory to the practice. The effects approach cannot be looked at in a vacuum. There is other civil rights legislation that is implicated, specifically title VI. There is a split in circuits now as to how title VI is to be interpreted, whether intent or effect.

One of the very significant potential consequences is that title VI will be interpreted to have an effects test. This would be extremely far-reaching. Under an effects test under title VI, if you have a program that targets minorities and benefits them expressly, it would practically immunize this program from cutbacks because inherently there would be a disproportionate impact. You would be

essentially giving a form of tenure to programs that were designed to benefit minorities because by definition they would be disproportionately affected.

Second, the language of the proposed House bill on section 2 is uncertain. The revision leaves ambiguous what a denial or an abridgement is. It does not say what is prohibited and it does not say why it is prohibited. It does not define a violation or an abridgement of voting rights. It just says, "results in the denial or abridgement."

There is another potentially far-reaching consequence. An example I use in the written testimony is, suppose a jurisdiction is considering reducing the voting age from 18 to 16. Assume that more blacks are aged in the 16- to 18-year-old category, and the proposal is voted down on the grounds that 16-year-olds are not sufficiently mature. Certainly there would be a disproportionate impact upon blacks. They would be denied the right to vote. Under section 2, is that a violation?

Third, for the reasons that Professor Horowitz stated, the disclaimer is likely to be ignored in practice. There is an inexorable trend toward using an easy standard, a numbers standard. This happened in the reapportionment area where in *Baker* v. *Carr* the thought was that we had a flexible standard, and we wound up having an inflexible standard.

Basically, in conclusion it seems to me that the policy of focusing on results assumes that racial bloc voting is an antidote to oldtime race discrimination. The assumption is that black districts will vote for blacks. I treat this as a cynical view. It perpetuates racial voting. It promotes the notion of "fair share," "a piece of the action." It reduces the incentives for interracial coalition formation. I would commend to the members of the subcommittee the quote in my statement from Justice Douglas's opinion in *Wright* v. *Rockefeller.*

Now while there is no theoretical justification for a deviation from the intent standard, in my point of view, you cannot ignore the claims made by those lawyers who practice civil rights law that there is a practical problem of proof. My testimony advances a proposal that accommodates these principles of pragmatism with the principles that I have articulated.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you. We are glad to have you with us.

Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I want to thank Professor Blumstein for his thoughtful statement, with which I generally concur. It seems to me one would say that if governmental action occurred a long time in the past, the problem of reconstructing the facts and circumstances at a given time may be insurmountable. This is one of the things that occurs to me: It is not only what happens a long time past but what happens over a period of time, perhaps running right up to the present. Wouldn't you agree with that?

Mr. BLUMSTEIN. Senator, I certainly agree that there are practical problems, that there are potential problems of proof. The intend standard, however, has been applied in a wide variety of

areas, in the criminal process, in the defamation area, and certainly in the desegregation area.

I think in my own circuit, the sixth circuit, you can certainly ask the people in Dayton and Columbus as to whether the intent standard is unworkable. They have court-ordered, districtwide desegregation plans based upon a finding of intent to discriminate. So it may be more difficult but I hardly think that an intent standard is universally unworkable.

Senator MATHIAS. You concede that it is more difficult?

Mr. BLUMSTEIN. Oh, I certainly concede that it is more difficult. Just the way——

Senator MATHIAS. I think that was what you said. I have not seen it in your written statement but in your oral testimony I think you said that it was easier to detect results than it was to detect intent, did you not?

Mr. BLUMSTEIN. Well, Senator, at the risk of sounding flip, if I have a standard that said that we would order a districting system if the sky were blue, that would also be an easier standard to meet, but there would be no rational basis——

Senator MATHIAS. I am asking you what you said. I am not demanding a new hypothetical from you; I just was trying to reconstruct what you said. We can ask the reporter to read it back.

Mr. BLUMSTEIN. No, no. I did say that it is difficult, as a matter of pragmatism, to prove intent. That is certainly right. The problem I have with effects is that it does not make any theoretical sense unless you assume affirmative entitlements based upon race, which I am not ready to do. The implications are far-reaching and unacceptable.

It is the principle, the implication of what an effects standard means, that I find objectionable. What have you proven?

Senator MATHIAS. Well, I agree with you that it is harder to prove intent. I think I part company with you on your latter. Thank you, Mr. Chairman.

Senator THURMOND. Senator DeConcini?

Senator DECONCINI. Mr. Chairman.

Professor, thank you for your testimony. It is excellent. On pages 14 through 17 you suggest that there will be no standard for courts to apply a section 2 without moving to proportional representation. At least that is the way I read it.

You give a hypothetical situation involving voting age requirements, I believe lowering voting age from 18 to 16, requirements which might have a different impact on the number of whites and the number of black voters. Your hypothetical is based on what I consider a simple analysis of the number of voters, unless I missed something there.

Now under S. 1992, according to the legislative history, it adopts the standard of *White* v. *Regester*. My question is, didn't that case make clear that much more is required before the court concludes minorities are frozen out of the system and denied their access to participate?

Mr. BLUMSTEIN. Senator, two comments, if I may, in response to that:

First just an ironic response, and that is that I have heard the argument that legislative history will solve an ambiguity in lan-

guage. Of course, that requires courts to look at legislative intent, which we are told is almost impossible to do. Therefore, the constraint of the restriction on the vague language is premised upon the court looking at legislative intent, and yet we have been told on the other hand that legislative intent pragmatically, as a matter of practice, is difficult to prove.

In response to your point, from the language rather than the legislative history that is appended to that provision, it is awfuly difficult to reconstruct by legislation a test in a particular case in a vacuum, without looking at how courts have dealt with other cases in the area of title VII, in title VI, and so forth.

Senator DECONCINI. Excuse me for a second. Do you quarrel with the standard set forth in *White* v. *Regester* and followed in almost a couple of dozen cases, I am told?

Mr. BLUMSTEIN. Senator, if we could agree upon what the standard in *White* v.——

Senator DECONCINI. Are you not clear enough?

Mr. BLUMSTEIN. If we can agree on what the standard in *White* v. *Regester* was, then I think that we could have a more meaningful conversation. In my——

Senator DECONCINI. Excuse me. Just let me follow that. You do not think you can clarify it or make it as clear as humanly possible through legislative report language. Is that what you are saying?

Mr. BLUMSTEIN. I am prepared to accept——

Senator DECONCINI. We do not want to do it that way?

Mr. BLUMSTEIN. Let met state my view and then we can see if we have a disagreement or an agreement. I am prepared to say that *White* v. *Regester* is appropriate if the fifth circuit construction, what I would call the latter-day construction of *White* v. *Register,* is adopted—to wit, let's look at all these factors as potential inferences, circumstantial evidence, but you must draw the bottom line that they, mounted together in the aggregate, will show that there is a nonneutral rationale for the legislation.

If that is what *White* v. *Regester* means, then I am prepared to say that that is appropriate, but that is an intent standard. Justice White, in his dissenting opinion in the *Mobile* case, indicated that that is what he thought *White* v. *Regester* was, and that is an opinion he wrote. Of course, that may not be the best evidence. A justice is entitled to change his mind between 1973 and 1980 but that certainly is the interpretation that Justice White gave to it.

I do not think the results language of section 2 is cabined this way; that is my problem with it. It talks about results. You have cases like *New York City Board of Education* v. *Harris* which adopt an impact standard, and New York City lost a lot of money because it did not show positive integrative results.

Now in that situation, perhaps that kind is justified. If the Congress wants to outcome certain kinds of affirmative policies, fine. In the voting area, it seems to me, the appropriate standard is one of nondiscrimination and not affirmative entitlements.

Senator DECONCINI. Yes. I agree with that. It was the example that jumped out at me, I think on page 15, 14 or 15, regarding your hypothetical of a legislature considering reducing from 18 to 16, and then the hypothetical that there were a large amount of blacks, and a further hypothetical that they did not decide to do it.

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Just with that standard there, you know, it seems to me that *White* v. *Regester* required more than your hypothetical, unless I missed something there.

Mr. BLUMSTEIN. Well, if you include that provision, the denial of the reduction in the age, and you show that there is a disadvantage, I think that under a results rationale I think an aggressive lawyer could certainly make the case that a strict reading results in the denial.

Senator DECONCINI. Yes.

Mr. BLUMSTEIN. Given the decision in the *Weber* case, it would not at all surprise me that a willing court could go that far. I think *Weber* is very, very powerful evidence that legislative history and disclaimers in legislation do not get the job done when a willful court has its mind set to do something else.

Senator DECONCINI. Can you give us some cases in point that you know of, or maybe supply to us cases decided under *White* which required intent, before the *Bolden* case?

Mr. BLUMSTEIN. Before the *Bolden* case?

Senator DECONCINI. Yes.

Mr. BLUMSTEIN. Well, again, as I have said before, I am not sufficiently familar with all the pre-*Bolden* cases. I have read some post-*Bolden* cases. I cannot give you chapter and verse of the pre-*Bolden* cases.

The fifth circuit cases do suggest that the fifth circuit had adopted the intent standard in 1978, which would be pre-*Bolden*. I think they had four cases decided all together but frankly, I am reading, I think, Judge Kravitch's interpretation of those earlier cases. I do not have the primary source on that but I believe that those four cases adopted—at least Judge Kravitch in the fifth circuit indicated that they adopted—an intent standard, but that is only secondary evidence. I do not have the primary on that.

Senator DECONCINI. You see, I cannot resolve in my own mind, when you get into trying to decide on the standards in section 2, that there is any great litigation or bank of cases there pre-*Bolden*. Maybe there are, and that is why I asked the question.

I have no further questions. Thank you.

Mr. BLUMSTEIN. Thank you, Senator.

Senator DECONCINI. Mr. Chairman, I do have a brief statement which, with your permission, I would like to have inserted in the record at this point.

Senator THURMOND. Without objection, so ordered.

[The prepared statement of Senator DeConcini follows:]

Prepared Statement of Hon. Dennis DeConcini, a U.S. Senator from the State of Arizona

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Thank you, Mr. Chairman. The topic of discussion before the subcommittee today involves the standard of conduct which should be required of jurisdictions before they are allowed to bail out from the provisions of Section 5 of the Voting Rights Act. While I am sure that much of our time will continue to be spent on other important issues, such as intent versus results in Section 2, I feel that it is imperative that we focus some attention on identifying when a jurisdiction should be allowed to bail out from the coverage of the Act.

Naturally, I am particularly interested in this issue because my home state of Arizona has been under the requirements of preclearance since 1975. I consult regularly with state and local officials during the time I spend in Arizona; bailout is an extremely important matter to them and to the state.

We can all agree that a jurisdiction which has faithfully complied with the law for a substantial period of time should be allowed to exempt itself from the necessity of clearing all its election-related decisions with Washington, D.C. Unfortunately, it is not so easy to agree upon a detailed legal process to assure that each jurisdiction which seeks to bail out has, in fact, complied with both the letter and spirit of the law. I look forward to hearing from the witnesses as to what standards they would apply before a jurisdiction could 'bail out', and what alternatives they might suggest to assure that the citizens of our country can exercise their voting rights to the fullest extent possible.

Senator THURMOND. Counsel for the subcommittee, do you have any questions?

Mr. MARKMAN. I just have one question, Professor Blumstein, the question that Senator Hatch has asked most of the witnesses that have come here: Could you compare and contrast the kinds of threshold questions that the court would ask itself in evaluating the so-called totality of factors under the intent test and under the proposed results test? What would be the question that the court would have to ask itself in evaluating these factors under each test?

Mr. BLUMSTEIN. Well, under the intent standard it would seem to me that certainly it is appropriate to talk about circumstantial evidence, drawing proper inferences from evidence. The thing you must do under intent is to draw a bottom line. Basically, is the rationale ultimately a sham or a pretext or is it a legitimate, credible, neutral rationale? Under the intent standard that is a factfinding decision, by the jury or by the judge, whoever the factfinder is.

Under the effects standard, it seems to me that you do not have to draw the bottom line. You just have to aggregate out a series of factors and the problem is, once you have aggregated out those factors, what do you have? Where are you? You know, it is the old thing we do in law school: You balance and you balance but ultimately, how do you balance? What is the core value?

That is my problem. I am not against an easy standard of proof if it makes some theoretical sense and does not have far-reaching implications. The effects standard is unacceptable because if you do a searching analysis of what the justification is—you are proving deviation from a norm—what can the norm possibly be except racially based entitlements.

That is the problem. I have not seen that in the testimony that I have read—and I have not read it all by any means—but in the little bit, the smattering that I have seen and the conversations I have had, I have not had an answer. I am answered with pragmatism. Fine, if pragmatism is the concern, let's deal with it but within the framework that retains our universalistic notion of what nondiscrimination means. That is what I am talking about.

Basically my view is, and I know that many of us have been on the defensive on this, but my view is that my position is faithful to what civil rights is all about. I think that the movement away from universalism to ascription to concern about race rather than trying to excise race from our system, is a step backward. I think it is about time that people who have been put on the defensive become more aggressive in saying that they are the true torchbearers on this issue.

Thank you

Senator THURMOND. Senator Mathias?

Senator MATHIAS. Professor Blumstein, I must confess you tantalize me. [Laughter.]

The answer you just gave is very interesting in the light of what you say on page 11 of your written statement. On that page you say: "Of course, when an affirmative constitutional or statutory policy exists, the use of a substantive effects test can be appropriate."

Mr. BLUMSTEIN. True.

Senator MATHIAS. Now I have trouble squaring that with your last answer. It sounds to me in that statement as if you are very close to your colleague, John Hart Ely.

Professor Ely says:

> It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous, that is, benefits to which people are not entitled as a matter of substantive constitutional right. In such cases, the covert employment of a principle of selection that could not constitutionally be employed overtly is equally unconstitutional. However, where what is denied is something to which the complainant has a substantive constitutional right, either because it is granted by the terms of the Constitution or because it is essential to the effective functioning of a democratic government, the reasons it was denied are irrelevant.

Mr. BLUMSTEIN. Is there a question at the end of that?

Senator MATHIAS. Do you agree with that?

Mr. BLUMSTEIN. Yes. I think it is totally consistent with my position. The affirmative constitutional——

Senator MATHIAS. Now you are not tantalizing me; you are confusing me.

Mr. BLUMSTEIN. Well, I will see if I can——

Senator MATHIAS. Well, let me just go ahead a second here so that you have it all out. Yesterday we had Frank Parker here, and he looked at the pre-1978 voting dilution cases and analyzing about 20-odd of them, he drew a number of conclusions from these cases, including that the prevailing standard was the results standard; that proportional representation was never required and was routinely repudiated; that there was no per se invalidation of at-large elections; that the results test does not insure near victory for the plaintiffs but that the defendants have won a significant number of cases under the results test; and, that results requires much more than a scintilla of evidence, in addition to the absence of minority elected officials, to sustain a finding of unconstitutionality.

Now it seems to me that this analysis, taken with the John Hart Ely precept with which you say you agree, really leads us to adopt the kind of pragmatic approach of looking comprehensively at a situation——

Mr. BLUMSTEIN. Senator, let me try to respond to that. I think that I now see where you are moving.

The notion that an effects test is appropriate where there is an affirmative constitutional duty applies in cases like interstate commerce, where the Supreme Court has held that there is an affirmative value in the free flow of commerce, or in separation of church and state, where you do not need to find intentional activity to breach that barrier. There is an affirmative policy of separation, and that can be proven by effects, or in the freedom of speech area we have an affirmative policy of encouraging the free flow of information, and that can be shown by showing an adverse consequence.

I certainly would agree, if we talk about what right is being infringed, I would not personally have a problem and I think section 5 really responds to this, as best I understand it. Section 5 is triggered primarily by low-voter registration. I think it is at least arguable that it would be appropriate for Congress and for society generally to adopt an affirmative policy of encouraging voter registration and encouraging voter participation.

What section 5 does, it says if there is not adequate voter registration or voter participation, then there is a breach of what is an important societal value and you can look at the effect. Those are participatory values, and I think it is appropriate for society to encourage participatory values.

My problem here is that the value that is being asserted is a result-oriented value, an outcome value, not a process value. You cannot measure result values or outcome values by effects because there is no entitlement or right. You have a right to vote and you have a right to have that vote counted. You have a right not to be shown the Peking Daily in a literacy test. You have a lot of different kinds of rights associated with participation in the voting process.

You do not have a right to have a particular representative of you political persuasion, your religion, your race, or your gender, elected as an official. That is where we part company. You have precisely put your finger on the problem: There is a right to participate; there is not an affirmative right to have race-based entitlements in the ultimate election of candidates. There you have put your finger on the nub of my disagreement with the language of section 2 of the House bill.

The other thing is that I do not think, in construing an effects standard, that you can look at the standard and just say *White* v. *Regester.* We can say *White* v. *Regester* as many times as we want but we also have *Griggs,* and we also have *Albemarle Paper,* and we also have *Weber.* We also have a set of title VI cases that would seem to have the impact of stopping or very seriously threatening the flexibility of Government policy from closing down hospitals, for example, that are aimed at minority communities, even if those hospitals, as I say in my testimony, are running deficits and are causing a fiscal hemorrhage. That is a serious problem.

If you look at the regulations under the certificate of need legislation, it makes it extremely difficult for a governmental entity to justify shutting down these kinds of hospitals, even though on economic grounds that might be perfectly justifiable. Therefore, I do not think you can look at this and recreate a *White* v. *Regester* standard, assuming we could agree on what *White* v. *Regester* says, on the basis of the language in section 2 as amended by the House.

Senator MATHIAS. Thank you very much.

Senator THURMOND. Any more questions from anybody?

[No response.]

Senator THURMOND. Professor Blumstein, we want to thank you again for your presence here today and the splendid testimony you have presented.

[The prepared statement of Mr. Blumstein follows:]

PREPARED STATEMENT OF JAMES F. BLUMSTEIN

Mr. Chairman, and Members of the Subcommittee, I am James F. Blumstein, Professor of Law at Vanderbilt University School of Law in Nashville, Tennessee. I am pleased to appear today, in response to an invitation from the Subcommittee, to present my views on the renewal of the Voting Rights Act, which is being considered by the Subcommittee.

For the record, I have conducted research that has resulted in a number of articles on voting rights matters and have been involved in voting rights litigation for more than ten years, although I have never been directly involved in a lawsuit in which race-based vote dilution has been at issue. I was the plaintiff and counsel in the durational residency voting case, Dunn v. Blumstein, 405 U.S. 330 (1972), and I have been involved in a number of other voting rights lawsuits. For example, I am currently representing the League of Women Voters of Tennessee in an appeal by the State of Tennessee to the Sixth Circuit Court of Appeals of a federal district court decision holding invalid certain portions of Tennessee's absentee balloting law. I have consulted with the Election Systems Project of the National Municipal League, the League of Women Voters Education Fund, and with the Common Cause Voting Rights Project. In sum, I have spent a good deal of time over the past ten years thinking about voting rights matters and working directly on improving access to the ballot for persons and groups who have for one reason or another been fenced out of the political process.

I have been asked to address my remarks exclusively to the language that should be adopted as part of Section 2 of the Voting Rights Act; specifically, whether the Subcommittee should embrace the "results" standard as proposed in the version of the Act passed by the House of Representatives, or whether an "intent" or "purpose" standard should be retained in Section 2 of the Act.

As a result of the United States Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), Section 2 of the existing legislation has been interpreted to require a showing of intent to discriminate on the basis of race in order for a plaintiff to prevail in a Section 2 lawsuit. As will emerge from the testimony that follows, it is my view that, as a substantive matter, the appropriate standard for Section 2 is the existing requirement for proof of discriminatory "purpose" or "intent." Despite the contrary assertions of its proponents, the "results" or "effects" standard must be based on some theory of racially-based affirmative entitlements to actual governmental representation; otherwise, the "results" standard is, as a matter of substantive doctrine, devoid of any discernible analytical foundation. The justification for the "results" approach seems, on bottom, not to be born of principle but of pragmatism. In my testimony I shall suggest an approach to voting rights legislation that is faithful to the principle of an "intent" standard but also attempts to come to grips with the points proffered by proponents of pragmatism.

I. Intent vs. Effects: The Issues

The debate over the appropriate language for Section 2 of the Voting Rights Act cannot take place in a vacuum. Probably the most important civil rights issue of the 1980s is to determine what we mean by the term "discrimination" and how to prove its existence. That is, we must decide whether discriminatory "purpose" or "intent" is the cornerstone of what we mean by discrimination, or whether discriminatory "effect" or "impact," however defined, is the appropriate yardstick. The distinction, which implicates fundamental value choices, is hardly a quibble. Important principles are at stake, and they cannot be blurred by exclusively focusing on pragmatic considerations of proof. Moreover, these issues arise in other statutory contexts,

including Title VI of the 1964 Civil Rights Act, and the far-reaching implications of adoption of a result-oriented impact standard in Section 2 of the Voting Rights Act could well influence interpretations of other civil rights statutes.

Nevertheless, those sensitive to the injustices of disparate treatment based on race cannot completely ignore the legitimate concerns of those civil rights practitioners who have raised their voices from the civil rights trenches, cautioning against imposing a standard in the name of principle that is unworkable in practice. Their pragmatic concerns are realistic and should be accommodated, consistent with the fundamental principle of nondiscrimination. However, exclusive emphasis on the pragmatic issues of proof cannot be allowed to direct attention from the basic philosophical issues that underlie the purpose vs. effects debate. While an effects standard may increase plaintiffs' prospects of success, adoption of an effects test has some unacceptably far-reaching implications.

A. The Nondiscrimination Principle

The issues involving intent vs. effect arise in a wide variety of contexts. In the constitutional domain, the Supreme Court has ruled that discriminatory purpose is the prerequisite for showing that government classifies on the basis of race in violation of the guarantee of equal protection under the fourteenth amendment. The Court has held that nondiscrimination is the constitutional norm, and proof of a violation must include evidence of racially biased treatment. A complainant must show that a course of conduct was pursued "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial] group."

The essential point, it would appear, is that there is a fundamental distinction between "discrimination" by government, on the one hand, and

neutral government action that has the consequence of disadvantaging an identifiable group, on the other hand. Identifiable groups, even such historically discriminated against groups such as blacks, are not immunized in our rough and tumble political system from the adverse impacts of governmental actions, provided that those actions are not taken for the sake of discriminating on the basis of some impermissible criterion such as race.

Discrimination in the constitutional sense, then, is a fundamentally procedural concept. It focuses on evenhanded treatment of individuals by government. It guarantees individuals a fair shake, a decisionmaking process free of racial bias. The state and those acting under the color of state law are able to make rational classifications, but distinctions drawn on the basis of race are inherently suspect and subject to an extraordinary, almost insuperable burden of justification. This is heavy medicine within our constitutional system because a finding of race-based classifications reverses the traditional presumption of validity normally accorded to legislative action. That presumption stems from our belief in the basic legitimacy of decisions made by popularly elected officials who presumably are responsive to their constituents. Where decisions are based on racial criteria, we have reason to question the assumption of legitimacy of our governmental process; the courts and the Congress have stepped in to thwart that type of discriminatory conduct.

In the sense discussed to this point, the concept of discrimination has an essential ingredient of volition. Our objection occurs when similarly situated people are in fact treated differently because they are of a certain race. That notion of discrimination necessitates a finding of unequal treatment based on race. Absent overt legislative or administrative classifications, such as existed prior to the Brown decision in 1954, the only reliable way of knowing when this

type of discrimination occurs is by proving that government or its agents intended to draw distinctions based on race. Of course, the question of intent is one for a trier of fact to determine, and that factfinder can draw permissible inferences from objective evidence that suggests discrimination in the absence of neutral justifications. But, in the face of plausible, neutral justifications, it is the responsibility of a complainant to show that the plausible, neutral explanations are merely a sham or a pretext for masking racially-based activities.

Perhaps the best way to see this point is by a hypothetical example from outside the areas of race and voting. Assume that the German Department at Anywhere University has a policy of hiring only native speakers who grew up and were educated in Germany. The rationale is that American students should learn how to speak a foreign language from people for whom the language is primary and, presumably, unaccented. In the relevant age cohort of eligible job candidates, there are virtually no qualified Jewish persons because of the Holocaust and the Nazi reign of terror and persecution. The question is whether, faced with the application of an otherwise qualified American Jewish Ph. D, the German Department's policy is discriminatory against Jewish candidates because they are entirely excluded from qualifying for a position.

In thinking about the issue, one quickly turns to "intent" or "good faith" on the part of the members of the German Department. One begins to ask questions about the faculty members — were they Nazis or Nazi sympathizers? What kinds of rules are applied elsewhere? What was the history or derivation of the rule? Why was it adopted? How important is it, educationally, to maintain the rigid rule? Are non-native speakers reasonable substitutes? In essence, one's position on the question whether religious discrimination exists quickly focuses

on the credibility and good faith of the decisionmakers. That is, the inquiry turns on intent to discriminate.

If one is persuaded that the members of the Department were "clean" and were pursuing a policy out of a rational commitment to an educational philosophy, then the conclusion likely would follow that no discrimination occurred. To be sure, Jewish applicants would be disadvantaged — seriously affected in their career advancement. But that would be an unfortunate consequence of a neutral educational decision and the loss would have to be absorbed — unless, that is, there is some affirmative obligation on the part of the University to be especially solicitous of Jewish applicants because of their religion. Only if some religiously-based entitlement exists would reliance on an effects or impact standard make sense analytically.

The German Department hypothetical illustrates the intensely procedural orientation of the nondiscrimination principle. One inquires into procedural or process factors to determine whether the ostensibly neutral policy is legitimate or pretextual. Focus on results or outcomes is a departure from the fundamental principle of nondiscrimination. Naturally, adverse consequences are far from irrelevant. The outcomes legitimately raise questions about the fairness and neutrality of the process. But the ultimate focus of analysis must concentrate on the decisionmakers and the actual basis of their decision. Otherwise, one moves, ever so subtly, from a principle of nondiscrimination (the "fair shake" concept) to a principle of entitlements based on ascriptive criteria such as race, religion or sex (a "fair share" concept). The theoretical change is not often identified or acknowledged, as is the case in the present debate over the language of Section 2, but it is nevertheless there; the subtlety of the change does not diminish the potentially far-reaching implications of its adoption. For

that reason it is my view that, as a matter of substantive doctrine, the nondiscrimination principle and the intent standard of proof should be retained in Section 2 of the Voting Rights Act.

B. Pragmatic Concerns

The objection to an intent standard is normally stated in terms of practical problems of proof. Surely, a plaintiff can more easily demonstrate that, in a statistical sense, an act adversely affects a racial minority. Statistics are readily available, and the issues often narrow quickly to a matter of numbers. Proof of discriminatory intent may be difficult to uncover. If governmental action occurred a long time in the past, the problems of reconstructing facts and circumstances at a given time may be insurmountable. Also, it is undeniable that plaintiffs have a formidable task in determining whose intent is critical in making out a case of discriminatory purpose. The legislative process is, like sausage, something that is more suitably enjoyed after the fact and at a distance. The intent standard surely does require a court to inquire into the underlying "true" rationale why certain votes were cast, laws passed and so forth. The pragmatic concern, and it is not an unrealistic one, is that a good bit of intentional discrimination may go undetected and therefore unremedied.

However, this is not a process of analysis unique to cases involving race discrimination. Proof of intent is a traditional part of the criminal law and for almost twenty years has been a part of the law of defamation, at least when public figures are involved. Moreover, the courts constantly must discern "legislative intent" in construing statutes when the intent of those who agreed on any piece of legislation truly varies. Indeed, advocates of the amended version of Section 2 rely on the courts' construction of the legislative history as a means of assuaging concerns about the broad, uncabined implications of the revised

language. Although the courts' handling of legislative intent is far from exemplary in all situations, they do have to get into the questions of whose intent matters in construing legislative history. The questions involving proof of discriminatory intent are not qualitatively different in character.

Moreover, the ability to discriminate on the basis of race is much more difficult if one is obliged to keep a sanitized record for fear of subsequent lawsuits. Norms of conduct and language have had on an important constraining influence politics in the north. Southern politics for years reflected virulent racism. The social acceptability of saying out loud and up front that segregation would continue as a way of life in the region facilitated the perpetuation of this pernicious racism. Once politicians no longer were able to rouse the rabble by explicit exhortation to racist goals, the politics of the region became much more benign. I have often said that I would rather have to deal with the covert anti-Semite than the Nazi because the range of conduct of the closet anti-Semite is inherently constrained by the need to remain invisible and socially proper. The same can be said of the covert racist. It is much more difficult to achieve pernicious policies for racist reasons when racist sentiments must never be mentioned overtly.

Another factor offsets the pragmatic concern with the problem of proof of discriminatory purpose. In the past ten years, the Supreme Court has expanded the scope of personal liability of governmental officials who violate constitutional rights of individuals. The narrowing of immunity for public officials suggests that persons acting under the color of state law can be held personally liable for damages and attorneys' fees in successful civil rights litigation. Since 1978, local governmental entities have been subject to liability under the civil rights statute, 42 U.S.C. §1983. Although municipalities are not

liable for punitive damages under §1983, it seems possible for courts to assess punitive damages against government officials if they intentionally violate rights of blacks on account of race. Had these holdings been in place during the period of massive resistance in the post-Brown era, one could confidently predict that the concentrated resistance by governmenal officials to that decision could have been overcome with somewhat less hardcore, politically opportunistic official resistance. In any event, the liability possibilities suggest a strong disincentive for official acts of discrimination, and the intent standard suggests a means of imposing personal liability on officials who intentionally deprive minorities of federal statutory or constitutional rights.

C. The Theoretical Implications of a Substantive Effects Test

The adoption of a substantive effects standard has the consequence of focusing analytical inquiry away from the basic process and criteria of decisionmaking, replacing that type of scrutiny with an examintion of results or outcomes. Adherence to that approach, as a matter of principle, is antithetical to the fundamental nondiscermination value. It turns the doctrine from one of "fair shake" to that of racial "fair share," an aliquot proportion of a particular benefit based on factors such as race.

This substantive use of an effects approach subtly but necessarily adopts a philosophy that racially proportionate rates of participation in society's institutions are the norm, any material deviation from which constitutes illegal discrimination. Color-blind rules and procedures are insufficient; racially-based numerical outcomes control. The principle of racial neutrality or nondiscrimination is transformed into an affirmative duty explicitly to consider race in effectuating racially defined outcomes. In other contexts, integration, not desegregation, and quotas, not fair hiring practices, become central. In the

voting arena, the emphasis on fair participation (equal access to registration and voting) is replaced by attention to the number of black elected officials, to the responsiveness of elected officials to perceived minority needs, and other similar outcome-oriented, "piece-of-the-action" concerns.

Candid analysts now recognize that adoption of an effects test must theoretically be premised on some underlying notion of affirmative entitlements. In a lengthy article on employment discrimination law, a colleague of mine acknowledged forthrightly his view that the concept of "preferential treatment" of racial minorities "is implicit in the enactment of laws prohibiting discrimination," even though neither the laws themselves nor their legislative histories expressly make any such provision. That is a view I am not prepared to adopt but one that inheres in the effects approach.

In his dissent in the City of Mobile case, Justice Marshall argued that part of the constitutionally protected right to vote included an affirmative entitlement to equal participation in the institutions of governance. Although he eschewed the label of "proportional representation" as a "red herring," he nevertheless acknowledged that there is some form of constitutionally based entitlement for members of minority groups to participate successfully in the political process. Success clearly had a result-oriented scope, encompassing such factors as the election of black public officials, the responsiveness of government to interests of the black community, the racial ratio of appointees to local boards and commissions, the extent of blacks' receipt of public services, and the overall priority assigned to blacks' needs. Justice Marshall understood the need to identify an underlying entitlement in order to make sense of the effects approach. However, even if the plurality is not correct in characterizing Justice Marshall's position as advocating strict proportional representation as a

matter of constitutional entitlement, surely the plurality is correct in its view that the position of Justice Marshall relies on some theory of affirmative race-based entitlements in actual representation in government. The plurality's response, consistent with the Court's view in Whitcomb v. Chavis, 403 U.S. 124 (1971), and with the nondiscrimination principle, is that the notion of equal participation does not protect any political group, however defined, from political defeat. Equal participation stresses nondiscriminatory access to the electoral process, not the right to elect representatives of any particular race or political persuasion.

To summarize, in order for a substantive effects approach to make analytical sense, a notion of racially-based entitlements must exist — to seats in school, to jobs, to housing, to elected officials and favorable political treatment, to a vast array of life chances. Equality of end result replaces equality of opportunity as the yardstick for measuring civil rights progress.

Of course, when an affirmative constitutional or statutory policy exists, use of a substantive effects test can be appropriate. For example, when the effect of state legislation discriminates against out-of-state commercial interests, such legislation has been held invalid because the commerce clause of the Constitution implicitly contains a norm of free trade. Similarly, a neutral state law that adversely affects the freedom of expression of a person or of a group may be declared unconstitutional because it unduly and unnecessarily interferes with the free flow of ideas, an affirmative value under the first amendment. Likewise, a state law whose primary effect is to advance religion is unconstitutional because separation of church and state is an affirmative value, violation of which can occur inadvertently as well as intentionally.

In the civil rights field generally and in the voting rights area specifically,

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the policy concern has traditionally been race-neutral, evenhanded treatment. The norm of nondiscrimination does not have an affirmative component, despite what the forthright advocates of racial entitlements would have us believe. The orientation of the nondiscrimination principle is fair process and equality of opportunity, not equality of outcomes. Faithful compliance with a racially neutral procedure does not necessarily lead to any predetermined outcome. For a wide variety of reasons having nothing to do with racial discrimination, racial rates of participation in specific institutions may not be consistent with overall population ratios. Lack of black elected officials or perceptions of low priority for black political interests may reflect only that blacks voted for the losing candidate. Therefore, looking solely to outcomes is inappropriate in the absence of evidence that intentional discrimination was the cause of the observed disproportionate results.

D. The Practical Consequences of an Effects Approach

1. As indicated earlier, consideration of the proper standard under Section 2 of the Voting Rights Act must be viewed in context. Similar issues arise in housing and, most importantly, in the Title VI area. Although the Supreme Court in Lau v. Nichols, 414 U.S. 563 (1974), upheld a federal regulation adopting an effects test, a majority of the justices in University of California Regents v. Bakke, 438 U.S. 256 (1978), suggested that purpose not effect was the proper standard to apply in the Title VI field in light of the Court's intervening decision in Washington v. Davis, 426 U.S. 229 (1976) (holding discriminatory purpose the standard under the fourteenth amendment). The courts of appeals that have reviewed the issue have split in their interpretation of the proper standard under Title VI.[1] To the extent that the legislative history of the

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1. My last count is that the 2nd, 5th and 7th circuits have imposed an intent standard, while the 3rd and 9th circuits have clung to the

revised version of Section 2 suggests that the revision is designed to return the construction of the language to its original meaning, that conclusion might well have a considerable impact on the Supreme Court's ultimate resolution of the conflict among the circuits in construing Title VI.

The Title VI issue is important because that provision covers a wide variety of public and private conduct. Title VI bars use of federal funds in programs that discriminate on the basis of race. Adoption of an effects test of discrimination might make it virtually impossible for a recipient of federal funds to take any action that disproportionally disadvantages blacks. This can occur, for example, when governments cut back on programs originally designed for the purpose of disproportionally benefiting blacks. A cutback would inevitably adversely affect blacks disproportionally and thus give these programs a sort of "tenure," immune from the normal political process. An effects approach for Title VI also can bar recipients of federal funds from closing a hospital that serves a minority patient population, even if there is no evidence of racially discriminatory intent and even if the hosptial is running at a substantial deficit and creating a fiscal hemorrhage. Such a rule would have extraordinarily far-reaching consequences, and this Subcommittee should not take any action that might encourage the Supreme Court to interpret Title VI to require an effects standard.

2. The Voting Rights Act, as presently interpreted, has a certain symmetry to its provisions that mirrors constitutional doctrinal developments. Section 5's preclearance provisions adopt a purpose and an effects standard for

Footnote Continued

effects approach. See Guardians Ass'n. v. Civil Service Comm'n., 633 F.2d 232, 270, 274 (2d Cir. 1980); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); NAACP v. The Medical Center, Inc., ____ F.2d _____ (3d Cir. July 20, 1981).

judging the validity of certain voting changes in covered jurisdictions. The triggering mechanism relies primarily on the existence of low voter registration. Congress in 1965 and subsequently has used low registration as a proxy for a concern about potentially abusive voting practices. Once a jurisdiction is covered for purposes of Section 5, it becomes subject to the effects standard. This use of effects parallels the Supreme Court's adoption of an effects approach in a remedial context in constitutional litigation. Thus, in the school desegregation cases, the Court has required a finding of discriminatory intent to impose liability but has focused on effects to measure the success of a desegregation remedy. Presumably, the effects test is used at the remedy stage on the basis of an assumption that, absent the illegal racial discrimination, the school system would be operated on an integrated basis.

Unlike Section 5, which is remedial, Section 2 sets a standard for a finding of liability. It applies broadly throughout the nation — to jurisdictions of which we have no reason to be inherently suspicious. The parallel with the constitutional cases would be to analogize to those establishing a standard of liability, not those focusing on a remedy. Thus, since Section 2 creates a standard for determining liability, parallels to such liability cases as Washington v. Davis and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), would seem to be appropriate. That was the approach in City of Mobile.

3. The precise meaning of the revised Section 2 creates other potential problems. The revised language bars use of any procedure that results in the denial of the right to vote on account of race. The changed language does not really come to grips with the ultimate question of what actually constitutes a denial of voting rights on account of race. The notion of what is prohibited is

not clarified, it is blurred. The modified language provides no real guidance for a court to determine what precisely is prohibited and the reason for the prohibition.

Consider the following hypothetical as an illustration. A jurisdiction faces the question whether to lower the voting age to 16. After legislative debate, the decision is to retain the 18-year old requirement. The rationale is that 16-year olds are not sufficiently mature to exercise the franchise responsibly. Evidence, by hypothesis, would show that a disproportionate number of 16-18 year olds were black. Despite the lack of discriminatory intent, would such a decision (or nondecision) be held invalid under the "results" language of revised Section 2?

If read literally, the 18-year old restriction is a "prerequisite to voting" under the terms of Section 2. By assumption, a disproportionate number of blacks would be adversely affected by the decision not to lower the voting age to 16. If those results are sufficient to show a denial based on race, then the decision might well be invalid. Surely, the blacks in the 16-18 year old age category are absolutely denied their franchise by the legislature's decision.

The point of the hypothetical is to demonstrate the potential scope of an undefined standard that focuses on results rather than on procedures for judging discrimination. Although advocates of the results approach indicate that there are limits to its application, one does not see them readily ascertainable in the language of the revised Section 2 itself.

The disclaimer about proportional representation is likely to be virtually meaningless in practical operation. In the seminal decision in Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court merely held that matters of reapportionment were not political questions. The Court did not, however, purport to adopt any specific constitutional rule for apportionment. The majority suggested a good

deal of flexibility for states, provided that they acted in accordance with some rational policy. In his dissent, Justice Frankfurter noted that discussion of vote "debasement" or vote "dilution" cannot occur in the abstract. One needs an underlying frame of reference, a normative political theory, to determine what a vote is worth. An inference he drew from the majority opinion in Baker was that it did indeed have a theory of apportionment in mind when it described the Tennessee legislature as malapportioned — namely, one person, one vote. Inexorably, the Court was led to that simple manageable formula within two years of the Baker decision.

As a practical matter, one can reasonably predict a similar scenario in the interpretation of revised Section 2. The numbers will become increasingly important to courts adjudicating Section 2 claims because of the complexity of the process of examining all the other factors that would go into such a lawsuit. The legislative change to a "results" standard would be an invitation to the courts to give great weight to the numerical outcomes. The direction of the legislative change could well be interpreted as a green light for considering impact and, as a matter of practicality, the courts likely would tend to rely increasingly on the manageable statistical data that would become available during the course of the litigation. That is a natural development since courts will look to evolve objective, statistical standards if the statute permits; use of such rules reduces the complexity of cases, adds uniformity and narrows the range of discretion for a court. It also would tend to reinforce the importance of naked statistical evidence.

One other ambiguity in the language of revised Section 2 is worthy of mention. Since the language prohibits practices that result in a denial or abridgement of the right to vote, the section could be interpreted to apply to

black-majority jurisdictions as well as to white-majority areas. Consequently, one can foresee claims for assured representation by whites in formerly white-majority cities such as Detroit. If these minority whites can show that higher tax rates or other social policies by black city administrations are likely to encourage further white flight, would that effect be sufficient to state a cause of action under revised Section 2? The potential for enhanced judicial oversight of a multiplicity of local government policy decisions is expanded considerably by the results language of revised Section 2.

4. There seems to be an assumption underlying the revision of Section 2 that minority political interests will be better served by the elimination of at-large elections and the adoption of a districting system for local elections. The reasoning seems to be that black elected officials should represent the interests of black constituents, and that blacks are discriminated against if they are required to seek political advantage by voting for more favorable white candidates.

The districting approach assumes the existence of racially identifiable living patterns, since it will achieve no representational goal if neighborhoods are racially integrated. It also assumes the propriety of encouraging racial bloc voting. The very rationale for seeking districts with black majorities is that blacks will be able to elect a black candidate to office. This strategy for dealing with the ugly residue of Jim Crow accepts the racial basis for decisionmaking but seeks only a piece of the action. It promotes one form of racial politics as an antidote to another, unacceptable form of historically based racial politics.

District elections may achieve some increase in black representation in some areas. But overall it is unclear whether black influence will increase or diminish by the shift from an at-large to a district system. Although it may be

true that racial polarization in some communities effectively precludes the election of black candidates, this does not mean that black political influence is necessarily nullified. In the at-large system, blacks have an incentive to forge coalitions. Once the districting system is adopted, that reduces or eliminates the incentive for the formation of inter-racial coalitions. Representatives in a polarized environment may take a firmly parochial perspective, making governance more difficult.

Moreover, in some communities important local decisions are made by representatives to state government. Where evidence of lack of political clout at the local level exists, that does not necessarily mean that coalitions cannot be formed in the election of officials to state legislative or executive office. Provided no malapportionment exists, blacks can have a fair shot at influencing decisions that affect them locally by participating in coalition-formation for the election of officials at higher levels of state government.

In his dissenting opinion in Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964), Justice Douglas made the point that there is no national interest in defining political groups according to racial characteristics.

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.
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> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion

> rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

As the Subcommittee contemplates the direction to take with respect to Section 2, it should take its lead from Justice Douglas in eschewing the racial piece-of-the-action approach. Ultimately, that reflects the path of cynicism, at odds with our finest democratic traditions; it attempts to eradicate the effects of prior racial discrimination by perpetuating the evil of governmental decisionmaking in accordance with racial factors. In short, by alleviating the incentive to create bi-racial coalitions at the local level, the piece-of-the-action approach encrusts rather than exorcises a previous system of racial politics.

II. Accommodating Principle and Pragmatism

To this point I have sought to demonstrate that the case for an effects standard for Section 2 must either adopt an unacceptable concept of entitlements based on race, or it cannot be defended as a substantive standard at all as a matter of principle. At the same time, I have acknowledged that the principal objection to the intent test for proving discrimination is the pragmatic one of mustering enough evidence of impermissible intent to carry a burden of persuasion before a finder of fact. I will now address myself to this pragmatic concern and suggest an approach, consistent with the intent framework, that accommodates the fundamental commitment to principle with the legitimate concern for pragmatism.

There are two very different types of effects tests that must be distinguished. To this point I have spoken of an effects test that is substantive in character. It purports to measure race discrimination by focusing on the results of certain seemingly neutral conduct. Another type of effects approach involves

primarily a matter of evidence. Its orientation is basically pragmatism, not principle. It retains as a matter of substantive principle the basic theory of nondiscrimination and its standard of discriminatory intent. Its goal is not an alteration of the fundamental concep[illegible] what discrimination is; rather, it accepts the fair process focus of the nondiscrimination principle. Its objective is the pragmatic one of decreasing the amount of undetected purposeful discrimination that occurs. It recognizes that the behavior of complex organizations like government may not be easily individualized or personalized.

Under an evidentiary effects approach, if a certain result is almost certainly to have been caused by a discriminatory act, then proof of the result alone should impose a burden of justification on a defendant to explain its conduct on the basis of neutral, non-racial policies. Since a defendant is permitted an opportunity to rebut the evidence of discriminatory impact, the substantive implications of the evidentiary effects notion are not so grave. The fundamental principle of nondiscrimination is preserved; use of effects in specified, narrow circumstances can be justified as an evidentiary mechanism to avoid some of the pragmatic problems of proof under the intent standard. In essence, this type of effects-oriented doctrine is an institutionalization of normal principles of circumstantial evidence.

An appropriate analogy to the doctrine of res ipsa loquitur (the thing speaks for itself) in the law of torts may be helpful. The res ipsa rule is largely an evidentiary rule for proving the existence of negligence in cases in which plaintiffs have a difficult time in securing all the necessary evidence to make out a case. Under res ipsa the underlying theory of liability — negligence — is retained, but where an accident would not happen in the ordinary course if proper care is utilized, a plaintiff can create an inference of negligence without directly showing that the defendant committed a specific negligent act.

An illustration from the law of medical malpractice is appropriate. If an injured patient can show that surgical sponges were left inside her after an operation, she raises an inference that the surgeon was negligent. A factfinder would be justified in establishing the defendant's negligence from this showing alone. The defendant, on the other hand, is afforded an opportunity to rebut the inference of negligence by showing that the injury was not his fault. Rebuttal evidence is relevant to show either that no negligence occurred or that it did not cause the injury.

Applied in the voting rights context, the res ipsa idea, if embodied in legislation, would suggest an accommodation between the mandate of principle and the call for a pragmatic way around problems of proof. Where common sense and experience indicate that a certain racially disproportionate impact almost always stems from purposeful discrimination and no other cause, and where direct proof of the discriminatory conduct itself is difficult to obtain, some form of an evidentiary impact approach may be justifiable. A defendant would than be permitted to present evidence justifying its conduct on nondiscriminatory grounds, indicating the neutral, non-racial basis for the decision. The factfinder would have to weigh the overall evidence to determine whether, with the assistance of the res ipsa - type inference, the plaintiff would prevail by carrying his overall burden of persuasion on the ultimate question of intent.

In practice, I would think that the Subcommittee, from its hearings and independent investigations, could identify types of conduct which have very little social utility, which are subject to abuse by persons seeking to disenfranchise minorities, and wherein a violation is very difficult to establish. These specific

procedures or practices could be enumerated in the legislation, suggesting that proof of the use of these practices and otherwise unexplained disproportionate results would raise an inference of racially discriminatory intent. The Subcommittee would have to be careful not to embrace this invitation so enthusiastically so as to swallow up, by a procedural artifice, the basic underlying intent principle. Nevertheless, used selectively, this approach offers an opportunity to strike a balance between principle and pragmatism. It is also a technique that Congress has used in another form in other sections of the Voting Rights Act — for example, when literacy tests were prohibited because of the potential for abuse, the difficulty of proving discriminatory purpose in the administration of the test, and the relatively low social value of the results of the literacy tests themselves.

If asked for an illustration of a candidate for this evidentiary impact approach, I would suggest the so-called anti-single-shot balloting provisions found in a number of areas. These are likely to be used to suppress minority voting influence without any substantial and social policy being served. Proof by a plaintiff of disproportionate results caused by the anti-single-shot factor could well be allowed to create an inference of discriminatory intent, imposing a burden of justification on a defendant. Perhaps the numbered post mechanism used in some at-large systems might be a candidate for res ipsa-type treatment. The at-large system itself, on the other hand, has such substantial, non-racial justifications and is so widespread in use without disproportionate impact that it would not seem to be a proper candidate for res ipsa-type treatment. Specific enumeration of practices or procedures would depend on the outcome of further inquiry by the Subcommittee into the justifications for and possible abuses of specific voting mechanisms.

Senator THURMOND. Our next witness I believe is the last witness, Mr. Drew Days of the Yale University Law School. Mr. Days was formerly head of the Civil Rights Division of the Justice Department during the Carter administration.

We are glad to have you, Mr. Days. You may now proceed.

Mr. DAYS. Thank you, Senator Thurmond. I have a prepared statement that I would like to submit for the record and simply summarize in my testimony the content.

Senator THURMOND. Without objection, your entire statement will go in the record, and you will have 10 minutes to summarize.

STATEMENT OF DREW DAYS, ASSOCIATE PROFESSOR OF LAW, YALE UNIVERSITY

Mr. DAYS. Senator Thurmond, as you indicated, one of the reasons for my being here is because I think that of the people who have dealt with voting rights issues, I am one who has had perhaps some of the closest exposure to the operation of the Voting Rights Act.

I say that not merely because I served as Assistant Attorney General for Civil Rights in the Carter administration and had legal responsibility or departmental responsibility for this area of the Government's role in enforcing the Voting Rights Act but because I was personally involved in its enforcement.

I was involved in reviewing submissions and going over proposed objections and dealing with lawyers and elected officials from a variety of communities, and so I think that I can say, as I do in my statement, that there has been a significant increase in the ability of minorities to vote and to elect candidates of their choice but that we have a long way to go.

Therefore, the first part of my testimony is really directed toward the manner in which the Justice Department during my tenure enforced the Voting Rights Act and evidence of the continuing need for the Voting Rights Act, particularly section 5 of that legislation.

When I testified last July before the House on the extension of the Voting Rights Act, the Reagan administration was considering a number of proposed modifications in the act which I thought would seriously weaken the act's effectiveness, and I spent much of my House statement addressing those questions.

It is now my understanding, however, that any thoughts of modifying the act to require nationwide preclearance, to restrict the types of changes subject to preclearance, to replace preclearance with mandatory notice mechanisms, and to change the section 5 coverage trigger and the bilingual provisions, have been abandoned by this administration. In view of this development, I would like to direct the committee's attention to my House testimony, which is part of the House record, for my thoughts on those issues.

What I would like to do today is devote the balance of my time to two issues that I understand are of particular interest to the Senate in its consideration of the Voting Rights Act. The first is bailout and the second is a proposed amendment to section 2 of the Voting Rights Act.

I am aware that one of the topics being most discussed in the Senate is the procedure for bailing out, that is, for terminating section 5 coverage for a covered jurisdiction. Of course, there is a current bailout provision with provisions that allow jurisdictions with a genuine history of nondiscrimination to bail out.

That procedure is complicated in and of itself and quite frankly, as I indicated in the House, I would not be in favor of any tampering with that provision unless there were strong reasons to do so. I reviewed the testimony in the House and looked at some of the testimony before this committee, and quite frankly, I do not see any powerful justification for changing the existing bailout provision. Namely, I have not seen any parade of representatives from jurisdictions covered by the Voting Rights Act and the section 5 provisions, saying that they have not engaged in discrimination against members of their community, that they have had a clean record with respect to submissions under the Voting Rights Act, that there have been no objections, and so forth and so on.

However, I understand that the House of Representatives decided to amend the bailout provisions because it was concerned about achieving another objective, and that was providing greater incentive to jurisdictions to get out from under section 5, to provide some sense that if they did attend to the question of providing greater opportunity for minorities, if they complied with section 5, if they were not engaged in any violations of Federal law or the Constitution, that there would come a time when they would be able to get out from under section 5.

I think that the bailout provisions in S. 1992 achieve precisely that. They provide an incentive for jurisdictions, to quote the Attorney General, Attorney General Smith, "to bring blacks and other racial minorities into the mainstream of American political life." This is, you might say, an "earn you way out" bailout, and I think that is appropriate.

I will not go into the details of that particular bailout provision but essentially what it does is require that jurisdictions demonstrate a clean record under traditional provisions—in other words, there are objective ways of evaluating their compliance—but it goes on to say that those jurisdictions have to show some affirmative action, if you will, to insure that minorities are not fenced out, that we are not talking about some boilerplate compliance with the requirements under that provision.

I think that these provisions will in fact allow counties and other jurisdictions, in some cases States, perhaps, to bail out of the section 5 coverage. In fact, I am told that when Mr. Armand Derfner testified before this committee, he appended to his testimony a chart that demonstrated that just using the first part of the bailout standard, in excess of 24 percent of the counties presently covered would be able to bail out from section 5 coverage.

I understand also that there is a concern with respect to maintaining the exclusive jurisdiction, if you will, of the U.S. District Court for the District of Columbia over section 5 cases. As I set out in my testimony, I think that maintenance is appropriate for a variety of reasons.

My experience as Assistant Attorney General tells me that shifting jurisdiction from the District of Columbia to the local district

courts would not be simply a jurisdictional modification. It would be a major undoing of the essential part of the congressional scheme that has helped to make the Voting Rights Act as effective as possible.

With respect to the amendment of section 2, I am in favor of this proposed amendment as well because I believe it provides much-needed clarification with respect to standards of proof required in suits brought under section 2 after the Supreme Court's fragmented decision in *City of Mobile* v. *Bolden.* As my testimony sets out, while *Mobile*—at least the plurality opinion in *Mobile*—asserts that proof of intent is required in order to show a violation under section 2 of the Voting Rights Act or of the 15th amendment, that was not the understanding of judges and lawyers and commentators who had been looking at the question of attacks upon discrimination in voting for a number of years.

In fact, all of those parties were relying on a combination of cases that began in around 1965, particularly *Whitcomb* v. *Chavis* and *White* v. *Regester,* as an indication of what would be required to prove a violation of the Voting Rights Act or of the Constitution with respect to discrimination against minorities. Those cases—in my estimation and in the estimation of the numerous courts that dealt with this issue—those cases stood for a "totality of the circumstances" analysis of the situation.

It seems to me that the proposed amendment to section 2, given the report language in the House report, given the fact that there is a direct link identified between the amendment to section 2 and the *White* v. *Regester* standard, what Congress would be doing here would be particularly consistent with the goals that it has been trying to achieve since the Voting Rights Act was passed in 1965, indeed since 1959 and 1960 when these issues were of great concern to the Congress.

Given this confusion after *Mobile,* given the fact that, as many of the witnesses before me have testified, it is hard to determine what more one does after *Mobile* to achieve a successful attack upon certain systems that fence out minorities, change in the provision is completely warranted. Given this state of affairs, I think that the Congress has ample justification for seeking to amend section 2 of the Voting Rights Act.

It achieves the objective of making it possible for litigants to determine and prove exclusionary activities but it also does not give litigants a free ride. As the disclaimer language points out, it is not a situation where one can simply show disproportionate representation and win the case.

There has been some suggestion that without an intent test under section 2, communities will be called racist. With all due respect, I do not think that the Congress should deal with this very serious issue based upon concerns over name-calling. It is as though, in looking at a reapportionment case where it has been determined by a court that a community has not followed the one person-one vote principle, that everyone will call the people who were involved in that process "Boss Tweed."

I think what we should be concerned with is making certain that where a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a

meaningful role in the electoral process, that something can be done.

In conclusion, I would like to say that we have come a long way but I believe it remains with this Congress to take the next important step to insure that we are not left in 1982, 1983, and 1985 with communities where black voters might as well be in South Africa, given the type of exclusion that they experience in trying to play a meaningful role in our most valued process, that is, the process of casting a ballot and electing candidates of one's choice.

Thank you very much.

Senator THURMOND. Mr. Days, I believe you claim flagrant violations in covered jurisdictions are the rule rather than the exception. Are you referring to a failure to submit changes for preclearance.

Mr. DAYS. Yes, I am, Mr. Chairman.

Senator THURMOND. Do you know of anyone in these covered jurisdictions who has attempted to register or vote and was refused?

Mr. DAYS. Yes, I do. I do not know them by name but I could point you to——

Senator THURMOND. Would you cite those for the record and tell us what you did about it as Assistant Attorney General, to correct it?

Mr. DAYS. Senator, I do not have those records before me but I am certain that my successors in the Civil Rights Division would be happy to provide you with that evidence. I think it is there in the record and easily found and submitted to the committee.

Senator THURMOND. You have specific instances of persons who were refused the right to vote?

Mr. DAYS. Absolutely.

Senator THURMOND. We would like very much to have that. We are wondering what the Federal officials did to correct that.

Mr. DAYS. Well, one of the things we did——

Senator THURMOND. They had a duty to perform, did they not?

Mr. DAYS. Absolutely, and we tried to perform that duty.

Senator THURMOND. Did this occur while you were Assistant Attorney General?

Mr. DAYS. Yes, it did.

Senator THURMOND. Did you take action to correct it?

Mr. DAYS. To the best of my ability, given the resources that Congress provided.

Senator THURMOND. Would you give us the facts about each of those cases, supply it for the record?

Mr. DAYS. Well, Senator, with all due respect, I can perhaps go over to the Justice Department and comb through those records but I think that a properly framed question to the present administration would elicit the evidence that you are seeking.

Senator THURMOND. Well, you might be able to put your finger on it over there, with all the records they have, quicker than they could. If you will work with them I am sure they will cooperate with you, if you——

Mr. DAYS. Let me understand you question, Senator. Are you asking whether in 1977, 1978, 1979, or 1980 there were instances in which minority group members were turned away from the polls——

Senator THURMOND. In which anybody attempted to register or vote and was refused, and then I want to know what you did about it as Assistant Attorney General, whether you helped those people, which you should have done, I presume.

Mr. DAYS. Well, the short answer, Mr. Thurmond, is that I was responsible for suggesting that some 3,000 Federal observers be sent to jurisdictions during the time that I was Assistant Attorney General. That decision, in almost every case, was based upon powerful evidence of discrimination against minorities.

With respect to the physical act of casting the ballot—we are not talking about other problems of gerrymandering or manipulation of the mechanism of voting but the physical act of going in and casting a ballot—3,000 observers were sent to a variety of jurisdictions. That record, is, I think already in the testimony in the House and to me that is a very strong example of the problem that continues to exist.

Senator THURMOND. Well, Mr. Days, we do not want generalities. I am asking you a specific question: Do you know of anyone in those covered jurisdictions who has attempted to register or vote and was refused? During the time you were Assistant Attorney General, do you know of any that attempted to register or vote and were refused?

If you do know of those, would you tell us what you did in each case to help those people, to correct the situation.

Mr. DAYS. Mr. Chairman, I will try to respond to your question but I want to say again, I am not the custodian of those records. It seems to me more appropriate to direct your inquiry to the present incumbent of the job of Assistant Attorney General for Civil Rights. I do not have access to those records.

Senator THURMOND. They will cooperate with you, I am sure, if you will contact them.

Senator MATHIAS. Mr. Chairman?

Senator THURMOND. Senator?

Senator MATHIAS. If you would yield to me, as I understand Professor Days, he says that this is detailed in the House report. Am I right?

Mr. DAYS. That is correct.

Senator MATHIAS. Might I just offer a suggestion here, that we ask him to identify the pages in the House report and submit them as a part of this record.

Senator THURMOND. That will be fine, if the House report has the information, the specific information I asked for.

Mr. DAYS. The House record does.

Senator THURMOND. I am opposed to anybody being deprived of the right to vote. I will fight for anybody's right to vote. They have a right to vote. They have a right to register, they have a right to vote, and no one should deprive them of it. If anybody claims they were denied the right to register or vote while you were Assistant Attorney General, then I presume you took some steps to help them, and I would like to know of the different instances in which that occurred and what you did to help those people. You had a duty there.

Mr. DAYS. I certainly did, sir.

Senator THURMOND. Now the next question is, How many successful contested bailout suits have there been? Would you give us those citations?

Mr. DAYS. Zero.

Senator THURMOND. What is your answer?

Mr. DAYS. None.

Senator THURMOND. How many counties have had examiners rather than observers under the act?

Mr. DAYS. I think about 60 jurisdictions have had examiners.

Senator THURMOND. Sixty, you say?

Mr. DAYS. Yes.

Senator THURMOND. I am pleased that you agree with the Attorney General that bailout should offer some incentive. Of course, for the past 17 years there has been an absolute bar to all but a relatively miniscule number of jurisdictions. Our inquiry should focus on a fair, reasonable, and workable bailout. Under this test it is the opinion of most people that S. 1992 fails. Now do you believe consent decrees should bloc bailout?

Mr. DAYS. Yes, I do.

Senator THURMOND. How can the bailout be a fair incentive if the jurisdiction cannot control the factors upon which bail- out is determined?

Mr. DAYS. I think they can control the factors upon which bailout is determined. It sets out the ways in which a jurisdiction can insure that it is not running afoul of the standards under the proposed bailout, that is, responding to claims of discrimination promptly, not making changes without getting preclearance with the Justice Department or through a declaratory action in the District of Columbia.

If they oppose a particular finding, it can be overturned through some type of suit in the District of Columbia, an original action, so there are many ways in which a jurisdiction can control its eligibility for bailout under this proposed provision.

Senator THURMOND. The question was, if the jurisdiction cannot control the factors, then what is your answer?

Mr. DAYS. Well, if it could not control the factors I would be concerned about that but I do not think that is the state of affairs presented by this amendment.

Senator THURMOND. Mr. Days, can a suit filed by anyone bar bailout?

Mr. DAYS. Can a suit by anyone bar bailout?

Senator THURMOND. Yes.

Mr. DAYS. I do not believe so.

Senator THURMOND. In other words, can someone just file a suit and would that bar bailout?

Mr. DAYS. No, that is not the case.

Senator DECONCINI. Mr. Chairman, would the chairman yield on that question?

Mr. Days, at page 3 of the bill down at the bottom it starts:

> No declaratory judgment under this section shall be entered during the pendency of any action commenced before the filing of an action under this section and alleging such denial or abridgement of the right to vote.

I interpret that, and I would appreciate it if you do, as indicating that if everything is cleared on the bailout but there is a complaint filed, then the bailout could not proceed as long as that complaint is pending.

Mr. DAYS. Well, that is certainly correct, yes.

Senator DECONCINI. I thought maybe that was the chairman's question.

Mr. DAYS. Well, I think what ultimately it means is, until there is a final judgment of a court that determines that there have been denials or abridgements, it is simply that this bailout provision would not let bailout be granted while there was a lawsuit before the courts. It is simply allowing the courts to resolve that complaint.

Senator DECONCINI. Therefore, to answer the chairman's question, yes, if someone brings a complaint or files a suit, as the chairman made reference, that would stop the bailout even——

Mr. DAYS. During the pendency of that litigation, yes that is correct.

Senator DECONCINI [continuing]. During the pendency of that litigation. I just wanted to clear that up.

Senator THURMOND. Therefore, anyone can file a suit, with merit or without merit, and that bars a bailout.

Mr. DAYS. That is right but I would think that if the case is without merit, it would be thrown out. If it is with merit then what is achieved is precisely what I think the Congress ought to be achieving.

Senator THURMOND. What safeguards will prevent an administration from bowing to political pressure and appointing examiners merely to prevent a jurisdiction from bailing out.

Mr. DAYS. Well, Senator Thurmond, this Congress enacted the Voting Rights Act of 1965, including section 6, which sets out standards by which an Attorney General is to determine whether examiners should be sent. My experience has been—not only my personal experience but my experience in looking at what Attorneys General have done over this period—that those provisions have been faithfully adhered to. I see no reason for expecting that there would be any wholesale change in the future.

Senator THURMOND. What are the standards?

Mr. DAYS. Well, there are several standards. The Attorney General has to certify, one, that he has received complaints in writing from 20 or more residents of the political subdivision alleging that they have been denied the right to vote under color of law and that he believes—and I am summarizing—that he believes such complaints to be meritorious, or that in his judgment—and it says in parentheses—"considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within that subdivision appears to him to be reasonably attributable to violations of the 14th or 15th amendment, or whether substantial evidence exists that bona fide efforts are being made within such subdivisions to comply with the 14th or 15th amendment." The appointment of examiners is otherwise necessary to enforce the guarantees of the 14th or 15th amendment.

That is, in essence, what the Congress decided should be the standards in 1965.

Senator THURMOND. Is that decision reviewable?

Mr. DAYS. It is not.

Senator THURMOND. By the Attorney General?

Mr. DAYS. No, it is not.

Senator THURMOND. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

Let met just ask one question on this same line raised by the chairman and by Senator DeConcini: If there were to be a case filed without substantial merit, and presumably just to block a bailout——

Mr. DAYS. Yes, sir?

Senator MATHIAS [continuing]. In your opinion, do the Federal rules of procedure give to Federal judges ample authority to deal with that kind of case, without substantial merit?

Mr. DAYS. Absolutely.

Senator MATHIAS. Therefore, your original judgment that the filing of a case would not block a bailout really is the right answer.

Mr. DAYS. Well, I try to give right answers, Senator, and I thought I was right when I said it but of course there is a legitimate concern with respect to these particular issues——

Senator MATHIAS. There is a way it can be done.

Mr. DAYS. And I think the experience with the Voting Rights Act has demonstrated that courts can act expeditously when they understand that important issues turn on a prompt resolution. There are cases filed all the time that have to do with elections, not necessarily having to do with race, and the judges work overtime, they get the parties in on Saturdays, and in the evenings and they resolve the case. Therefore, I think that we have ample evidence of the ability of the courts to deal with a suit that is filed attempting to achieve this blocking purpose for no good reason whatsoever.

Senator MATHIAS. Any one of us in this room can be sued at any time, as long as the courthouse doors are open.

Mr. DAYS. That is right.

Senator MATHIAS. Whether it amounts to anything is another story.

Mr. DAYS. I think those of us on this side are more likely to be sued effectively than those on that side, Senator. [Laughter.]

Senator MATHIAS. Well, we get our share. That is why we have Senate counsel these days.

I must say that when you were discussing the amendment, I had to think a little bit that in spite of the precept that history never repeats itself, that history was in fact repeating itself a little because in this very room the kind of description of what we were trying to do was given to this committee by Attorney General Katzenbach in response to a question that was asked by a member of the committee, a dear friend of all of us, Hiram Fong. He raised the question specifically in connection with section 2.

Attorney General Katzenbach talked about dealing with the effects, and he talked in very much the language that you used to us this morning, perhaps not the very words, so that we cannot say that history did repeat itself precisely but certainly in the same tenor and in the same way. That, I think, is the spirit in which the act of 1965 was enacted. That is the spirit in which the courts administered it, at least up until *Mobile,* and that is merely what we

are trying to restore, not to graft any new or exotic development onto the act. Would that be your judgment?

Mr. DAYS. Yes, Senator, precisely.

Senator MATHIAS. You may recall that in the *Burton* case—which is one of those cases, perhaps, that the chairman was inquiring about, a case in which you had some involvement—that the Court relied upon the transcript of the colloquy between Senator Fong and Attorney General Katzenbach on this very point.

Mr. DAYS. That case is particularly troubling, Senator, because I understand that the Supreme Court has stayed the mandate in that case and is going to be considering it this term. If a case like that cannot survive, and I think there are serious doubts now posed about its vitality, I think that the purpose behind the Voting Rights Act and the objectives of the Congress will be substantially frustrated.

Senator MATHIAS. Of course, when I say the Court depended on it, I assume they did because it was cited in the Department's brief. The Court was thus aware of that transcript.

Mr. DAYS. That is correct.

Senator MATHIAS. I want to thank you. I think you have been very helpful to us today, and I appreciate your coming. It is good to have you back again.

Mr. DAYS. Thank you, sir.

Senator THURMOND. Senator DeConcini.

Senator DECONCINI. Mr. Chairman.

Mr. Days, I have one question on this bailout provision, that I think the Governor of Texas raised, which concerns me. Since the act has been held to apply to all jurisdiction, school districts or city elections or what have you, do you feel that it makes sense to require each and every jurisdiction within a State or a county to bail out before that county or the State itself could bail out?

The example—I did not think too much of it because the State I come from only has 14 counties and 100-some school districts but Texas has 260-some counties and 1,100 school districts, and I do not know how many other irrigation or other elected districts—the Governor gave the hypothetical, what if every jurisdiction there except one was in fact cleared and there were no complaints filed? Ought there to be some procedure or some consideration to let the rest of the jurisdictions bail out and keep this one under custody, under jurisdiction and scrutiny? Can you comment?

Mr. DAYS. Yes, I can, Senator. I think that what the 15th amendment was about and what the original Voting Rights Act was about and what this proposed bailout provision is all about, is putting the responsibility and keeping it where it has always been, that is, at the State level: A State, which is really the only entity that we recognize in our Constitution, is not going to be absolved of the responsibility for overseeing the protection of the rights of minorities within its boundaries. Until every jurisdiction that is subject to the Voting Rights Act has complied with it, I do not see any reason for letting States out from under the preclearance provisions.

Senator DECONCINI. Well, I appreciate that. I find it a little difficult that one complaint involving one school district out of maybe 2,000 entities could keep a State from bailing out. I have no sympathy for that entity where the complaint is, from the standpoint of

whether it should be bailed out, as long as there is a complaint. If it does not have any merit, it will be thrown out, as you indicated.

Mr. DAYS. I think it just reflects the fact that the State has a tiny step more to take, and not that the State is going to be under the provisions of section 5 inevitably. If it is, then I think it says something about the incredible inability or unwillingness of the State to take that precise action that the Voting Rights Act ought to direct it to take.

Senator DECONCINI. Well, a State with thousands of jurisdictions, it could conceivably be that they could never have them all complying all at the same time. Now a State with a dozen jurisdictions or less, I can agree with you. Somewhere it seems to me that the numbers finally become a little unreasonable, to force the State and the rest of the people never to be able to bail out.

I do not have an answer to it, and I just thought maybe you had some comments other than, sure, everybody has to be just perfect. Unfortunately, that is not the way life is and I hate to see those who really have complied and are perfect, to suffer because one jurisdiction out of multiple thousands might be in violation.

Mr. DAYS. Well, Senator, perhaps the Congress will get to the point where it is confronted with a number of those examples and may want to rethink this but I certainly do not think that is the situation now.

Senator DECONCINI. Well, I think you are right. I do not think that we have that, and it is somewhat hypothetical on my part but the Governor made a point, at least from a hypothetical case, that that could occur and I can see how it could.

Mr. DAYS. Yes.

Senator DECONCINI. Thank you.

I have no further questions, Mr. Chairman.

Senator THURMOND. Counsel for the subcommittee?

Mr. MARKMAN. Professor Days, at page 55 of the transcript of your testimony before the House of Representatives last year, you said that you thought that the courts would interpret the term "results" as "very much like effects." Do you still hold to that view?

Mr. DAYS. I do not have the transcript before me but I hope that what I said under those circumstances was that the results test would be viewed as looking at a totality of the circumstances, looking at the context of which certain determinations were made, and then arriving at a judgment as to whether there has been discrimination.

Mr. MARKMAN. Well, I think I am using the precise language from your statement when you said "very much like." We probably ought to go back and look at the context but you would disavow that statement today; is that right?

Mr. DAYS. No, I do not disavow things lightly and I do not see any reason to do so with respect to that testimony, particularly since I do not have it before me. However, I think the context of the discussion before the House was whether courts would have difficulty understanding what the results test was all about.

That took place at a time when negotiations were still going on as to how to narrow the definition of "results" in the ultimate bill that passed the House. Certainly, through the intercession of Mr. Hyde and some other people, the ultimate product was one that

had in it a specific disclaimer with respect to proportional representation, so that if there had been any risk of courts concluding that because "effects" and "results" sounded like, maybe proportional representation was what was being sought or identified, that disclaimer language deals with it quite effectively, in my estimation, as does the extensive House report on that issue.

Mr. MARKMAN. I just hope you can appreciate some of the confusion that I think Senator Hatch has and perhaps other members of this committee, in trying to adduce precisely what the term "results" means——

Mr. DAYS. Yes.

Mr. MARKMAN [continuing]. Given some of the suggestion that it is similar to "effects" and given——

Mr. DAYS. No; I understand that. That is a perfectly reasonable inquiry to engage in.

Mr. MARKMAN. In response to Senator Thurmond's earlier question with respect to the extent to which pending cases would stay a bailout, is it your view in fact that section 2 is clear enough that a case under any circumstances could be thrown out on its pleadings, as you suggested? Particularly given the totality of factors test that you suggest, how could a case be thrown out on its pleadings?

Mr. DAYS. Well, I never said that the case would be thrown out on its pleadings. There are ways in which summary judgment motions can be decided in a matter of days on issues precisely of this kind, so it is not that the courts would decide on a bare record. The lawyers would simply be directed by the court to prepare affidavits, to take depositions, to bring in witnesses, and have the matter concluded as rapidly as possible. That has been done in literally hundreds of cases.

Mr. MARKMAN. In your testimony that you submitted for the Senate committee here, you state that the Justice Department under your term of office did not work to "dictate any particular result" insofar as racial proportions in redistricting proposals. You also say that in a district with a 25-percent minority population with four council seats, you would look askance at any district plan that "frustrates" the prospect that "minorities will gain control of one district." How precisely is this different from the Justice Department dictating a result?

Mr. DAYS. The difference is that we looked at what would normally be expected, given a fair drawing of lines or given a fair consideration of the impact that certain—in this case—reapportionment plans would have on minorities. It is not that we dictated that there would be 25 percent but we simply asked the question, How is it possible that, drawing lines fairly, this result would not be produced?

Now in some cases—and this is the reason why we entertained a request for reconsideration and withdrawal—the jurisdictions were able to come forward and demonstrate exactly why that was the result, that contrary to our initial understanding of what was going on, the facts were entirely different. Given that understanding of the realities, it was not our position to say, "Come hell or high water, you have to have one district for blacks." The result was quite different, and I try to make the point in my testimony that we were not seeking to maximize minority voting strength.

I received pressures from all quarters when I was in charge of the Civil Rights Division. There were some who suggested that perhaps we ought to force jurisdictions to gerrymander, to carve out certain enclaves, to insure that minorities got a certain number of representatives on a city council or whatever might happen to be the legislative or governmental body. We rejected those suggestions time and time again.

Mr. MARKMAN. You are not unaware, of course, that some people have suggested that you did precisely that in the *UJO* v. *Carey* situation, are you?

Mr. DAYS. Well, I did not do that but I know that there are those who suggest that the Department did that in dealing with that problem when it arose. I think the proof of the pudding is in the eating, and however, it is alleged that that came about—that is, the Government's involvement in that situation and its position—the result was that nonminority candidates were elected in districts that were allegedly drawn to insure, beyond a shadow of a doubt, minority representation.

Mr. MARKMAN. Therefore, the test you used was something less than a "beyond a shadow of a doubt" test but certainly something more than not taking race into account.

Mr. DAYS. No, I did not say that. Perhaps I was being too florid in my response to your question.

Mr. MARKMAN. I am sorry if I misunderstood.

Mr. DAYS. That was not a test that had anything to do with the way we operated.

Mr. MARKMAN. Can I pursue a question I pursued a little bit earlier with Mr. Chambers?

Mr. DAYS. Yes.

Mr. MARKMAN. How did your division when you were in charge make a distinction between districting proposals that attempted to limit minority strength because of racial prejudice and those efforts designed to limit the strength or the impact of a particular neighborhood that might have been minority-dominated because of political or partisan identification? How do we make those distinctions? How does a court make those distinctions, and how does a draftsman for a districting plan make those distinctions?

Mr. DAYS. Well, we did not make those distinctions in enforcing section 5 of the Voting Rights Act. If the intent or the effect of a practice was to dilute or diminish minority voting strength, we did not care what party they were members of. That was not a consideration.

In other words, what I understand the 15th amendment and the Voting Rights Act to be all about is, whatever you call it, if the consequence is to provide minorities of a fair opportunity to participate in the electoral process, then it is wrong and it has to be remedied.

Mr. MARKMAN. This would be the case even though a genuinely colorblind architect of a districting plan took a look at a neighborhood and he identified it as a predominantly Democratic or a predominantly Republican neighborhood, and created district lines designed to maximize or minimize the impact of that neighborhood purely on that basis?

Mr. DAYS. Under section 5 that is absolutely right. Section 5 was designed not to force that type of inquiry or not to require that type of inquiry.

Mr. MARKMAN. Does that square with the *Whitcomb* v. *Chavis* principle, in your view?

Mr. DAYS. We are talking about section 5 now. Section 5 is different from *Whitcomb* v. *Chavis*. I think *Whitcomb* v. *Chavis* would require a consideration of some of the issues that you are just describing, that is, the relationship of politics and race and the normal give and take that we see in the political process. However, in talking about enforcement of section 5, I think that whether blacks or Republicans or Democrats or Socialists or whatever they may happen to be—noneuclidian Druids—I do not think that is important. What is important is, are they blacks, are they Hispanics, are they Chinese, and are they having their political power affected in a way that contravenes the Voting Rights Act?

Mr. MARKMAN. You are, of course, saying that this neighborhood would be immune to a gerrymander because they happen to be black?

Mr. DAYS. Yes, that is right.

Mr. MARKMAN. OK.

Mr. DAYS. It is one of the few immunities we have. [Laughter.]

Mr. MARKMAN. In the *Mobile* case, the Carter administration Justice Department filed a brief, and it stated that section 2 of the Voting Rights Act represented, and I quote, "a rearticulation of the 15th amendment." Is that still your view?

Mr. Days. Well, that is a nice word, "rearticulation." I certainly think that section 2——

Mr. MARKMAN. I believe that was the word in the brief.

Mr. DAYS. My view is that the proposed amendment to section 2, whatever was going on in the *Mobile* case, gets at the profoundly difficult problems that lawyers and courts were dealing with before *Mobile* using the *Whitcomb* v. *Chavis* approach. As I understand it, the amended section 2 would get back to that standard.

I think between 1978 and 1980, when *Mobile* was decided, there was a great deal of confusion existing as to exactly what was going on. Therefore, while I do not disavow that language in a brief that was filed on *Mobile*, I think that what we are talking about now is something quite different.

Mr. MARKMAN. On page 16 of your statement, you say that the city of Rome, Ga., has a history of violations and would likely be ineligible for bailout. If you do not believe that a city like Rome, which has been found by the Supreme Court to have been absolutely free from discrimination for a 17-year period, should be allowed to bail out, who in your view can bail out? If S. 1992 becomes law, who could or should be able to bail out?

Mr. DAYS. Well, it was the subject of an objection under section 5.

Mr. MARKMAN. I am sorry?

Mr. DAYS. It was subject to an objection under section 5. The objection was lodged because it was determined that the changes had a discriminatory impact upon minority voters, and that is what the Supreme Court so held.

Mr. MARKMAN. However, don't you agree that objections under section 5 are not necessarily indicative of discrimination? All they suggest is that the community has not borne the burden of proof to demonstrate to the Justice Department that there will not be a discriminatory effect. That is not evidence of a violation, is it?

Mr. DAYS. Well, it depends on what violation you are talking about. I think the violation under section 5 is a legislative change or an electoral change that has the effect of reducing the ability of minorities to participate in the political process. I do not think that a jurisdiction that has been found to have acted in that fashion, putting motive to one side—and I echo the concerns of Julius Chambers and many other people with respect to proving motive or intent—I do not think that a jurisdiction that has been found to have made changes that had a significant impact upon minority voting power should be allowed to bail out.

I think that is what the bailout provisions says. I think objections do say a lot about not so much motivation but impact, that however you describe the motivation behind it, blacks or other minorities are being significantly affected.

Mr. MARKMAN. In your testimony, again, you defend S. 1992's denial of bailout to covered jurisdictions until all subdivisions have bailed out. I believe you just reiterated this position to Senator DeConcini.

Mr. DAYS. That is right.

Mr. MARKMAN. Why doesn't the same logic demand that the States of New York and Massachusetts be completely covered because of the existence of individual jurisdictions within them that are also covered? Can you explain to me the logic of the difference?

Mr. DAYS. Well, I suppose that one could push the logic to that point but Congress decided otherwise. If Congress wants to place New York and every other State in the Nation under section 5 preclearance provisions, then it is perfectly entitled to do so, I suppose, but that is not the real world we are dealing with.

Mr. MARKMAN. You are right that that is the law but I am asking why do you recommend that this law not be changed. You are endorsing the present law, as I understand it.

Mr. DAYS. Well, because I think the original inclusion of entire States under section 4 and section 5 of the Voting Rights Act was a determination that the States as States had failed in their responsibility and duty to respect and enforce the 15th amendment.

Mr. MARKMAN. Could I ask one more question, please? What do you mean by your assertion in your statement that we have communities in this country—I do not believe you are specific in this regard—but that we have communities in this country where blacks might as well be in South Africa? Could you elaborate upon that just a little bit, please? It is a pretty serious charge, I would think.

Mr. DAYS. I think, Mr. Markman, that it is an incredible state of affairs in this country in 1982 to find that in some jurisdictions in this country, no matter how hard blacks and other minorities have tried to fulfill their roles as citizens, they cannot break into the process. That was what the Supreme Court found in Bexar County, Texas and in Dallas County, Texas, that no matter what efforts minorities made, they were still kept outside the fence and could not

get in and play a meaningful part, to engage one-on-one in the rough-and-tumble of the political process. They were told, "Look, you simply do not have the ticket to get into this club."

That is what I am talking about, and there are still situations in this country where that obtains. I do not have a name of a community on the tip of my tongue and I probably would not say it if I did but there are such situations.

Mr. MARKMAN. Thank you, Mr. Days.

Thank you, Senator.

Senator THURMOND. Thank you, Mr. Days.

[The prepared statement of Mr. Days follows:]

PREPARED STATEMENT OF DREW S. DAYS, III

Mr. Chairman, I want to express my deepest appreciation to you and the other members of the Subcommittee on the Constitution for inviting me to testify on extension of the Voting Rights Act. For it is my firm conviction that the need for the Voting Rights Act continues to exist if fair minority access to the electoral process is to occur and that various proposals to alter or amend the House bill will serve unjustifiably only to weaken not strenghthen the Act's protections.

I think that I approach this subject from a unique perspective based upon my nearly 4 years as the chief federal enforcer of this most important piece of civil rights legislation. As Assistant Attorney General for Civil Rights from March 1977 to December 1980, it was my responsibility to review, with the assistance of my staff, literally thousands of voting changes subject to the preclearance provisions of the Act, to lodge objections to those changes determined to have a discriminatory purpose or effect, to seek the assistance of the courts in enforcing such objections and to respond to litigation brought by covered jurisdictions challenging our refusal to grant preclearance. I want you to understand, moreover, that I speak today based not merely on my former ex officio status, but rather from 4 years of direct, personal involvement in the administration of the Voting Rights Act by the Department of Justice. I personally approved every objection lodged by the Attorney General during my nearly 4 years in office, save for a few occasions when I was absent from Washington and such decisions were made by my deputy pursuant to departmental regulations. By my rough estimate, I approved 120 objection letters covering several hundred changes from 1977 to the end of 1980. I personally met with literally scores of local, county and state officials to discuss our concerns over certain proposed election changes. I personally reviewed and approved every court action, approximately 62 to

count, filed by the Civil Rights Division to enforce the Voting Rights Act during my tenure. And I determined when and where federal observers should be assigned, and recommended to the Attorney General new jurisdictions for the assignment of federal examiners, pursuant to the Act. I stress this point, so that you understand that my unqualified support for extension of the Voting Rights Act grows out of a deep, direct and long-term involvement in its enforcement.

I.

The Voting Rights Act was passed in response to compelling evidence of continuing interference with attempts by black citizens to exercise the franchise despite prior Congressional efforts to end such practices. As the Supreme Court observed in South Carolina v. Katzenbach:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. 383 U.S. 301, 327-28 (1965)

Congress' decision to "shift the advantage of time and inertia" to the victims of voting discrimination has clearly paid dividends. Other witnesses have testified to the significant increases in voting turnouts by minorities, in the numbers of minority candidates running for office and in the number of minority-elected officials directly attributable to the operation of the 1965 Voting Rights Act. As one who was charged with enforcing a host of other federal civil rights laws, I can attest that the Voting Rights Act of 1965 is by far the most effective statute on the books. While diligent efforts have been made to achieve compliance with laws prohibiting discrimination in housing, education, employment and the like, meaningful remedies for proven violations in these areas have come only after years of litigation. Administration of the preclearance provisions of the Voting Rights Act has, in contrast, prevented in a matter of days electoral changes likely to undercut or retard meaningful minority participation at the ballot box.

It would be unfortunate, however, for anyone to take what I have just said or what others have said before me about the relative effectiveness of the Voting Rights Act to mean that over a century of injustice against minority voters has been remedied and that we need no longer fear that new strategies will be devised to reverse or retard what few gains have been achieved since the Act came into existence. Nothing could be further from the truth.

Though the Act has been on the books since 1965, any fair assessment of its enforcement history would have to conclude that it has been a meaningful weapon against other than the most direct forms of discrimination for less than a decade. It was not until 1969 that the Supreme Court made clear that private parties could sue to obtain compliance by covered jurisdictions with provisions of Section 5 (Allen v. State Board of Elections, 393 U.S. 544 (1969)) and not until 1971 that the Justice Department received explicit Supreme Court approval to require that changes in polling place locations and in boundary lines by means of annexations receive approval pursuant to Section 5 procedures. (Perkins v. Matthews, 400 U.S. 379 (1971)). As my predecessor, J. Stanley Pottinger, testified during hearings on the 1975 extension of the Act:

> The Congressional hearings on the 1970 Amendments to the Voting Rights Act reflect that Section 5 was little used prior to 1969 and that the Department of Justice questioned its workability. Not until after the Supreme Court, in litigation brought under Section 5, had begun to define the scope of Section 5 in 1969 (Allen v. State Board of Elections, 393 U.S. 544) did the Department begin to develop standards and procedures for enforcing Section 5. Congress gave a strong mandate to us to improve the enforcement of Section 5 by passing the 1970 Amendments. We subsequently promulgated regulations for the enforcement of Section 5 and directed more resources to Section 5 so that today enforcement of Section 5 is the highest priority of our Voting Section. Thus, most of our experience under Section 5 has occurred within the past 5 years. Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975)

Moreover, procedures for enforcing the voting Rights Act have been the subject of broadly-based court challenges, several of which had to be resolved by the Supreme Court, almost every year since it was enacted. Just last year, in

fact, in McDaniel v. Sanchez, 448 U.S. 1318 (1981) the Supreme Court addressed the question of when reapportionment plans submitted by local legislative bodies to federal courts must satisfy Section 5 requirements. In October 1977, I argued for the Government the case of United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) in which the Supreme Court was faced with the question of whether voting changes enacted by a city which is within a state designated for coverage under Section 5 of the Voting Rights Act of 1965 must be precleared under Section 5 before they become effective. The Court held that they did. One can gain some sense of the consequences for enforcement of the Voting Rights Act had Sheffield's challenge succeeded by looking at the Department's experience between 1965 and May 1977. During that period, it received more than 3,600 submissions of more than 8,100 proposed changes by political units like Sheffield. Fifty-six percent of all Section 5 submissions and 48 percent of the changes in all submissions during that period were from such entities. I mention these challenges not because I question the right of affected jurisdictions to have their day in court but rather to emphasize that effective enforcement of the Voting Rights Act has been significantly impaired pending resolution of such litigation. Between December 1976 when a three-judge court in Sheffield decided against Section 5 coverage and the Supreme Court's decision in March 1978, meaningful enforcement of Section 5 with respect to similar entities was effectively stalled.

One must also acknowledge, in assessing the Act's effectiveness, that covered jurisdictions have made literally hundreds of changes that have never met the preclearance requirement of Section 5. I do not think it extravagant to conclude that many of those changes probably worked to the serious disadvantage of minority voters. I am proud of the performance of the Civil Rights Division in enforcing the Voting Rights Act during my tenure. But I will not sit before you today and assert that even during what I think was a period of vigorous enforcement of the Act that the Department

was able to ensure that every, or indeed most, electoral changes by covered jurisdictions were subjected to the Section 5 process. There was neither time nor adequate resources to canvas systematically changes since 1965 that had not been precleared, to obtain compliance with such procedures or even, in a few cases, to ascertain whether submitting jurisdictions had complied with objections to proposed changes. It was not uncommon for us to find out about changes made several years earlier from a submission made by a covered jurisdiction seeking preclearance of a more recent enactment. Take, for example, the case of the City of Greenville, Pitt County, North Carolina. In February 1980, the Department of Justice received a submission from Greenville, a city with a 25 percent black population, seeking preclearance of voting changes that became law in 1970, 1972, 1973, 1975, and 1977 without satisfying Section 5 requirements. In this instance, it should be noted, the submission was prompted by inquiries we made based upon an FBI survey conducted of voting changes in North Carolina, conducted at our request. Though the Department found most of the changes were nondiscriminatory, an objection was lodged to the city's switch from a plurality to majority vote system for election of its city council because of its discriminatory consequences for black voters. Viewed more positively, however, the Greenville experience does point up the fact that many unprecleared changes do come ultimately to the Department's attention. Extension of the Act should increase the likelihood that existing noncompliance with the law will be uncovered and remedied for the betterment of minority voters.

We must also recognize that electoral gains by minorities since 1965 have not taken on such a permanence as to render them immune to attempts by opponents of equality to diminish their political influence. I do not mean to be rhetorical or hyperbolic when I say that electoral victories, won by minorities in many communities through courageous and tenacious effort, could be swept away overnight were protections afforded by the Voting Rights Act removed. Shifts from ward to at-large elections, from plurality win to majority vote, from slating

to numbered posts, annexations and changes in the size of electoral bodies, could, in any given community among those jurisdictions covered by the Act, deprive minority voters of fair and effective procedures for electing candidates of their choice. "One swallow does not make a spring" and it is too early to conclude that the effects of decades of discrimination against blacks and other minorities have been eradicated and that they are now in a position to compete in the political arena against non-minorities on an equal basis without the assistance of the Voting Rights Act.

Furthermore, it bears noting that Voting Rights Act enforcement still must be concerned with changes that have a direct efffect upon the process of casting ballots, even though most of the serious challenges to minority electoral gains have come recently from redistrictings and annexations. In April 1978, for example, New Orleans, Louisiana submitted five proposed polling place changes 2 days after the changes went into effect for April 1 elections in that jurisdiction. We concluded that one of the changes had had discriminatory effects, in fact, upon the participation of black voters in the election. In that instance, the polling place was changed only 14 days before the election from a private home located in the 92 percent black district to an elementary school in another, non-contiguous district. Advertisements placed in the daily newspaper up to March 30 contained the address of the old polling place. On the day prior to the election and on election itself, the correct polling place location was given but the public school was incorrectly identified. The new polling place, located approximately 16 blocks from the old, required voters, many of whom were elderly, without automobiles or convenient access to public transportation, to cross an interstate highway approximately 170 feet wide in order to cast their ballots. Not unsurprisingly in view of the physical and other obstacles to casting their ballots I have just described, many black voters stayed at home on election day.

Between early 1977 and the end of 1980, the Attorney General, on my recommendation, authorized the assignment of over 3,000 federal observers to monitor elections in covered jurisdictions.

In almost every case, observers were assigned based upon our judgment that physical interference, intimidation or pressure was likely to be directed at minority voters absent a federal presence. Minority advances in the electoral process would appear to me to be especially vulnerable during the next few years when thousands of jurisdictions will be reapportioning themselves and making other alterations in their political structures based upon results of the 1980 census. I can think of no worse time to pull out from under minorities the props contained in the Voting Rights Act than during this period.

I have attempted, thus far, to describe certain strengths and weaknesses of efforts to enforce the Voting Rights Act, particularly during the 4 years I headed the Civil Rights Division. One additional feature of this enforcement record, however, deserves mention. For while I regarded it as my central responsibility under the Act to ensure against changes having a discriminatory purpose or effect with respect to minority participation in the electoral process, I was also determined to carry out that mission in a manner that was fair to the submitting jurisdictions and properly respectful of the integrity of their electoral processes.

Consequently, we devoted a great deal of time and energy to obtaining voluntary compliance by covered jurisdictions with Section 5 procedures. We wrote and rewrote guidelines and advisories to make such procedures as clear and nonburdensome to covered jurisdictions as possible. When inadequate submissions were sent to us, we attempted by letter and telephone to ensure that the affected entity understood what additional materials we needed to make an informed judgment. And every effort was made, even when submissions were received on the eve of elections, to complete the preclearance process in an expeditious fashion. Pursuant to this practice, most submissions received preclearance. In those cases where objections were lodged, we attempted to explain the basis for our opposition and to suggest, but not dictate, approaches that might make the proposed changes acceptable under the Act. We uniformly rejected attempts through political pressure to withdraw objections. Where jurisdictions requested reconsiderations

on the merits, however, we gave a second look and were willing to withdraw objections if newly presented evidence convinced us that no discrimination would result from the proposed changes. In these respects, I do not believe my approach differed very much from that taken by Stan Pottinger and most of my other predecessors.

I have heard it suggested that contrary to what I have just described, Section 5 enforcement by the Attorney General has been designed to ensure "proportional representation" or "quotas" for minorities in the electoral process. Let me take a few moments of your time to explain, by way of describing procedures the Department followed during my tenure, why such allegations are completely unfounded.

Under Section 5 the Attorney General must detemine whether an electoral change submittted for preclearance has the purpose or will have the effect of denying or abridging the right to vote on account of race or color. Once the Department receives a submission, the first step is to discern whether the covered jurisdiction has provided enough data on the change to allow meaningful evaluation of its nature and impact. If the information is insufficient, then the Department requests further data. Among the types of information needed by the Department are population and voting figures (by race or national origin), election results showing the degree of racial bloc voting or polarization and the extent to which minorities have been able to elect candidates of their choice, census maps, and some explanation of what, if any, alternatives were considered before the submitted change was adopted. The Department also seeks the identity of knowledgeable minority persons and organizations in the submitting jurisdiction in order to elicit their concern on the proposed change.

An analysis of all this information is ultimately designed to assess the pre-change level of minority political power and to decide whether that power is augmented, diminished or not affected at all by the change. Where the change augments the ability of minority groups to participate in the politcal process and to elect their choices to office, that is, gives greater recognition

to legitimate minority political strength, then the core objective Congress sought to achieve under Section 5 has been satisfied. No objection is lodged, therefore. Where the change promises to diminish or leave unaffected minority political power, further inquiries must be made. What they boil down to in many situations is a consideration of whether the submitting jurisdiction adopted the proposed change despite the availability of equally acceptable alternatives that would have given minorities a fairer opportunity to elect candidates of their choice. Take the case of redistricting plans. In a community with a 25 percent minority population, let us assume that local officials can create a compact and contiguous set of four city council districts where minorities are likely to have a sizeable population advantage in one district. When the jurisdiction submits instead, however, a plan that is not compact or contiguous, reflects substantial population deviations from district to district or is otherwise drawn in a fashion that frustrates any prospect that minorities will gain control of one district in the plan, the Department is likely to object. On the other hand, we might assume another set of facts in which it can be shown that no fairly-drawn redistricting plan will result in minority control of one district, because of dispersed minority residential patterns, for example. The Department's response is not to demand that the jurisdiction adopt a crazy-quilt, gerrymandered districting plan to ensure that proportional minority representation. Nor is the Department going to object to a plan that does not ensure minority control of a district where a community can show that racial bloc voting is not a significant consideration and that minority candidates or candidates favored by minority voters regularly run and win even from districts where non-minority voters are in control. In each of these instances, the Department objective is not to dictate any particular result.

II.

It must be clear to you by now, members of the Subcommittee, that the Voting Rights Act is needed now more than ever. It is

my profound conviction, moreover, that any efffort to tinker with the administative preclearance mechanism of Section 5 would serve to weaken and dilute the Act's effectiveness. The problem which Congress documented in 1965, 1970 and 1975 is, as the record before this Subcommittee shows, still with us. Flagrant violations of the rights of blacks and Hispanics in the covered jurisdictions continue to be the rule rather than the exception. Only with continued enforcement of existing Section 5 preclearance requirements will these violations be monitored and in more and more instances deterred.

When I testified last July before the House on extension of the Voting Rights Act, the Reagan Administration was considering a number of proposed modifications which, in my estimation, would have seriously weakened the Act's effectiveness. Consequently, much of my House statment was devoted to explaining my opposition to any such changes. It is my understanding, however, that any thoughts of modifying the Act to require nation-wide pre .earance, to restrict the types of changes subject to preclearance, to replace preclearance with mandatory notice mechanisms and to change the Section 5 coverage "trigger" and the bilingual provisions have been abandoned by this Administration. In view of this development, I would rather not repeat my House testimony on those issues and simply direct your attention to the record made there. Instead, I intend to devote the balance of my statement to consideration of two issues: a) bailout and b) Section 2.

Bail-out

I am aware that one of the topics being discussed most is the procedure for "bailing-out," that is, for terminating Section 5 coverage for a covered jurisdiction. There is a bail out provision in the law as it stands, and it has always been there. Moreover, that bail-out procedure, in Section 4(a), has been used successfully by 24 jurisdictions since 1975. Six such cases since 1975 have been unsuccessful,

and, before 1975, New York succeeded in bailing-out but the case was later reopened and New York was brought back in.

The current bail-out allows jurisdictions with a genuine history of nondiscrimination to bail-out. Because there is a bail-out that works in the law as it stands, when I testified before the House I urged the Subcommittee there to think very hard before deciding to change the procedure and venture out into uncharted territory. Bail-out is a complicated subject that should be complicated further by change only if the record requires it.

In that respect, as I understand it, the record is fairly clear: there is an absence of any clear basis or need for a change in the bail-out formula. As former Congresswoman Barbara Jordan testifed before the House Subcommittee:

> "Where are the incidents of jurisdictions changing their election laws to benefit minority voters? Where are the state legislatures which have enacted statutes mandating enforcement by local cities, counties, and school boards of 14th and 15th Amendment voting rights? Where are the state attorneys general who provide positive guidance to local governmental attorneys? Where are the minority citizens who testify to the good deeds of their elected officials? If they exist at all, they have not come before this Subcommittee."

Moreover, while a number of representatives of covered jurisdictions came before the House Subcommittee complaining about coverage and asking for an easier bail-out provision, such as the city attorney of Rome, the former mayor of Richmond, and a party official from Yazoo County, these witnesses seemed to have come from jurisdictions that have records of significant violations and would not be eligible for bail-out even under an amended bail-out formula. There may well be places that have a good record and that would be good candidates for bailing-out and yet are unable to do so under the current bail-out formula; if there are such places, though, they have not come forward to testify at the hearings. Whether this is because they do not exist, or whether it is because places that would be ready to terminate coverage do not find coverage burdensome, I do not know. I do know that many local officials believe (although they are

not in a position to say so publicly) that the Voting Rights Act is a useful reminder or prod for being certain that voting procedures are devised and applied in a way that focuses attention on the need to avoid diluting minority rights. Because of this, and the relatively little burden of complying with Section 5, it is quite likely that many jurisdictions have learned to live with Section 5 in a positive rather than negative way.

The House of Representatives, after considering this subject carefully, has, as I understand it, recognized that there may well be no jurisdiction that would be a proper candidate for bail-out now. But the Committee report speaks of the value of giving jurisdictions an incentive to do better, essentially some higher standard of conduct at which to aim.

Although I take issue with ~~most~~ much of the testimony of Attorney General William French Smith, I would like to quote his January 27 testimony on this very point: "...(I)t is imperative that we not lose sight of the fact that while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward looking and constructive in nature. That purpose was to encourage states and localities to bring blacks and other racial minorities into the mainstream of American political life."

Although General Smith critizes the new bail-out in S. 1992, his rationale for changing existing law is identical to that behind S. 1992. As I understand it, the justification for amending and expanding the existing bail-out is not to make it easy for a jurisdiction to do the minimum amount in order to terminate the Section 5 protections of its citizens, without having really changed its attitude and its practices. Rather, the provisions encourage jurisdictions to act consistently in a non-discriminatory fashion.

I am of the opinion that the bail-out provisions in S. 1992 accomplish the Attorney General's goal of providing an incentive for jurisdictions "to bring blacks and other racial minorities into the mainstream of American political life." This is an earn your way out bail-out.

First, a jurisdiction must show it has no violations of the Voting Rights Act or of the Constitution or other voting rights provisions, as well as no objections to proposed voting changes. There are five, ten year eligibility tests that target activities that would be a sign of continuing discrimination. For example, a jurisdiction must show that no federal examiners have been assigned. The assignment of examiners is a good indication of voting rights abuses at the local level. The significance of federal examiners was recognized by the Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301 (1965). The Court said that § 6(b) set adequate standards to guide the Attorney General in appointing examiners consistent with the purposes of the Act and protected against arbitrary use of the appointment process. My tenure as Assistant Attorney General convinces me that jurisdictions to which examiners have been sent are those where there are continuing voting rights violations.

In the category of no violations, I put a high value on a record of no implementation of Section 5 changes by the jurisdiction in question without submission and preclearance. During the past 5 years, there have been an alarmingly high number of non-submissions throughout the covered jurisdictions; these should not be tolerated in a jurisdiction seeking to show that it is "pure" or "saintly" and, therefore, entitled to bail-out. Moreover, it is indeed appropriate that a jurisdiction demonstrate compliance with the law from which it seeks exemption.

Second, the jurisdiction must show it has taken affirmative steps to bring about full voting participation, and the steps to be taken are specifically spelled out. If the bail-out procedure is to be an incentive, it ought to set standards high enough to discourage a jurisdiction that

might want to be free of the submission obligation but not wish to undergo a true change of attitutde and practice.

Third, there is an attempt to measure the practical effect of the things that the jurisdiction sets out to do, by providing the opportunity to look at evidence of the rate of participation by minority voters. The formula for Section 5 coverage is based on the use of a literacy test and a below 50% voter registration and turnout. As a practical matter this figure reflected the existence of discrimination that resulted in low minority participation. It is appropriate for a jurisdiction seeking to end Section 5 coverage to show that conditions have changed. This is an especially appropriate requirement since the covered jurisdictions have pointed continually to large increases in minority registration, voting and officeholding as evidence that they no longer need Section 5 coverage.

Apart from the substantive showing to be made by a jurisdiction seeking to bail-out, S. 1992 provides that a jurisdiction establish not only that its record as a particular governmental body warrants Section 5 coverage termination, but that the same is true of all subunits of government located there. For example, it would not be sensible or practical to allow a state to bail-out if there were violations within individual counties and cities within the state. The bailout in S. 1992, in this regard, contemplates the same level of State responsibility and protection as was contemplated by the Framers of the 15th Amendment, and the drafters of the 1965 Act. S. 1992 simply effectuates the 15th Amendment declaration that the States may not deny or abridge the right to vote. The State is the unit of government which is constitutionally responsible and which has plenary power, even where there is home rule, to determine the "conditions under which the right of suffrage may be exercised." Carrington v. Rash, 380 U.S. 89, 91 (1964). S. 1992 considerably expands the number of jurisdictions which are afforded the opportunity for separate bail-out. This new opportunity for counties to be relieved from the requirements of Section

5 does not, however, undermine the fundamental responsibility of covered States to protect the right to vote.

A question has arisen concerning the inability under S. 1992 of political subdivisons below the county or independent city level to be eligible for a bail-out suit. I think there is a great danger in expanding the level of jurisdiction eligible to file suit. The sheer number of suits resulting and the drain on resources of the Justice Department and private intervenors would be enormous. Even the change in S. 1992 to allow counties to bail-out presents some threat to uniform interpretation of the Act. It is critical, consequently, for exclusive jurisdiction over such suits to remain in the District of Columbia court.

Congress has previously recognized the need for uniformity in administering this critical statute, and the Supreme Court in the recent 1981 case of McDaniel v. Sanchez, a case from Texas involving a reapportionment plan, affirmed the importance of uniformity in holding that even where a local district court has jurisdiction over the "one person-one vote" issues in a reapportionment case from a covered jurisdiction, the discrimination issues should be dealt with by following the uniform procedures under Section 5. The Court in McDaniel said:

> "The procedures contemplated by the statute reflect a congressional choice in favor of specialized review either by the Attorney General of the United States or by the United States District Court for the District of Columbia. Because a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way."

Of course, every law should be interpreted uniformly, so why should the Voting Rights Act be treated differently from other laws? The reason lies in its subject matter -- the right to vote, and in its paramount importance in the congressional protection of our fundamental rights. Elections are critical yet short-lived events. Violations often emerge just before or even at an election; every

violation takes a great toll, yet violations are impossible to redress fully; not only are money damages no remedy, but injunctions never catch up with violations.

This feature of elections was the cornerstone of the strategy that the covered states followed of changing their voting laws promptly when on type of discrimination was blocked by Congress or the courts. Indeed, a former governor of one of the covered states made the public statement that any legislature can pass a law faster than a court can strike it down. It was precisely these facts that led Congress to pass the Voting Rights Act, and in Section 5 to shift the "burden of inertia." Congress recognized that relief was slow, and sometimes ineffective, and in voting more than in any other area this was destroying the right irreparably. For this reason Congress included a provision designed to achieve a high degree of uniformity in the enforcement process along with the other aspects of the speedy and effective remedy. It is for this reason as well that, as I discuss later, it is appropriate for Congress to amend Section 2 in an effort to provide a more effective remedy for longstanding voting rights abuses than is contained in the four corners of the 15th Amendment.

Unfortunately, many of the decisions which have arisen in local district courts -- in cases not committed to the exclusive jurisdiction of the United States District Court for the District of Columbia have borne out the danger of allowing these cases to lose the uniform treatment that Congress intended. Whether the results are because of judges who allow their personal or ideological beliefs to overcome the law, or because of the enormous local pressure in Voting Rights Act cases, the fact remains that many of the decisions in the local district courts have been and each of these decisions has caused enormous delay, delay that in turn destroys the right to vote.

Congress recognized that every attack on the right to vote kills at least a part of it that can never be brought back, especially for minority citizens who have been bred to

know that some people will stop at literally nothing to prevent them from having that right.

Make no mistake about it. My experience as Assistant Attorney General tells me that shifting jurisdiction from the District of Columbia to the local district courts would not be a simply jurisdictional modification; it would be a major undoing of an essential part of the congressional scheme that has helped make the Voting Rights Act as effective as it has been.

Congress was entitled to think in 1965 (and reaffirm in 1970 and 1975) that the right to vote is different from other legal questions, and that a degree of diversity that may be permissible in cases having to do with securities transactions or utility rate disputes is not permissible in an Act born out of years of frustration with the Nation's most intractable and most disgraceful problem.

The record before this Subcommittee has shown the importance of other features of Section 5; I believe it equally well shows the importance and integral role of keeping bail-out jurisdiction in the District of Columbia.

These thoughts lead me to some conclusions about the Administration's position that the bail-out in the House bill and S. 1992 is not reasonable, that the provisions are not workable and in a view you, Mr. Chairman seem to share, that they are impossible. I have not seen anything in either the House record or testimony before this Subcommittee to document such allegations. The only effort, in fact that I have seen to study the practical effect of the HR 3112/S. 1992 bail-out provisions has been done by the Joint Center of Political Studies. They attached a chart to the testimony of Armand Derfner, Director of the Center's Voting Law Policy Project. Contrary to the position of the Administration and other critics of S. 1992, the bail-out provisions <u>are</u> reasonable. At least 24% of counties within the covered states would not be disqualified by any of the objective criteria of S. 1992. On a legislative record lacking in specific case studies or factual support for modifying the

existing bail-out, I simply do not see how anyone can claim that more than 24% of the counties in covered states should bail-out immediately. Furthermore, as I read the Joint Center's aggregate projections, by 1992 all jurisdictions will have had notice of and the opportunity to comply with the new bail-out provisions in S. 1992. As Mr. Derfner concluded, "those jurisidictions that remain covered beyond 1992 will be under the Act only because they continue discriminating not only today, but on into the future as well."

Section 2

Section 2 of S. 1992 would amend Section 2 of the Voting Rights Act of 1965 as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4 (f) (2). The fact that members of a minority group have not been selected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section. [New matter underlined].

I am in favor of this proposed Amendment, already adopted in the House-passed version (H.R. 3112), for I believe it provides much needed clarification with respect to standards of proof required in suits brought under Section 2 after the Supreme Court's fragmented decision in City of Mobile v. Bolden, 446 U.S. 55.

In Mobile, the Court held that under the Fourteenth and Fifteenth Amendments (and under Section 2 of the Voting Rights Act) a successful plaintiff must prove that a challenged electoral scheme was "conceived or operated as a purposeful device to further racial discrimination." Id., at 65. Prior to Mobile, however, other decisions of the Supreme Court had led lower courts, litigants and commentators to conclude that unconstitutionality could be established by proof that did not turn upon whether governmental officials who created or perpetuated schemes that effectively excluded racial and ethnic minorities from the electoral process were motivated by discriminatory purposes or intent.

In Fortson v. Dorsey, 379 U.S. 433 (1965), the Court stated:

> It might well be that designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. Id. at 439.

Shortly thereafter, the Supreme Court cited the above-quoted language in Fortson for the proposition that the consequences it described were precisely the types of "invidious discrimination" and "invidious effects" that the Constitution forbade. Burns v. Richardson, 384 U.S. 73, 88 (1965).

Fortson and Burns, while they spoke to the question of the possible unconstitutionality of multi-member electoral plans, did not present for decision claims that racial or ethnic minorities were having their voting strength minimized or cancelled out by such arrangements. Where that precise claim was made several years later with respect to Indiana's state legislative apportionment plan, the Supreme Court found the evidence issufficient to support a finding of unconstitutionality. Whitcomb v. Chavis, 403 U.S. 124 (1971). In reaching that conclusion, the Court observed:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats. Id. at 149-150.

The plaintiffs were often unsuccessful at the polls in a strongly Republican county, the Court concluded, because they were Democrats, not because they were black.

In contrast to its treatment of the challenges to multi-member districts in Whitcomb, in White v. Register, 412 U.S. 755 (1973), the Court found that blacks and Mexican-Americans in two Texas counties had been effectively excluded from the electoral process in violation of the Constitution. There, the Court relied upon findings by the trial court that blacks in Dallas County, Texas had been 1) the victims

of a history of official racial discrimination in Texas which at times touched the right of Negroes to register and vote and to participate in the democratic processes; 2) that Texas' majority vote requirement and "place" rule "enhanced the opportunity for racial discrimination" by reducing legislative elections from multi-member districts to a "head-to-head contest for each position," 3) that only two black state representatives had been elected from Dallas County since Reconstruction and that these were the only two blacks ever slated by an organization that effectively controlled Democratic Party candidate slating; 4) that the Democratic Party slating organization was insensitive to the needs and aspirations of the black community; and 5) that the same slating organization had employed racial compaign tactics to defeat candidates supported by the black community. With regard to the exclusion of Mexican-Americans from the political process in Bexar County, the district court made factual findings 1) that there were continued effects of a long history of invidious discrimination against Mexican-Americans in education, employment, economics, health, politics and other fields, and cultural and language barriers which made Mexican-American participation in the political life of Bexar County extremely difficult operating "'to effectively deny Mexican-Americans access to the political processes in Texas even longer than the blacks were formerly denied access by the white primary;'" 2) that only five Mexican-Americans have represented Bexar County in the Texas legislature since 1880; and 3) that the county's legislative delegation "was insufficiently responsive to Mexican-American interests." The Supreme Court found the trial court's findings a persuasive "blend of history and an intensely local appraisel of the design and impact of the Bexar County multi-member district in the light of past and present reality, political and otherwise."

The plaintiffs in Mobile made a case equally as strong as that presented to the Court in White, in my estimation. The trial court found 1) that blacks had been subject to

massive official and private racial discrimination until the Voting Rights Act of 1965; 2) that the effects of past discrimination still substantially affected black political participation; 3) that local political processes were not equally open to blacks; 4) that there was extensive evidence of racial polarization in voting patterns during the 1960's and 1970's; 5) that no black had ever been elected to the Mobile City Commission despite the fact that blacks constitute more than 35% of the population of Mobile; 6) that City Commissioners had not been responsive to the needs of the black community; 7) that there was no clear-cut state policy preference for at-large elections; and 8) that the large size of the city-wide election district, majority vote requirement, the place or number requirement and the lack of provisions that candidates run from particular geographic subdistricts enhanced the exclusion of blacks from local political process. Yet the plaintiffs in Mobile lost. Why they lost cannot be determined with any amount of certainty in view of the fact that the court spoke with not one voice, as in White, but rather through six separate opinions, no one of which gained a majority vote of the justices. It is sufficiently clear to me, however, that Mobile ~~made substantial doubt upon the ability of~~ makes it [unlikely that] the plaintiffs in White ~~to prove a case~~ would be able of unconstitutional exclusion were that very same case, presenting the very same facts, relitigated in 1982.

Given this state of affairs, I think that the Congress has ample justification for seeking to amend Section 2 of the Voting Rights Act pursuant to its powers under the Fourteenth and Fifteenth Amendments to ensure that racial, and ethnic minorities are not left powerless to challenge effectively schemes like those at issue in White and Mobile. Such arrangements, which have relied upon a combination of pervasive official discrimination and private prejudice for their creation and maintenance, are precisely the types of effective exclusion of historically disadvantaged groups

from the political process that the Voting Rights Act of 1965 was intended to extirpate.

The proposed Amendment to Section 2 appears to achieve this objective satisfactorily. It does not require plaintiffs to undertake the extraordinarily expensive, time-consuming and, often, futile search for evidence of discriminatory motives of public officials who created and maintained the challenged systems, as the plurality opinion in Mobile seems to require. In the criminal context, the question of illegal intent turns upon the motivations of an identifiable person or persons with respect to a discrete number of acts, usually within a relatively limited period of time. Establishing intent in the context of an electoral challenge, in contrast, might well impose upon plaintiffs the task of pinning down the motivations of literally hundreds of public officials, regarding myriads of election-related decisions over a period of years, if not scores of years. Instead, it adopts, as the House Report makes clear, the type of painstaking analysis of a variety of factors alleged to result in minority exclusion, that the Court approved of in White.

Yet it does not free challengers to make their case of discrimination merely by showing that they are disproportionately represented on the elective bodies at issues. The Amendment, by its very terms, negates such a reading. In so doing, the Amendment incorporates the well-recognized doctrine that an electoral scheme cannot be challenged effectively merely by showing "that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." White v. Register, supra at 765-66. One need only compare the drastically different outcomes in Whitcomb, on the one hand, and White, on the other, to see that the proposed Amendment, informed by these two principles, does not signal an all-out attack upon at-large electoral schemes across the country, irrespective of the factual contexts in which such schemes were established and have been maintained.

In those jurisdictions where the evidence supports the conclusion that a combination of public and private actions, over time, have succeeded in "fencing out" minorities from the electoral process, I find it difficult to understand how requiring that corrective measures be undertaken brands that community and its officials as "racists," as some critics of the proposed Amendment have suggested.

By the same logic, I suppose, communities found to have deprived certain voters of an effective political voice by not adhering to the "one person, one vote" principles of Reynolds v. Sims, 377 U.S. 533 (1964) should be stigmatized as "Boss Tweed," even though no intent to discriminate need be proven in such challenges. In both cases, in fact, the court's intervention occurs because the political process has shown itself incapable of correcting historic electoral schemes that result in a denial of full participation in the electoral process.

With all due respect, I do not think that the Congress should allow concerns over "name calling" to allow the perpetuation of schemes that effectively exclude racial and ethnic minorities from electoral process any more than it allows for plans that make one person's vote worth more than another's through malapportionment. For we are not, in either case, engaged in the process of affixing individual, personal blame for the exclusions but rather ensuring that our most precious right in this democracy, the franchise, is not debased.

CONCLUSION

In upholding the constitutionality of the Voting Rights Act against an early challenge by the State of South Carolina, the Supreme Court concluded as follows:

> Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they must live. We may finally look forward to the day when truly "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous conditions of servitude." South Carolina v. Katzenbach, supra, at 337.

As I trust my testimony and that of many other witnesses before me have made unavoidably clear, Mr. Chairman and Members, that hope expressed over 15 years ago remains but a hope, not a reality.

Passage of S. 1992 offers, in my sincerest estimation, the only genuine prospect of ensuring that millions of minority citizens gain their rightful place in the political life of this Nation. In addition to extension of the Voting Rights Act, however, the Act needs the resources and vigilant oversight only this Congress can provide to ensure its continued effectiveness. Congress must ensure that the current and all future Administrations faithfully enforce the provisions of this most vital law. Thank you.

Senator THURMOND. I believe that completes the witnesses we had scheduled for today, so the hearing is now adjourned.

[Whereupon, at 12 noon, the hearing recessed, to reconvene at the call of the Chair.]

VOTING RIGHTS ACT

THURSDAY, FEBRUARY 25, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:52 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Kennedy.

Staff present: Stephen Markman, chief counsel; William Lucius, counsel; Claire Greif, clerk; and Burt Wides, minority counsel.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The subcommittee will be in order.

Ladies and gentlemen, this marks the eighth day of hearings by the Subcommittee on the Constitution on the Voting Rights Act. We will conclude our hearings on this matter next Monday when we hear the Assistant Attorney General of the United States for Civil Rights, Mr. William Bradford Reynolds.

Because we have a slightly longer witness list today than usual, I will be brief in my opening remarks. I would, however, like to note for the record my extreme disappointment in the quality of coverage thus far on the Voting Rights Act. While there are many journalists who have done an excellent job in attempting to explain the extremely important issues being discussed in these hearings, I regret to say that this has not been the norm, in my opinion.

I believe that these hearings have really highlighted the best arguments on both sides, or all sides, of this very important issue, and there are good arguments on both sides. I empathize with the arguments on both sides, and I think that the people in this country deserve to hear the arguments on both sides. I do not think they have, basically, through the media that I have read, except with some notable exceptions.

While I recognize that the question of intent versus effects, for example, is not a very glamorous issue, nor is it one that can be written in a glamorous fashion, I suppose, it is nevertheless disappointing to see the concentration in the media, particularly the television networks, with the subject of parades and marches on voting rights rather than the issues that are involved here. I think they should cover those, also. Such parades and marches, I think, are indeed newsworthy, but it is also newsworthy occasionally to

explain the issues supposedly motivating these parades and marches, and I have rarely seen this on the networks.

Similarly, while I recognize the differences of opinion that exist on most of the issues surrounding the Voting Rights Act, there really does not seem to be serious disagreement as far as what these issues are. Clearly, the question of the standard in section 2 and what constitutes a reasonable bailout are the major focuses of debate.

Despite this, there seems to be a preoccupation in parts of the media to define the debate in terms of whether or not the Voting Rights Act will be extended this year or permitted to expire. That really is not the question. There is nobody that I know of who will not extend the present voting rights law, at the very least, and I think most people want to extend it with some strengths if in can be done.

In particular, I would like to draw attention to the coverage of the only newspaper in town, the Washington Post. Their coverage of this issue, both on the editorial pages and in what purport to be their news columns, has been particularly distorted. I will not belabor the point now except briefly to compare the nature of their remarks on this debate in recent weeks and their remarks when the Supreme Court's *Mobile* decision was handed down in 1980.

Today, the Washington Post says that the results test in section 2 would "simply reinstate the standard used by the courts before the Supreme Court decision in *Mobile* v. *Bolden*." In 1980, in less politically charged times, the Post said:

> It is not at all clear that what the Justices did was, from a legal point of view, wrong or even that their decision represented a serious setback to civil rights.

Today, the Washington Post says that the issue in section 2 is simply whether or not we are going to restore the earlier standard. In 1980, the Post added just a bit of description that has been absent from the present debate when it said that the Court's decision in *Mobile*:

> Derails the legal theory that civil rights lawyers had hoped would force a shift from at-large elections to ward or district elections in cities all over the country.

Now, the Post was right then. That is the issue. That is one of the major issues in this battle. It is not whether or not the Voting Rights Act is going to be extended. There is no question in my mind about that. I recommended that 6 to 8 months ago, or longer than that. I went down to the White House and recommended that. They agreed to it, and at that time everybody was arguing for a simple extension.

But today the Washington Post says that the change in section 2 would simply restore the traditional standards for identifying discrimination. In 1980, the Post acknowledged that the *Mobile* decision would effect legal challenges to dozens, perhaps hundreds, of legal challenges against existing systems of government or multimember legislative districts.

Today the Washington Post derides those who argue that the only logical end of the results test is proportional representation by race. That is an important issue. That is the issue, as far as I am concerned. It is, I think, one of the most important issues in the history of the Constitution.

In 1980, the Post said of the *Mobile* decision that:

> It also avoided the logical terminal point of these legal challenges that election line districts be drawn to give proportional representation to minorities.

That, I would emphasize, was not merely the Court's view of the effects test; it was the view of the Washington Post as well.

Finally, the Washington Post today speaks about congressional efforts to "dilute the voting power of minorities." In addition, we are told that the President has "received some very bad advice on civil rights matters," presumably including on the Voting Rights Act. I agree that he has received some very bad advice on civil rights matters. I have no doubt in my mind about that, and I have made my point clear at the White House—but not on the Voting Rights Act.

In 1980, the Post concluded its exposition of the Voting Rights Act by stating that, "not all problems of discrimination can or should be settled in the courts, and this is one left just as well in the political arena."

The Washington Post is, of course, entitled to change its views on this or any other issue. I simply wish that they would be just a little bit less self-righteous in condemning those who do not convert at quite the same moment.

The same goes for the steady stream of witnesses that we have had before this committee for the last month, who now tell us that those members who adopt the positions that these witnesses had held less than a year ago on such matters as how long to extend the Voting Rights Act or whether to effect changes in the Voting Rights Act are now enemies of civil rights. That is pure bunk, and I think it is the rankest hypocrisy to boot.

Ladies and gentlemen, I welcome each of our witnesses to the committee this morning and look forward to your testimony. I will say this, that I have requested two witnesses this morning, and this has been the case throughout most of these hearings. Most of the witnesses have been requested by Senator Kennedy. I will expect Senator Kennedy or some member of the minority to be here to listen to those witnesses because I have got some other conflicts that I am going to have to take today. I can probably stay through the first three witnesses and maybe the first five here this morning. Beyond that, I am going to have difficulty being here, so I hope that we will get somebody from the minority, since they feel, as I do that this testimony is so important here today. But I have not seen an awful lot of people here to support the witnesses who have been making the point that the "effects" test was simply the test before *Mobile* v. *Bolden*, or any other points with which some of us might otherwise disagree.

Our first witness today will be Mr. Irving Younger of the Washington law firm of Williams & Connolly. He formerly was professor of law at New York University, Columbia University, and Harvard University. He is one of the most distinguished trial attorneys in the United States today. He has written widely, published widely; he has been responsible for a number of learned dissertations in the field of evidence, among other things, and we feel very honored to have you with us today, and we will look forward to taking your testimony.

Mr. YOUNGER. Thank you, Senator.

STATEMENT OF IRVING YOUNGER, ESQ.

Mr. YOUNGER. If at this moment I had three wishes, Mr. Chairman, I would use the first of them to acquire the gift of tongues, so that I might better be able to express the honor it is to have been invited to participate in these important hearings on the Voting Rights Act extension.

As a law professor, I have labored to explain statutes; as a judge, to apply them; and as a trial lawyer, to argue about their meaning. Here, however, a statute is being made. The process touches all that is best in our politics and all that is most difficult. That is why the members of this subcommittee, however opposed may be their views on the issues under debate and no matter the outcome, deserve the support and gratitude of all of us, for in that debate we govern ourselves.

My subject is section 2 of the bill. What standard is to govern litigation alleging a violation of the right to vote?

Others, I know, have described the history of section 2 and parsed out the cases construing it. It would serve no purpose for me merely to repeat what the members have already heard. The assistance I may be able to give the subcommittee involves something else—not so much what is to be learned in the library as what is to be learned in the courtroom.

Let me presume upon such experience as I have in the courtroom, which is summarized in the written statement I have submitted, to comment as a trial lawyer on the proposed section 2.

As it stands, section 2 forbids any practice applied "in a manner which results in a denial or abridgment of" the right to vote on account of race. In short, section 2 overrules the Supreme Court's decision in *Mobile,* replacing the "intent" test of that case with an "effects" test.

I doubt the wisdom of this provision, and my doubt rests upon three reasons.

First, in my view, the "effects" test will have an inevitable tendency to lead to racial quotas. That is so, I think, because human beings are remarkably quick to find the shortest way to avoid trouble with the authorities. In this instance, the human beings in question would be local officials and the authorities, agents of the Federal Government.

Local officials, under the proposed section 2, will note that an elected body with a racial composition unproportionate to that of the voting population may well be taken by the authorities as proof of discrimination. By contrast, an elected body with a racial composition proportionate to that of the voting population will be taken by the authorities as proof of no discrimination.

Since trouble with the authorities is the last thing any sensible person wants, the proper course will spring instantly to mind: Contrive matters so as to assure an elected body with a racial composition proportionate to that of the voting population. However explained, however disguised, however rationalized, that is a quota system, with fixed numbers of places in the elected body allocated to members of one race or another.

My vision of America is that of a country in which a citizen's chance to play a part in public affairs is unaffected by the citizen's race. Quotas are therefore repugnant to me, and any scheme which might lead to quotas pernicious.

My second reason is that the purported saving sentence of proposed section 2 in fact saves nothing. The sentence provides that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." That is simply incoherent.

To violate the section, a State or a subdivision of the State must apply a voting practice so as to deny the right to vote on account of race. The racial makeup of an elected body cannot, by definition, be a violation of the section. The question is whether the racial makeup of an elected body may be taken as some evidence of a racially invidious application of a voting practice; that is, as some evidence of a violation.

If the draftsmen of proposed section 2 wished to see to it that the racial makeup of an elected body would not be taken as evidence of a violation, they have failed to say so in their moving sentence. If enacted, that saving sentence will either be rewritten by the courts or ignored, in either event debasing Congress responsibility to write the Nation's laws.

Third, and perhaps most important to me, the alternative to an "effects" test is neither unusual nor difficult to apply. Under that alternative, the "intent" test, a claimant would be obliged to prove that the practice complained of was adopted or applied with the intention of discriminating on account of race. This would seem to be the clear command of the 15th amendment, which uses the phrase "on account of race," a reading of the 15th amendment which, so far as I am aware, has elicited opposition in principle from no one.

Opposition to the "intent" test has been practical. To enact it, the argument goes, is to make it difficult or even impossible to prove a violation, an argument which suggests to me that its makers lack practical experience of the conduct of litigation.

Spend a few hours in any court in the land, especially the criminal courts. What is the stuff on trial? Almost always, it is a question of intent. It is not a crime to raise your hand and strike someone. It is a crime to do so intentionally. It is not a crime to walk out of a store carrying merchandise unpaid for. It is a crime to do so intentionally. It is not a crime to underpay your income tax. It is a crime to do so intentionally. In nearly all criminal litigation and in much civil litigation, a party must prove the other party's intent.

So far as I know, except for the matter now before this subcommittee, there has been no serious contention that it is an unduly difficult or impossible thing to do. On the contrary, the courts have worked up several rules, really rules of thumb, to guide judges and juries in ferreting out intent. Some examples: Intent may be inferred from what X said, but what X said does not conclude the inquiry. A jury may find that X's intention was the opposite of what he said. Or X's intent may be inferred from all the circumstances of his behavior. Or X will be deemed to have intended the direct and natural consequences of his acts.

Nowhere does the law of evidence require a "smoking gun" in the form of an express acknowledgment of the offending intent, and nowhere has the administration of justice been impeded by the nearly universal absence of any such requirement. Litigation under a section 2 rewritten to include an "intent" test, I think, would be no exception. Lawyers and judges are familiar with the "intent" test, and juries have no particular trouble applying it.

Because the "effects" test would have unfortunate consequences, I urge the subcommittee to oppose it. Because the "intent" test is familiar and workable, I ask the subcommittee to support it.

I would be glad to try to respond to any questions you may have.

Senator HATCH. Well, thank you very much.

One of the great lawyers of this land, Prof. Archibald Cox of Harvard University, will testify later today, a man for whom I have a great deal of respect. He makes these comments:

> The principal difficulties with the "intent" test are, (a) to speak of the subjective purpose of a sizable legislative body or of the body of citizens voting in a referendum is to indulge in a fiction. In such cases, there is no one mind with a single purpose or set of purposes. Legislators and voters in a referendum vote one way or the other with a wide variety of purposes or sets of purposes.
>
> In other contexts, the Supreme Court has cautioned against probing the subjective purposes of legislators—for example, *Fletcher* v. *Peck*, *United States* v. *O'Brien*, *Palmer* v. *Thompson*.

Do you agree or disagree with Professor Cox on that statement?

Mr. YOUNGER. I agree with you, Senator, in your assessment of Professor Cox's distinction. He is one of the great lawyers of the land.

With respect to the portion of the statement that you have just read, though, I would say that Professor Cox takes an incomplete view of the problem. To begin with, at least in the portion of his statement that you have read, Professor Cox fails to address the alternative to the "intent" test, which is the "effects" test, and what I say is its inevitable consequence, the development of a quota system or a proportional representation system.

Second, Professor Cox ignores what I should think is the starting point for any consideration of this problem. We are seeking how best to give effect to the 15th amendment. Section 2 is, after all, Congress attempt to effectuate the 15th amendment. The 15th amendment is not a guarantee in blanket terms of the right to vote, nor is it a prohibition against depriving anyone of the right to vote. The 15th amendment, rather, is a prohibition against depriving people of the right to vote on account of their race, and I would take those words to mean because of their race, which is why I say that the 15th amendment, fairly read, suggests an "intent" test.

What Professor Cox does is repeat the argument that is traditionally made about the practical difficulties of conducting litigation under the "intent" test. It seems to me that his list of horribles bespeaks an inadequate experience of the courtroom. Professor Cox says that it is very difficult to determine what a legislature's purpose was, or intent. It is quite common in civil and criminal litigation for lawyers to argue to judges that the intent of a particular piece of legislation was thus and so. Indeed, that is the cardinal rule for construing a statute. The court must seek to determine, as best it can, what was the intent of the legislature.

We are all familiar with the debate on the intent of the Framers of the Constitution and of those who enacted subsequent amendments. I do not for one moment suggest that the matter is easy. I do not for one moment suggest, Senator, that you reach down and simply pick up off the ground the answer to the question, what was the intent of the legislature or the Congress or the local elected body?

I do suggest, however, that lawyers and judges have a great deal of experience in seeking to determine the answer to that question, and the law of evidence has evolved a set of rules to help the enterprise. This is not the place to rehearse the law of evidence, but I remind lawyers in the room of the doctrine of judicial notice of legislative fact, well established in the law of evidence everywhere, and specifically designed to permit a lawyer to submit to the court whatever the evidence may be, be it historical materials, the records of legislative debates, contemporary newspaper accounts, or the like, so as to help the court determine what the intent of the legislature was.

Senator HATCH. Let me read some more of what Professor Cox says, and I will read the rest of them and then you can respond to them.

(b) There is seldom any reliable record, even of the debates in the State legislature. There are only scraps of evidence concerning the public debate preceding a referendum. Furthermore, those who have a discriminatory purpose will seldom acknowledge it. They will be at pains to conceal their purpose if Congress acquiesces in the interpretation put upon section 2 in the *Mobile* case.

To make matters worse, one court has held that there can be no inquiry into the motives of voters in a referendum.

He cites *Kirksey* v. *City of Jackson.*

(c) Often, as in the *Mobile* case, the State or local law that results in systematic racial discrimination was enacted 10, 20, or even 50 years ago. The difficulty of proving the subjective purpose long after adoption is obvious.

(d) A law enacted in the distant past may have been nondiscriminatory initially in both purpose and effect but may later come to operate in a manner and context that results in systematic and drastic exclusion of a racial group from meaningful participation in the democratic process. Surely such a law should not be invulnerable and the racial injustice irremediable. But how in the world can anyone prove that the purpose of political inactivity is racial discrimination if proof of the consequences will not suffice? *City of Mobile* v. *Bolden* appears to rule that that form of proof is legally insufficient under the present act.

I will have my staff member bring this down to you so that you may have this in front of you, while answering the issues raised by these three points, which I have just addressed.

Mr. YOUNGER. Thank you. I don't know about answering them, but I would certainly be delighted to comment upon them, Senator.

Senator HATCH. I would appreciate your commenting upon them, Mr. Younger.

Mr. YOUNGER. In the last portion of the statement, Professor Cox seems to suggest that, in his view, proof of the discriminatory effect should suffice to establish the violation, and I suppose there, in a nutshell, is the difference of viewpoint between us.

The discriminatory effect of the voting practice, in my view, should properly serve as some evidence of the intent with which the practice was adopted, and one can conceive of cases in which that evidence would be so very persuasive as to conclude the inquiry. But I do not believe that in every case a demonstration of

that discriminatory effect should be equivalent to making out a violation of the statute. Apparently, Professor Cox does.

In addition, in the portion you have just read, Professor Cox uses three words interchangeably which a careful examination of the cases will demonstrate should not be used interchangeably because they are not synonymous in the law. Those words are "motive," "purpose," and "intent" with respect to the act of the legislature in adopting a given piece of legislation.

This is not the place to tease out the differences in meaning among those three words, but there is a rather considerable literature on it. I have been at some pains to use the word "intent" because that is the concept that has figured in the litigation I have in mind. A careful review of the literature will suggest that what a court does is determine the legislative intent, putting aside motive and purpose, those being—to speak broadly—the objectives the legislature seeks to achieve beyond the intent with which the legislation is enacted. That a local governmental body interested in concealing some racially invidious intent would say things designed to make it difficult to determine the intent is not a novel situation to any trial lawyer and certainly not to any criminal lawyer.

Any time a criminal case goes on trial, by definition, we have a defendent who has concealed his intent; he is not pleading guilty; he is not telling you that he did it with the necessary intent. And so, despite the silence or the deceptive words or behavior of the defendant, we go ahead and, much of the time, do manage to prove whether or not the defendant had the requisite intent. Similar issues will arise in civil litigation.

Senator HATCH. In criminal litigation, however, the prosecutor has to prove intent beyond a reasonable doubt.

Mr. YOUNGER. Yes.

Senator HATCH. But the standard civil measure of proof used to decide a potential civil rights violation case, such as the *Mobile* case, is by a mere preponderance of the evidence.

Mr. YOUNGER. By the standard civil measure of proof, yes.

Finally, as to Professor Cox's point that sometimes we are dealing with a practice that goes back 25 or more years ago, it seems to me that were we dealing with such a practice, our problem of proof would be that much easier because people would not have been motivated then to conceal what it is that led to the conduct in question.

I would say that it is a matter of investigation and making use of all of the resources that are available, historical materials, newspaper accounts, the record of the legislative process, et cetera. But there is nothing unusual about it, and there is nothing especially difficult about it.

Senator HATCH. I am compelled to clarify one critically important point which has been repeatedly misconstrued during this debate: Intent need not be demonstrated as far as the original passage of legislation, which has been a misconception that has been reiterated with great regularity during the course of these hearings. Am I not correct that intent to maintain legislation that is discriminatory is also within the coverage of the 15th amendment?

Mr. YOUNGER. Absolutely. I have no hesitation in agreeing with that.

Senator HATCH. That seems to contradict what Mr. Cox is saying.

Mr. YOUNGER. One can posit a situation in which we deal with a statute enacted 80 years ago, and we pay no attention at all to the intent or the motivation of the legislators who enacted it 80 years ago.

Senator HATCH. Rather the motivations of those who are maintaining that statute would be the subject to which the court's attention would be directed?

Mr. YOUNGER. It is a question of how is it being applied today, and as to that there will be evidence; there are people to be interrogated.

Senator HATCH. Well, I find a lot of people who have not had extensive trial litigation experience get very confused on these particular issues surrounding the intent versus effects controversy here. I presume that that is one reason why the media is having difficulty explaining the differences between the two.

Mr. YOUNGER. Perhaps so. It is not an easy concept.

Senator HATCH. No, it is not and perhaps I have been somewhat harsh on the media here this morning. I must suggest, however, that there are two legitimate sides to this issue and that both of them deserve attention in the media discussions of this matter.

Mr. YOUNGER. I would like a moment just to concur in what you said, Senator. I think that there are two legitimate sides here. I do not wish for one moment to be understood as suggesting that there is no merit to the contrary view. I do not wish to be understood as saying that Professor Cox is wholly off base. The points that he makes are coherent and valid points.

I think that the answers to Professor Cox's points outweigh the points, and hence, on balance, I come down in favor of the "intent" test rather than the "effects" test, but by no means do I question the good faith of the people who take the opposite viewpoint.

Senator HATCH. No, and neither do I.

Where did the notion evolve, in your view, that it is necessary to mindread or to find a "smoking gun" in order to identify discrimination under the "intent" standard?

Mr. YOUNGER. My guess is that that view has its origin in insufficient thought about the problem, slender trial experience, and the kind of surface attractiveness of the image of the smoking gun, for reasons that I suppose are well understood.

Senator HATCH. My suggestion is that that notion has its origin in a purely political considerations rather than in any intellectual or constitutional approach to a solution to the discrimination issue.

Mr. YOUNGER. You say it more forthrightly than I did, sir.

Senator HATCH. OK.

How do you respond to the argument that you have to evaluate the actions of individuals who may have been dead for many years when utilizing the standard of "intent"? Is that degree of evaluation required under the "intent" standard? In fact, is it even possible to do an evaluation of this sort?

Mr. YOUNGER. I think it is possible to do, but by no means is it required. We can conceive of cases in which one would be obliged to do that, and it is simply a matter of determining what people who are now dead once did and then, in the usual manner that

lawyers are familiar with, deriving from their conduct some sense of what was their intent.

But, as we have said, the statute is broader than that. The statute would permit the focus to be not upon the intent of those who enacted some piece of legislation years ago but on the intent of those administrators who are presently charged with the obligation to apply the enactment of many years ago. It would be the intent of those administrators which would be at issue, and they are alive and here to be questioned.

Senator HATCH. Well, you are, in my opinion, an expert trial lawyer. Could you suggest some of the bits of evidence to which you might look in an effort to establish an inference of intent on the part of a community sued under the Voting Rights Act?

Mr. YOUNGER. You begin, of course, by looking at what the community said. That would involve, discussions at town meetings, statements, press releases and the like by elected officials, editorial comment, town meetings, whatever else the circumstances permit.

Then one would apply the standard rules, as referred to in my prepared statement. What is it that was done? From what was done, is it possible to infer an intent, having in mind that people will be deemed to have intended the necessary and direct consequences of what it is that they did, and so on. It is difficult to lay out a computer program for it in the abstract, but given a concrete set of circumstances, I think there is no trial lawyer who wouldn't be able to map out a scenario of the questions you would ask, and once you had answers, you would be able to demonstrate that the intent was thus and so.

Senator HATCH. Would you agree with my prior statement that literally any kind of evidence can be used to satisfy this requirement? As the Supreme Court noted in the *Arlington Heights* case, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." Among the specific considerations that it mentions are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, and the impact of a decision upon minority groups, et cetera.

Mr. YOUNGER. Absolutely.

Senator HATCH. You agree with that?

Mr. YOUNGER. Absolutely, yes. And the last reference is, of course, to the effect of the thing, the impact upon minority groups. That is one element of the evidence.

Senator HATCH. In other words, you are not ruling out consideration of disparate impact or effects?

Mr. YOUNGER. No. I just say that it should not be, in all cases, dispositive.

Senator HATCH. Well, as a matter of fact, what you are saying is that, standing alone, it would not be dispositive.

Mr. YOUNGER. I can imagine a case in which, standing alone, it would be dispositive.

Senator HATCH. Yes.

Mr. YOUNGER. For example, if there were no conceivable explanation for what was done.

Senator HATCH. But you would still have to conclude that there was some purposeful intent, to discriminate in operation.

Mr. YOUNGER. Yes. You would conclude that there had been discriminatory intent from the effect.

Senator HATCH. You are saying it is not impossible, by any stretch of the imagination, to prove intent?

Mr. YOUNGER. Not at all.

Senator HATCH. And it is done every day in courts throughout this land and in every instance of a criminal conviction.

Mr. YOUNGER. That is precisely what I have come here to say.

Senator HATCH. How do we evaluate the existence of intent on the part of a corporate body, such as the city council or State legislature, as opposed to an individual under those circumstances?

Mr. YOUNGER. It seems to me, Senator, that in many cases it will be easier to evaluate intent in connection with a corporate body than with an individual, because it is the nature of the body that it leaves a paper trail. There are memos, there are speeches, there are records from which one can infer intent, whereas, when you are dealing with an individual, it is not at all uncommon that the individual speaks to nobody, writes nothing, and the only thing you have from which to infer his intent is his conduct.

Senator HATCH. The greatest problem that I have with the proposed results or effects test is that I cannot identify any basis for comparison by which evidence is to be evaluated, short of proportional representation standards.

Now, each time that I have tried to ascertain the threshold question that a court must ask itself in evaluating the evidence, I have been told by the witnesses that the court must consider the totality of the circumstances.

What I am interested in is the standard that the evidence must satisfy, not the scope of the evidence. Would you have any views on this particular issue, Mr. Younger?

Mr. YOUNGER. My view is that the only way to apply the "effects" test is what I think you, Senator, had in mind: Just look at the racial composition of the elected body and compare it with the racial composition of the electorate, and if they are roughly the same, you pass, and if they are different, you don't pass.

The consequence of that, in my mind, will be a quota system.

Senator HATCH. Then you believe that the consequence would inevitably be the implementation of a system of proportional representation?

Mr. YOUNGER. Yes. That is what I mean by a quota system.

Senator HATCH. OK.

Would you mind staying a while longer, Mr. Younger? I think that you have articulated the crux of this issue very well. It is not an issue of racial discrimination; it is an issue of what should be the standard by which the 14th and particularly the 15th amendments should be interpreted.

I find it quite upsetting that no one, except a few of the expert witnesses on both sides of this issue, seems to understand how important that particular issue is in constitutional law.

If you could stay, I think what we should do is give Mr. Cox an opportunity to give his statement, and perhaps we will have some questions for him. Afterward, your schedule permitting, you two

might be able to discuss the "issues" involved and help us to better understand them.

Mr. YOUNGER. I will try to stay as long as I can.

Senator HATCH. Thank you.

We will at this time call on the Honorable Archibald Cox, who is a professor at Harvard University and a highly respected attorney and labor lawyer in this country. Mr. Cox is representing, as I understand it, Common Cause here today.

We are very honored to have you before this committee, Mr. Cox.

STATEMENT OF PROF. ARCHIBALD COX, HARVARD UNIVERSITY, REPRESENTING COMMON CAUSE

Mr. Cox. Thank you very much, Senator, Mr. Chairman, I am representing Common Cause here today. I also cannot help speaking as one who has had a longtime interest in the Voting Rights Act because I participated in the original writing of it and argued in defense of its constitutionality in the Supreme Court.

But I am here for Common Cause, and I am here to urge the extension of the Voting Rights Act as it is proposed to be amended and extended in S. 1992.

Earlier witnesses have recalled the history that led to the passage of the Voting Rights Act and with the progress of the act and the progress made under it and the reasons for its extension. I simply want to say, before summarizing my testimony, that we share with them the conviction that extension is essential. I wish, instead of repeating all those reasons, to focus on one element that I regard as crucial to the effectiveness of the act. That is that section 2 should be strengthened by adopting the amendments in the House bill and proposed by S. 1992.

To put it in context—also, I realize that this is well known—the 14th and 15th amendments and section 2 as it stands presently nullify State and local laws relating to voting, representation, districting, and the like that rob the ballots of minority groups of real substance by gerrymandering and other invidiously discriminatory denials of opportunity to exercise effective voting power, where the conscious purpose of those who adopted the law was to discriminate on grounds of race or color.

The proposed amendments to section 2 shift the focus from one of motive to one of operative consequences or result, so that section 2, as amended by the enactment of S. 1992, would outlaw laws pertaining to voting, representation, and districting that result in discriminatory denials of effective participation in self-government, regardless of race or color.

I submit, Mr. Chairman, that that important change is essential to securing all Americans a meaningful right to vote. I recognize, of course, that the committee is considering three questions, and I want to consider them in my testimony here:

First, does the proposed amendment to section 2 have a sufficiently clear and understandable meaning for Congress to foresee its operation and the courts to apply it?

Second, will the "results" test operate fairly and equitably?

Third, is the proposed amendment constitutional?

My answer to each of those question is an emphatic yes. First, I think the words of the amendment and the body of case law already in the books give the proposed "results" test a clear and understandable meaning.

Second, I submit that the "results" test would operate fairly and equitably to prevent racially discriminatory exclusions from the reality of participation in the processes of government without unduly interfering with the opportunity of a State or political subdivision to choose among forms of representation and government.

And third, I submit that setting up a statutory "results" test is well within the power granted to Congress by section 5 of the 14th amendment and section 2 of the 15th amendment.

I thought I would proceed by sort of stating first the outer limits of the meaning and operation of proposed section 2 and then narrow down to the area of possible uncertainty.

First, it is clear that the proposed amendment gives stronger protection to voting rights than the present law because it plainly would supersede the restrictive plurality ruling of the Supreme Court in *City of Mobile* v. *Bolden* by, as I say, substituting a "results" test for an inquiry into motive.

A nation dedicated to the principle that all citizens should have the same opportunity for meaningful participation in self-government surely finds abhorrent any situation in which black citizens or citizens of Mexican-American descent, or of any other racial or ethnic minority, are drastically, systematically, and continually denied that equality of political opportunity by local voting law or practice, regardless of its purpose. The injustice is there, regardless of purpose. There is a departure from our professed ideals, regardless of purpose. Subjective purpose, motive and intent belong in the realm of individual action and of criminal law. The Voting Rights Act should not focus, I submit, Mr. Chairman, on blameworthiness but on securing the most fundamental of American rights.

To continue to require proof of subjective discriminatory purpose in the form prescribed in the plurality opinion of the *City of Mobile* case is to erect and maintain an almost insuperable obstacle to securing that right. Other witnesses have described the difficulty and enormous expense of litigation to inquire into motive, and I want to confine myself simply to listing what seemed to me to be the principal sources of difficulty.

First, I suggest that to speak of a subjective purpose of a sizable legislative body, or of a body of citizens voting in a referendum, is to indulge in a fiction. In such cases, there simply is not a single mind with a single purpose or set of purposes. Legislators and voters vote one way or another for different purposes, with different motives, and with different combinations of purposes.

Second, in my experience, there is very seldom any reliable record even of the debates in a State legislature, so that the evidence of what was in people's minds simply is not preserved. There is always the likelihood that if the purpose is invidious, that purpose will be concealed. And, of course, one court has held since the *City of Mobile* case that there cannot be any inquiry into the motives of voters in a referendum.

Third, as the *Mobile* case illustrates, often the State or local law that results in discrimatory exclusion from the democratic process

was enacted 10, 20, or even 50 years ago. The difficulty of proving subjective purpose in that sort of case is too obvious to emphasize or to detail.

And finally, if the law is one enacted in the past and was enacted in a way that it was not discriminatory, it may later come to have discriminatory results, and the inaction is, in a sense, the source of the law. How in the world are you going to prove the reasons for political inaction by a large number of citizens or their representatives?

Looking at the other side, it seems to me that the obvious outside limit upon the meaning of the "results" test is fixed by the proposed concluding sentence in S. 1992:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

I submit that this language surely should allay any fear that the effect of the "results" test would be to mandate a system of proportional representation. I realize that the Attorney General testified that any voting law or procedure which produces election results that fail to mirror the population makeup in a particular community would be vulnerable to legal challenge under section 2. But with all due respect to the Attorney General, I submit that that statement is plainly and demonstrably wrong.

The final sentence says that that shall not be enough. I cannot imagine any court simply disregarding the final sentence as it would appear in section 2. Furthermore, the earlier case law the amendments to section 2 were intended to revive and that will govern their meaning, as I understand it, explicitly and repeatedly asserts that it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.

I have included in my prepared statement, which I will not take the time to read now, two examples of cases that I have exaggerated, as one does in caricature, but to illustrate the point that the sentence, the final sentence, does have real meaning and effect.

Next, let me try to state the meaning of proposed section 2 as clearly and precisely as I can put it in a single sentence. I would expect the courts to read proposed section 2 to proscribe any law relating to voting or representation that had the effect, in its particular context, of substantially and systematically excluding voters of a particular race from equal opportunities for meaningful participation in the democratic process. I draw that meaning out of the language, "results in denial or abridgment of the right to vote on account of race or color."

So section 2, as proposed to be amended, would not prescribe any particular form of local government or districting without regard to the particular circumstances. Any form, including elections at large, may operate without racial discrimination in the circumstance of the particular time and place. Almost any form may operate or be manipulated in such a way, under the circumstances of the particular time and place, that there is an obvious discriminatory violation of basic democratic right.

In determining what factors are to be considered and when those factors add up to a denial or abridgment of the right to vote on account of race or color, as I have described it, the courts will have the guidance of a sizable body of precedent in the case law developed prior to the decision in the *City of Mobile* case in the spring of 1980.

So, again, I must respectfully disagree with the Attorney General, who testified that the proposed amendment would "inevitably invite years of extended litigation" by substituting a novel and untried "results" test for the intent test prevailing since 1965. As I see it, the situation is just reversed. The novelty was introduced in the spring of 1980 when the decision in the *City of Mobile* case, as one court in the fifth circuit put it, changed the "rules of the game." Up to that time, both the Department of Justice and the courts had been looking to results, first directly and later as evidence from which an inference of discriminatory purpose might be drawn in appropriate circumstances without other proof of intent.

So the proposed amendment to section 2 would operate in the context of the sizable body of interpretive case law that will give the amendment, as I see it, all the content and meaning that one could expect of an act in a complex and shifting field.

I have listed in my testimony, Mr. Chairman, the factors that I think would be relevant. Again, they are there in writing and I do not think I need take the committee's time to tick them off.

I would simply emphasize, before I conclude on the meaning of what I submit to be the fairness of this section, that the results test, I feel very certain, would not per se outlaw the practice of electing candidates at large. The cases cited above and others against the background of which the amendments are proposed all proceed on the premise that it is axiomatic that at-large and multimember districting arrangements are not unlawful per se.

The question would always be whether the arrangement—at-large voting or a multimember district—would operate under all the circumstances present in that situation to minimize or cancel out the voting strength of racial elements of the voting population.

And finally, Mr. Chairman, I submit that, in my view, there cannot be any serious doubt about the constitutionality of the proposed amendments to section 2. They seem to me to rest squarely on the constitutional law declared by the Supreme Court in *South Carolina* v. *Katzenbach* and particularly in the *City of Rome* case.

Congress cannot change the meaning of the Constitution as interpreted by the Supreme Court. It cannot change the meaning of the 14th and 15th amendments. The *City of Mobile* case, insofar as it is an interpretation of the Constitution, is one which we must all accept whether we think it was a wise interpretation or an unwise one.

But Congress does have power to correct misinterpretations of its former legislation or to fill gaps in its former legislation where the new enactment sets up a statutory rule forbidding conduct or acts or practices permitted by the Constitution but that Congress finds to endanger an established constitutional right as declared by the Supreme Court. That was the basis on which literacy tests were forbidden by Congress. The literacy tests themselves were not held to be per se unconstitutional, but *South Carolina* v. *Katzenbach*

said that they could be forbidden under the circumstance prescribed because this was a way of preventing them from being used in some of the situations to deprive citizens of the right to vote on the ground of race or color and could be so used even though it was not proved that that was the way the literacy test operated unconstitutionally in the past in the particular jurisdiction.

Similarly, in the *City of Rome* case, the Supreme Court upheld the effects test under section 5 of the statute saying that even if one assumed that the 14th and 15th amendments were limited to purposive discrimination, Congress could go farther as a means of preventing purposive discrimination if it found that prophylactic measure to be important.

So I submit to you, sir, and to the committee that those precedents squarely sustain the constitutionality of section 2.

With my prepared statement that we have filed, Mr. Chairman, I think that is sufficient.

Senator HATCH. Thank you, professor.

[Material follows:]

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Archibald Cox
Chairman

Fred Wertheimer
President

John W. Gardner
Founding Chairman

July 8, 1981

Representative Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights
House of Representatives
Washington, DC 20515

COPY

Dear Representative Edwards:

This will acknowledge your letter of June 16, calling my attention to a question raised by counsel representing Republican members of the Subcommittee conducting hearings on H.R. 3112 to amend and renew the Voting Rights Act. I regret the delay but I am glad to give you an answer.

I believe that it would not be reasonable for a federal court, under any circumstances that I can imagine, to apply the language of the Rodino bill in such a way as to require that the percentage of racial and language minority representation on applicable city councils, school boards and/or legislatures approximate the racial mix of the citizens it represents. I say this for two reasons.

First, I find it wholly unreasonable to suppose that any court would dictate or limit the racial character of representatives to be chosen at an election.

Second, I believe that the Rodino proposal would not make proportional representation a per se test of the legality of an electoral arrangement. Under controlling Supreme Court decisions the denials or abridgments of the right to vote on account of race or color that violate the Fifteenth Amendment involve purposeful racial discrimination. Section 2, if altered as proposed in the Rodino amendment, is apparently intended to authorize courts to find illegality by inference from the effects under circumstances in which that inference is warranted. Bare proof that the number of minority representatives elected is not proportionate to the number of minority voters would not be sufficient per se to establish a violation regardless of the circumstances.

If there is the slightest uncertainty about the answer to the question posed, the risk could be eliminated by including an appropriate explanation in the committee report.

I hope that this will be helpful.

With best wishes,

Sincerely,

Archibald Cox
Chairman

cc: Rep. Henry J. Hyde

Prepared Statement of Archibald Cox

Mr. Chairman, I appreciate this opportunity to express the strong support of Common Cause for S. 1992, the bill to extend the Voting Rights Act co-sponsored by 64 Senators.

My name is Archibald Cox. I am Chairman of Common Cause and also the Carl M. Loeb University Professor at Harvard University. I have been closely engaged in various aspects of the origination, defense and extensions of the Voting Rights Act. As Solicitor General of the United States, I shared in developing key provisions of the original Act. As counsel to Massachusetts and other states, I supported the constitutionality of the original Act in oral argument before the Supreme Court. I testified before this Committee supporting the extension of the Act with expanded guarantees in 1969. And the Act and litigation involving the Act have intensely interested me as a professor of Constitutional Law.

The Voting Rights Act is justly acclaimed as one of the most important and effective pieces of civil rights legislation ever passed by Congress. The Act is an essential part of the process of opening up governmental institutions to all citizens and actively involving more citizens in self-government. This has been a major goal of Common Cause from its beginning.

By the Voting Rights Act, hundreds of thousands of black and Hispanic Americans were enabled to exercise the most precious of constitutional rights -- the right to vote. By enfranchising these citizens, the Act also has removed barriers that previously barred the election of members of minorities to public office. These two changes have greatly strengthened the legitimacy of representative government in America.

But the hard-won gains under the Voting Rights Act are fragile, and we should not be complacent about the future. The patterns and habits of discrimination became engrained over the century preceding the Voting Rights Act. It would be naive to suppose that such deeply engrained ways of political thought have been removed so quickly.

Other witnesses have recalled the history that led to passage of the Voting Rights Act, the progress made under the Act and the reasons for its extension. Common Cause shares with them the conviction that extension is essential. Instead of repeating their testimonies, I wish to focus upon four elements we view as crucial to the effectiveness of the Voting Rights Act.

Section 2 should be strengthened by adopting the amendments proposed by S. 1992.

Although Section 2 would speak expressly only of "denial or abridgement of the right . . . to vote on account of race or color," using the words of the Fifteenth Amendment, both as it stands and as it would be amended, it also reaches State and local laws pertaining to voting, representation and districting that rob the ballots of members of minority groups of real substance by gerrymandering and other invidiously discriminatory denials of opportunities to exercise effective voting power. The Fourteenth Amendment and Section 2 of the present Voting Rights Act are presently held to outlaw such devices where the conscious purpose of those who adopted the law was to discriminate on account of race or color. Section 2 shifts the focus from one of motive to one of operative consequences or result. Section 2, as amended by enactment of S. 1992, would outlaw laws pertaining to voting, representation and districting that "result in" discriminiatory denials of effective participation in self-government because of race or color.

I submit that this important change is essential to securing all Americans a meaningful right to vote without regard to race or color. Before recommending it, however, the Committee will naturally wish to consider three questions:

1. Does the proposed amendment to Section 2 have a sufficiently clear and understandable meaning for the Congress to foresee its operation and the courts to apply it?

2. Will the "results" test operate fairly and equitably?

3. Is the proposed amendment constitutional?

My answer to each question is an emphatic, "Yes!"

1. The words of the amendment and the body of case law already in the law books give the proposed "results" test a clear and unstandable meaning.

2. The "results" test would operate fairly and equitably to prevent racially discriminatory exclusions from the reality of participation in the processes of self-government without unduly interfering with the opportunity of a State or political subdivision to choose among forms of representation and government.

3. Setting up a statutory "results" test, as the amendment to Section 2 proposes, is well-within the power granted to Congress by Section 5 of the Fourteenth and Section 2 of the Fifteenth Amendment.

Let me discuss the first and second questions together, and then turn to the third.

Meaning and operation of Section 2 as amended.

There is no room for argument about the outer limits of the proposed amendment:

1. The proposed amendment gives stronger protection to voting rights than the present law because it plainly would supercede the plurality ruling of the Supreme Court in City of Mobile v. Bolden, 446 U.S. 55 (1980). There the court held that a method of electing local officials is immune from attack under the present Voting Rights Act, regardless of how drastically and systematically it excludes black citizens from meaningful participation in local government, unless the plaintiffs prove that the purpose, i.e., the conscious motive, of those who adopted or maintained the law was racial discrimination, and unless they prove that motive by evidence other than inference from the discriminatory results of the action.

A Nation dedicated to the principle that all citizens should have the same opportunity for meaningful participation

in self-government finds abhorrent any situation in which black citizens or citizens of Mexican-American descent, or of any other racial or ethnic minority, are drastically, systematically, and continually denied that equality of political opportunity by the local voting law or practice, regardless of purpose. The injustice is there, regardless of purpose. There is departure from our professed American ideals, regardless of purpose. Subjective purpose, motive and intent belong in the realm of criminal law. The Voting Rights Act should focus not on blameworthiness but on securing the most fundamental of American rights.

To continue to require proof of a subjective discriminatory purpose in the form prescribed in the plurality opinion of the Mobile case is to erect and maintain an almost insuperable obstacle to securing that right. Other witnesses have testified to the difficulty and enormous expense of proving the subjective purposes of those who adopt or retain a law which actually operates in a manner that invidiously and systematically dilutes the voting power of a racial group. I confine myself to listing the principle difficulties:

(a) To speak of the subjective purpose of a sizable legislative body, or of the body of citizens voting in a referendum, is to indulge in a fiction. In such cases, there is no one mind with a single purpose or set of purposes. Legislators and voters in a referendum vote one way or the other with a wide variety of purposes or sets of purposes. In other contexts the Supreme Court has cautioned against probing the subjective purposes of legislators. E.g., Fletcher v. Peck, 6 Cranch 87, 130 (1810); United States v. O'Brien, 391 U.S. 367, 382-386 (1968); Palmer v. Thompson, 403 U.S. 217, 224-226 (1971).

(b) There is seldom any reliable record even of the debates in a State legislature. There are only scraps of evidence concerning the public debate preceding a referendum. Furthermore, those who have a discriminatory purpose will seldom acknow-

ledge it; they will be at pains to conceal their purpose if Congress acquiesces in the interpretation put upon Section 2 in the Mobile case. To make matters worse, one court has held that there can be no inquiry into the motives of voters in a referendum. Kirksey v. City of Jackson, 663 F. 2d 659 (1981).

(c) Often, as in the Mobile case, the State or local law that results in systematic racial discrimination was enacted ten, twenty or even fifty years ago. The difficulty of proving the subjective purpose long after adoption is obvious.

(d) A law enacted in the distant past may have been non-discriminatory initially in both purpose and effect but may later come to operate in a manner and context that results in systematic and drastic exclusion of a racial group from meaningful participation in the democratic process. Surely, such a law should not be invulnerable and the racial injustice irremediable. But how in the world can anyone prove that the "purpose" of political inactivity is racial discrimination if proof of the consequences will not suffice? City of Mobile v. Bolden appears to rule that that form of proof is legally insufficient under the present Act.

2. The other obvious, outside limit upon the meaning of the "results" test is fixed by the new concluding sentence proposed by S. 1992:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

This language should allay any fear that the effect of the "results" test would be to mandate a system of proportional representation. The Attorney General testified that "any voting law or procedure which produces election results that fail to mirror the population make-up in a particular community would be vulnerable to legal challenge under Section 2." With all due respect, I submit that that statement is plainly and demonstrably wrong.

The new final sentence to be added to Section 2 by S. 1992 explicitly and specifically provides that proof of "election results that fail to mirror the population make-up in a particular community" shall not be sufficient -- shall not be sufficient -- grounds to invalidate a voting law or practice.

The earlier case law that the amendments to Section 2 are intended to revive and that will govern their meaning explicitly and repeatedly asserts that "it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." Zimmer v. McKeithen, 485 F. 2d 1297, 1305 (5th Cir. 1973). See also White v. Regester, 412 U.S. 755, 765, 766 (1973). ("To sustain such claims it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.")

Two examples illustrating common situations in forms exaggerated for clarity further illustrate the point:

- The voting population of a populous county is 75 percent white and 25 percent black. The county is governed by a five-member Board of Commissioners elected by districts. If some theory of racially proportionate representation were applied, there should be one black Commissioner. In fact, the black portion of the population is not concentrated in a compact area but a gerrymander could be constructed that would put enough black people in one district to elect a black Commissioner if the votes pretty closely followed racial lines. In fact, the districts are compact and contiguous and no black person has ever been elected Commissioner.

  On these facts alone there would be no violation of proposed Section 2, because it does not call for racially proportionate representation.*

- The population of a populous county is seventy percent white and thirty percent black. Much of the black population -- twenty percent of the total population of the county -- lives in a compact area in the eastern part of the county. The county is governed by a five-member Board of Commissioners elected from five districts made up of compact and contiguous areas. The district lines divide the compact area in which black

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*If additional facts sufficient to prove systematic exclusion were added, then the result would be different.

> voters predominate so that the black voters constitute forty percent of the voters in District A, forty percent in District B and twenty percent in District C. No black Commissioner has ever been elected, but the political parties that nominate candidates regularly consult leaders of the black community and candidates not infrequently pitch part of their campaigns to the special needs of black voters.
>
> On these facts alone the present districting would not be unlawful even under the proposed amendment to Section 2.* Evidence of the absence of proportionate representation, even where proportionate representation could easily be provided, is not alone enough to prove a violation. To state the meaning of the proposed amendment as clearly and precisely as possible in a single sentence, I would expect the courts to interpret Section 2, as amended, to proscribe any law relating to voting that had the effect, in its particular context, of substantially and systematically excluding voters of a particular race from equal opportunities for meaningful participation in the democratic process. I understand this to be the meaning of the words "results in denial or abridgement of the right to vote on account of race or color."

Thus, Section 2, if amended as proposed by S. 1992, would not proscribe any particular form of local government, districting or representation without regard to the particular circumstances. Any form, including elections at large, may operate without racial discrimination in the circumstances of a particular time and place. Almost any form may operate or be manipulated in the conditions of a particular time and place in such a way that there is an obvious, discriminatory violation of basic democratic rights. Similarly, failure to elect members of a minority group proportionate to the group's numbers in the total population would not in and of itself constitute a violation. Voters in a minority group may have exactly the same opportunities for participation as any other voters, even though no members of the group are elected to office. The minority may not vote as a bloc. The minority may vote as a bloc but make its influence felt in the selection of non-minority candidates for election, in framing their programs and policies, and in support of one or more candidates against their opponents. Whether a parti-

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*If additional facts sufficient to prove systematic exclusion were added, then the result would be different.

cular form of government, districting, representation or voting operates to cancel out or dilute the potential voting strength of racial elements of the population to such an extent as to constitute a violation of Section 2, as proposed to be amended, will depend upon appraisal of all the relevant factors in the case, including the severity of the dilution and the weight of any other purposes served by the measure.

In determining what factors are to be considered and when those factors add up to denial or abridgement of the right to vote on account of race or color, the courts will have the guidance of a sizable body of precedent in the case law developed prior to 1980.

Because of these precedents, I must again respectfully disagree with the Attorney General. The Attorney General testified that the amendment would "inevitably invite years of extended litigation" by substituting a novel and untried test for the intent test prevailing since 1965. The truth is quite the contrary. The novelty was introduced in the summer of 1980 when the decision of the Supreme Court in City of Mobile v. Bolden, 446 U.S. 55 (1980) changed the "rules of the game." See Jones v. City of Lubbock, 640 F. 2d 777, 778 (5th Cir. 1981). Up to that time both the Department of Justice and the courts had been looking to "results" under Section 2, at first directly and later as evidence from which an inference of discriminatory purpose might be drawn in appropriate circumstances without proof of intent. The proposed amendment to Section 2 would therefore operate in the context of the sizable body of interpretative case law that it is intended to reinstate. That existing body of law will give the amendment content and meaning. See, e.g., White v. Regester, 412 U.S. 755 (1973); Howard v. Adams County Board of Supervisors, 453 F. 2d 455 (5th Cir, 1972); Zimmer v. McKeithen, 485 F. 2d 1297 (5th Cir. 1973); Bolden v. City of Mobile, 571 F. 2d 238 (5th Cir. 1978), reversed 446 U.S. 55 (1980); Justice White dissenting in

City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 1514 (1980).

Under these and like precedents decision in a Section 2 case would turn upon consideration of such factors as --

- whether voting is or is not polarized along racial lines
- whether minority candidates have been nominated or elected
- whether minority groups are consulted in the selection of candidates
- whether non-minority candidates appeal for minority votes and otherwise concern themselves with the needs and interests of members of the minority group
- any previous history of racial discrimination in access to the democratic process
- the degree and duration of exclusion from effective participation in the political process because of race
- the importance of any non-exclusionary purposes.

Before turning to the constitutional questions I wish to emphasize one final point concerning the manner in which the results test would be applied by the courts. There is no danger -- no danger -- that Section 2 would outlaw per se the practice of electing candidates at-large. The cases cited above and similar cases against the background of which the amendments to Section 2 are proposed all proceed upon the premise that it is "axiomatic" that at-large and multi-member districting arrangements are not unlawful, per se. See, e.g., Zimmer v. McKeithen, 485 F. 2d 1297, 1304 (5th Cir. 1973). At-large voting and multi-member districting arrangements would continue to be lawful, except where it was shown that under the circumstances of the particular case, the arrangement operated to minimize or cancel out the voting strength of racial elements of the voting population. See Whitcomb v. Chavis, 403 U.S. 124, 143 (1971).

Constitutionality of Section 2

In my opinion, Section 2 of S. 1992 is plainly constitutional.

Insofar as City of Mobile v. Bolden 446 U.S. 55 (1980) interprets the Fourteenth and Fifteenth Amendments, we are all bound

by the decision. Some of us may criticize the decision as a departure from prior law resulting from confused reason. Some of us may hope that the Court will correct its course, but only the Court can make that kind of correction in the course of constitutional interpretation. Congress cannot, consistently with the Constitution, overrule a Supreme Court interpretation of the Constitution, and it should not try.

Congress does have power, on the other hand, to correct misinterpretations of prior legislation, such as present Section 2 of the Voting Rights Act. And Congress does have power to enact a statutory rule forbidding conduct, acts or practices permitted by the Constitution that Congress finds to endanger an established constitutional right. So, in the present instance, Congress does have the power to outlaw all State and local voting arrangements that minimize or cancel out voting power on account of race, in order to ensure that the delays, expense and difficulties of the proof of subjective purpose will not result in minority citizens being deprived of their Fourteenth and Fifteenth Amendments rights to be free from purposeful discrimination. The power to enact such "necessary and proper" laws is conferred upon Congress by Section 5 of the Fourteenth and Section 2 of the Fifteenth Amendments. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156, 176-77 (1980).

These precedents squarely uphold the constitutionality of Section 2 of S. 1992. In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), the Supreme Court had held that a literacy test is not unconstitutional unless it is racially discriminatory on its face or it is applied in a manner that is racially discriminatory. In South Carolina v. Katzenbach the Court assumed the Lassiter rule but held that Congress had power to outlaw all literacy tests in certain parts of the

country as a means of preventing their use as engines of unconstitutional discrimination, even though not all literacy tests were unconstitutional and even though there was no proof that they were being administered in an unconstitutional fashion in the particular case. Similarly, Congress has power to outlaw all voting arrangements that result in denial or abridgement of the right to vote even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of purposive and therefore unconstitutional racial discrimination.

City of Rome v. United States, 446 U.S. 156 (1980) is an even more exact precedent for upholding the constitutionality of Section 2. Section 5 of the present Voting Rights Act which prohibits a change in voting laws unless the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The City of Rome challenged the constitutionality of the "effects" part of the test on the ground that the Fifteenth Amendment prohibits only "purposeful discrimination" as defined in the Mobile case. The Court squarely held that even though the Constitution bars only purposeful discrimination, Congress may enact a statutory "effects" test in order to prevent violations of the Constitution that might otherwise be concealed. ". . . Even if §1, of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2, outlaw voting procedures that are discriminatory in effect."*

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*The so-called "right-to-life" bills raise wholly different constitutional questions. The decisions cited above give no support to the "right-to-life" bills because they do not seek to protect an established constitutional right. S. 158, for example, seeks by legislative definition of "life" and "person" to create constitutional rights. Thus, although S. 158 apparently would prohibit conduct which is not otherwise unconstitutional State aid to any interference with the natural development of a fetus -- the analogy to South Carolina v. Katzenbach cannot impose the prohibition in aid of an established Fourteenth Amendment right. A fetus is not a "person" under the established constitutional meaning of a word. Roe v. Wade 410 U.S. 113, 158 and cases cited. Only persons within the meaning of the Constitution have Fourteenth Amendment rights.

We have dealt at length with the Section 2 provisions because they have become the primary focus of much of the Senate attention to the Voting Rights Act. We will, therefore, summarize our view on the other three provisions which we believe are essential to the Voting Rights Act:

The Act's crucial pre-clearance provisions should be continued.

The constitutionality of the pre-clearance provisions has been upheld time and again; it is beyond doubt. The prompt administrative process established by the Act has minimized the need for long and complicated legal battles, while the powerful deterrent effect of Section 5 discourages circumvention and evasion.

Common Cause believes that the need to extend the pre-clearance provisions can be readily demonstrated:

- Even after seventeen years some jurisdictions fail to submit for pre-clearance changes in their election laws affecting voting rights. According to a study by the Southern Regional Council, more than 650 election law changes have been enacted and are currently being applied in five states without ever having been pre-cleared.
- Unlawful changes denying voting rights continue to be submitted to the Department of Justice with great frequency. From 1976 through 1980, 400 changes were found to be objectionable -- exceeding the 386 changes objected to in the preceding five year period.
- The Justice Department has issued objections to a number of redistricting plans based on the 1980 census. Objections have been issued concerning the plans for: both houses of the legislatures of Virginia and Texas; both houses of the legislatures and the congressional delegations of North Carolina and Georgia; and the state house of South Carolina.

Some Members of Congress have proposed extending the coverage of the pre-clearance provisions nationwide. Common Cause opposes this appraoch. The Voting Rights Act already is a national rather than a regional act. The Act's permanent provisions apply nationwide and already provide for bringing additional jurisdictions under court-ordered pre-clearance procedures. Broader national coverage would waste valuable resources and overburden the existing enforcement staff.

The "bail-out" provisions crafted in the House should be maintained.

Common Cause supports the "bail-out" provisions included in S. 1992. They are the result of a careful compromise that was struck in the House. For the first time, jurisdictions that have met the obligations of the Voting Rights Act by meeting clear and attainable standards will be eligible to be exempted from the Section 5 pre-clearance requirements. Yet the full force of the law will remain in effect for those jurisdictions which fail to improve their record of compliance.

The requirements for "bail-out" are fair and achievable. As part of the compromise, counties with good records would be able to bail out independent of the states as long as all jurisdictions within the county also met the standards for bail-out. Of some 800 jurisdictions covered, approximately 25 percent would be eligible to file a "bail-out" suit on the effective date of that new provision in 1984. Each year, more jurisdictions would complete the ten year record of compliance so that by 1992 all jurisdictions would bail out if they sincerely wanted to meet the standards of the Voting Rights Act.

Existing bilingual election requirements should be included in any extension of the Voting Rights Act.

Common Cause applauds the support the Administration has given in this area. In adopting the bilingual election pro-

visions, Congress recognized that English-only election materials and voter assistance can constitute a barrier to voting similar to literacy tests. Requirements for bilingual elections have enabled and encouraged minorities to become active participants in the great work of governing ourselves. I am not unmindful of the argument that the bilingual provisions will tend to polarize Americar society. Surely, bilingual voting will have just the contrary effect. The best way to avoid a separatist movement in this country is to encourage participation in the exercise of the right to vote. For participation in the electoral process without language barriers makes it plain to all that we are one Nation with one government for all the people.

Conclusion

During the past seven years, the Voting Rights Act has continued to build on the successes of the previous ten. By the Act, hundreds of thousands of black and Hispanic Americans were enabled to exercise the most precious of constitutional rights -- the right to vote. Nevertheless, there is hard evidence that discrimination, though significantly lessened, has not been eradicated. The important gains of the last seventeen years are fragile. Continued vigilance is essential if the promise of the Fourteenth and Fifteenth Amendments is to be fulfilled.

S. 1992 would continue the progress made for seventeen years under the Voting Rights Act. It maintains the effective enforcement strengths of the Act while, for the first time, providing attainable incentives for jurisdictions with good records to "bail-out" from coverage of the Act's special provisions. It clearly establishes that discrimination against voters on account of race, whether intentional or accidental, will be remedied.

Common Cause urges this Subcommittee and the full Senate Judiciary Committee to act promptly to report the extension of the Voting Rights Act with the essential elements I have discussed above. History has proven the wisdom of the Congress in framing this important remedial legislation. This is no time to allow backsliding on the right to vote.

Senator HATCH. In your testimony before the House committee, you attacked racial gerrymandering, saying, "Pockets of minority voters can be dispersed throughout many districts or packed into a few districts to dilute minority representation." If, as you suggest, it is possible to dilute the minority vote in both of these ways, how is the Government supposed to tell when it has precisely the correct racial mix? Where do you find the authority for your position under the current law, and how will the law change in this regard if the act is amended as you are requesting here today?

Mr. Cox. I would hope that the total context of my statement did not assume that there was any precisely correct racial mix. If I gave that impression, let me correct it now because I also wrote the committee that I did not think that merely the failure to elect a proportionate number of representatives should be enough to prove a violation of section 2, and it was after that—I suggested that it could be done by the legislative history—that the new last sentence, as I described it, was put in.

Senator HATCH. The question that naturally arises to me is, how do we know, then, when minorities are neither too dispersed nor too concentrated? How will we decide that, or would you leave that decision to the court?

Mr. Cox. I think the ultimate question, Mr. Chairman, depends on an appraisal of the entire situation, all the factors that bear upon whether minorities are being systematically shut out of the political process in fact for whatever reason. To state the question that I would put to myself if I were a judge as clearly as I can, I would ask, looking at that total context, whether the effect was substantially, systematically, to exclude voters of a particular race from equal opportunities for a meaningful participation in the Democratic process.

I cannot put it more particularly. I do not think one can reduce this kind of question to a slot machine. It involves weighing and balancing a number of factors. But that is the question I would ask myself, Senator Hatch, if I were a judge and had section 2 as amended as the binding law.

Senator HATCH. You have used terms "meaningfully," "substantially," "equal opportunity," et cetera. How is the local community ever going to know whether they have met their obligation without any kind of defined standard?

While we are doing this, Mr. Younger, why don't you come back to the witness stand, and take this microphone so that Senator Kennedy and I can both question you with regard to this issue. I think you both know each other. Feel free to comment on any of these questions, Mr. Younger.

Mr. Cox, how will a community be able to weigh its actions under the "effects" test, as you are defining it, with these terribly ambiguous terms, that still lie undefined in the law?

Mr. Cox. Well, first, I suppose that if the local community is trying to be just as discriminatory as it can and still not run afoul of the law, it may have some difficulty. But I would not think it would have any difficulty if it were not seeking to come just as close as it could. In addition, it would have a set of facts to apply the statutory formula to. It would look—take the factors in the *City of Mobile* case. One of them was that at-large voting covered a

large area with a large population. Second, you ran for a particular place so that there could be a white candidate and a black candidate, if he dared, running for every place. Third, the history showed that the voting was racially polarized. Fourth, there was no requirement that a candidate for the council live in a particular district. Fifth, there were the pervasive effects of the past exclusion.

Sixth, anyone looking at the political history of Mobile would see that blacks had been excluded from the political process, the informal parts of the political process, systematically.

Senator HATCH. Perhaps.

Mr. Cox. Well, given those facts, I would think that anyone could advise the city that no, at the present time, your at-large voting, with these other incidents, would not satisfy the statute.

Senator HATCH. Mr. Younger, do you have any comments to make concerning this first set of questions that I have asked?

Mr. YOUNGER. Senator, I do not wish to engage in a debate with my old friend, Professor Cox.

Senator HATCH. No, that is not the purpose.

Mr. YOUNGER. Hence, I do not wish to respond point by point.

Senator HATCH. No, that is understandable.

Mr. YOUNGER. But let me make this comment which perhaps will summarize the difference between our viewpoints.

I take it as beyond argument that Professor Cox and I and the members of this subcommittee begin on common ground, and that common ground is a determination to see to it that no American is deprived of the opportunity to participate in the political process on account of that person's race.

Senator HATCH. That is correct.

Mr. YOUNGER. In short, race ought to be irrelevant to the question of participation in the political process.

Now, standing on that common ground, I turn in one direction and would say to the local official, if you deprive one of your constituents of an opportunity to participate because of your constituent's race, you have violated the law. To my mind, that is the "intent" test, taking into account that in applying the "intent" test, one looks to all of the circumstances, as I tried to say in my earlier testimony.

It seems to me that Professor Cox turns in the other direction and says to that local official, I am going to look at the results of what you have done. I walk into the town council chamber and I count those who have been elected by race, so many whites, so many Mexican Americans, so many blacks, and if the proportion of people of each race present in this chamber is not equivalent to that in the voting population at large, I say that you have violated the statute.

It seems to me that in taking that view of it, Professor Cox makes race relevant rather than irrelevant, and there, I think, is the weakness of his position.

Senator HATCH. But Professor Cox does cite the saving clause in section 2 as a way of proscribing that narrow interpretation.

Mr. Cox. I would think I was giving my client very bad advice if I told him that was what I would do. I would think I was

a wretched liar; I was not reading the statute, was not telling him what the statute said.

There suddenly came to my mind, Senator Hatch, an answer that I think I might have given to my clients on the city council or in the legislature. First, I would tell them that whether you have complied with the statute will be judged by looking at all the factors, and the results will be what count because it is the results that determine whether members of a minority group do have the opportunity. It is not what went on in somebody's mind that determines whether they have an equal opportunity; it is the results that determine whether they have the equal opportunity.

Now, I think what I could say, informally, to my clients would be what I recall when I first started practicing labor law my chief saying to an employer client who wanted to make a speech urging his employees not to join a union. He said—the man was a good friend; he called him by his first name—"Sid, you go home tonight and you write yourself a speech that you in good conscience can say will not be coercive. I will trust you, and I think when you come in with that speech in the morning, I will probably clear it."

The individual—I don't want to name his last name—came in in the morning and said, "I don't want to make a speech." I think that I could say—I say this off the top of my head—but I think I could say as a rough, informal guide, you go and draw up a plan that you think does not systematically and substantially exclude minority voters from meaningful participation and I am inclined to think that if you have really done that, the chances are pretty good that it will satisfy the "results" test.

Now, he has got to take all the factors into account when he looks at it that way, and there would be some circumstances where I would have to tell him that that won't satisfy me. But I think it would be a pretty good rough guide.

Senator HATCH. Mr. Younger, my time is up, but you can respond and then we will turn to Senator Kennedy.

Mr. YOUNGER. With respect to the saving sentence upon which Professor Cox places so much reliance, for the reasons stated earlier, I regard the saving sentence as a dreadfully sloppy piece of statutory draftsmanship.

In any event, accepting it at face value, the saving sentence says that a disproportionate representation of minorities in an elected group shall not, "in and of itself," be a violation. If one had a disproportionate representation of minorities in the elected group, together with, for example, some change in the hours when the polls are open——

Senator HATCH. In fact, any other scintilla of evidence.

Mr. YOUNGER [continuing]. You are right out from under that saving sentence, and there you are facing what Professor Cox just stated as the heart of his view of it. He said that opportunity is measured by the results, and I just do not see it that way. Opportunity is one thing; the results which are achieved by various people, assuming the same opportunity, are quite another thing. To say that one equals the other is to confuse categories and, I think, to engage in loose thinking and imprudent social policy.

Senator HATCH. Senator Kennedy?

Senator KENNEDY. Just on my time, if you would like to respond to that, Mr. Cox, that last comment, you may do so.

Mr. Cox. Well, I think anyone who read the proposed section 2 as Mr. Younger suggests, that lack of proportionate representation in the elected body plus a change in the voting hours without more warrants the kind of finding that section 2 requires, was not making a conscientious effort to apply the statute in accordance with its intent, and I would be convinced that he would be reversed by a higher court.

One must remember here that this sentence, like the whole of proposed section 2, is not something that suddenly was thought up for the first time. The sentence is the same thought, in almost the same words, that was expressed, particularly in the fifth circuit, but I think—I cannot guarantee my memory—also in *White* v. *Regester,* but certainly in Justice White's dissenting opinion in the *City of Mobile* case. So it has been said that the law had been applied in a way that did not make proportionate representation plus some trivial little other thing the test of lawfulness under section 2. And it is to bring that body of law back, as I understand it, that the amendments are proposed.

Senator KENNEDY. I want to just, first of all, welcome Professor Cox back to the Judiciary Committee. I think all of us who have served on this committee for a considerable period of time have benefited from his help and assistance to this committee on a wide variety of different issues, and I think all of us are extremely grateful for the service to this country of Professor Cox, when he served in the Justice Department as the Solicitor General and then as the Special Prosecutor, and his continued interest and understanding of the law is something which is, I think, universally recognized and respected, and his obvious skill in the understanding of the constitutional law is something which is of very special importance to this committee.

I know those words perhaps make Professor Cox uncomfortable, but they are genuinely expressed and I think are true, and we are grateful for his presence here. I know I speak for all the members, I am sure, on both sides of the aisle.

Senator HATCH. Would you yield on that?

Professor Cox, I studied your labor law casebook, so you are to blame for all of the things that I have been doing here. [Laughter.]

I might also add that I question the wisdom of anybody who spends a career studying labor law and teaching it. [Laughter.]

Mr. Cox. If you will permit, Senator Hatch, while there are lots of grounds on which you might convict me for lack of wisdom, studying labor law for the whole of my life is not one, because I have rather turned away from it. [Laughter.]

Senator HATCH. I would like to myself sometimes.

Senator KENNEDY. In those days, the chairman was a Democrat. [Laughter.]

Senator HATCH. It just shows what wisdom can bring to someone. [Laughter.]

Senator KENNEDY. I appreciate both the witnesses being with us here this morning because you have been commenting on, obviously, the two elements which both have been debated most extensive-

ly in the House and, I think, in the course of these hearings, and which have been the crux of the discussion and of the difference.

I will get into the particular questions, but it does seem to me, as we come down to the final aspects of this committee's hearings and deliberations, that we ought to ask ourselves if we are committed—and I take the comments that have been made by those that both differ with perhaps my understanding of section 2 and section 5 as well as those that agree—that, clearly, we have the power and the authority to make a judgment at this time on the issue of voting rights, and whatever decision we might draw or conclusions we might draw from the past cases, we have certainly that responsibility here and now. If we can draft that language in ways which are going to enhance the right to vote, it seems to me we have an overbearing responsibility to do so.

There has been a lot which has been added to this discussion and debate which I am not sure has clarified it. I think we, as an institution, the Senate of the United States, know how that can be done, it seems to me, and that is with the effects test and with a bailout provision which is reasonable and responsible and, I think, adds some degree of incentive for communities to make a best-faith effort.

Now, would you not agree with me, Professor Cox, that we have both the authority and the power and that, given what we know from past case histories, we can, in a constitutional way, no matter what we might say about the previous holdings, we have, under the 14th and 15th amendments, the ability to make that guarantee a reality for citizens of this Nation by, basically, acceptance of an effects test in section 2?

Mr. Cox. I do, yes. I quite agree that you have the power to do that as a matter of statutory law. My own view of sound policy and the Senate's responsibility is that it ought to do it quickly.

Senator KENNEDY. And that is a way, in accepting the effects test, that that objective can be achieved?

Mr. Cox. I believe so.

Senator KENNEDY. And if the judgment is made by the Senate of the United States that we use an intent test, what would be your estimate, as a person who has been a former solicitor and a student of this constitutional law, of the results on protecting voting rights?

Mr. Cox. I think, first, there would be numerous cases in which truly equal opportunities to participate regardless of race would be denied to minority groups of citizens because there was simply no way of getting into the minds of the people that had written or adopted the laws at some time in the past, or even most recently, and that therefore that large number of denials of basic American rights would occur, whatever the motive or purpose.

Second, I think that the effort to correct those situations would very frequently bog down in a hopeless morass of efforts to prove something that I regard as a fiction—the motive of the members of a large legislative body or the motive, even, of a 12- or 15-man city council or, of course, the motive of citizens who adopt a vote in a referendum. The expense, and therefore the ineffectiveness, of any such formula seems to me to be very plain.

Senator KENNEDY. Now, we have heard over the course of these hearings, and I am sure we will on the floor, the basis of our legal

system is built on intent, whether it is in civil cases or criminal cases, and therefore that is basic to our jurisprudence. That has a ring to it out on the countryside although, obviously, with regard to civil law, it is not necessarily so.

How do you think it is best that you deal with that issue?

Mr. Cox. Well, I think the only way to deal with it is to take it headon. It simply is not true that intent in the sense of purpose or in the sense of motive is the foundation of our legal system. It simply is not true. That is the case in much of our constitutional law. The Supreme Court has, over and over again, cautioned against examining the motives of legislators.

It is true that in the *City of Mobile* case, it did bring in an examine-their-motives test, but there are many other cases, going way back to Chief Justice Marshall, that say motive is irrelevant. I think that was the much wiser position.

Second, in the civil law, it is a little hard offhand to say what the proportions are, but I would think a bad motive or evil motive would be required in a very small fraction of cases. Now, often we do talk about every man is presumed to intend the natural and probable consequences of his act, but in fact we are saying that he is liable for the natural and probable consequences of his acts whether he intended them or not. It is resorting to a fiction, but I think it just confuses the situation, and what you say is happening shows how it has confused the situation, to engage in that kind of fiction.

I do not think it would add anything to try to set up a similar fiction here, and if one really means purpose, there is just no way of finding it out. I should say, for the sake of completeness, Senator Kennedy, that of course there are questions in the criminal law where the motive, a very specific intent, is relevant. It is not true all through the criminal law, but it often is true, and I think the reason for that is because in the criminal law we are not concerned with the quality of opportunity in fact; we are concerned with how bad a man this was, and therefore we do look to his state of mind in many criminal cases. But that really is not the question in the area that this bill deals with.

Senator HATCH. Let me ask a few more questions, and then I will go vote.

Senator KENNEDY. Could I just finish on this one point, Orrin?

Senator HATCH. Sure.

Senator KENNEDY. Just on the record, it has been clear, as I understand from your answer, that the Congress has, over a period of time, passed statutes which have been upheld by the Supreme Court which have not required intent. Is that not so?

Mr. Cox. Oh, yes.

Senator KENNEDY. Particularly in the area of civil rights? I mean, there are other areas as well, but has that not been so in the area of civil rights?

Mr. Cox. I believe so. Certainly, there are many areas. I would guess most statutes enacted by the Congress do not require intent.

Senator HATCH. Thank you, Mr. Cox.

Mr. Younger, do you have any comments on any of Senator Kennedy's questions or Professor Cox's responses?

Mr. YOUNGER. Just a few moments ago, Professor Cox said that what we are all concerned with is the quality of opportunity, and indeed we are all concerned with that. If I understand the position espoused by Professor Cox, however, he translates equality of opportunity into equality of effect, and that, it seems to me, is the essence of the difference in viewpoint between us.

It seems to me that if you are concerned with equality of effect, you end up with a quota system or a system of proportional representation which I would abhor.

Senator HATCH. Mr. Cox, in your testimony before the House committee, you said that the preclearance provisions of the act should not be extended in perpetuity but only for a period of 10 years. The bill passed by the House will, however, extend the preclearance provisions forever.

Do you still disagree with this provision of the House bill, and if so, why or why not?

Mr. COX. Well, there has now been added to the bill a so-called bailout provision, which means that the longer extension does not have the same rigor—I think my memory is right—as the one I was testifying about.

Senator HATCH. In your testimony before the House committee, you failed to answer a question as to whether or not section 2 of the act, as amended by the House bill, could be used by a court to establish a racial quota system for elected officials. In light of your own testimony that redistricting must be carefully calibrated to insure a correct racial mix—one might be well founded in harboring the fear that the proposed changes, in section 2 of the bill, will ultimately lead to the implementation of a system of proportional representation. Do you now have an answer to the question you were asked by the House committee?

Mr. COX. Yes. I would like, if I may, Senator Hatch, to see that you and the committee receive a copy of the letter that I wrote the House committee.

Senator HATCH. We would love to have it.

Mr. COX. I had time to think it over and consider it. The nub of that answer is the same as I gave to you here a little earlier, first that I thought the section, even as it stood in the House, could not be so interpreted, on reflection; second, that I thought any danger could be obviated by putting material in the committee reports and legislative history that would make it clear that that was not the intent.

Third, the danger seems now to have been clearly obviated by the final sentence, as I have been calling it for shorthand.

Might I add just one word of emphasis? I do not want to occupy more than my share of time, but I have put two examples in my written statement spelling out the facts that show that proportionality of result in the body elected would not, in my view, be alone enough to prove a violation of the proposed new section 2. They are on page 8, running over onto 9.

Senator HATCH. Let me ask one further question. You say that there is plenty of case law which courts may use to interpret the results test. Are you referring to the many Supreme Court cases interpreting the "effects" test of section 5, or do you mean the case of *White* v. *Regester*?

I might point out that neither the witnesses before the subcommittee nor the justices themselves, in the *Mobile* case, can agree on what *White* v. *Regester* means. We have heard a lot of conflicting views over determining the meaning of *White* v. *Regester*. If you are referring to the "effects" test as interpreted by the courts with regard to section 5, I think that might be considerably different from the "results" test in section 2 here today.

Mr. Cox. No, I do not mean the cases under section 5.

Senator HATCH. What cases do you mean, then?

Mr. Cox. I mean the cases I have cited, some of which, for example, are on page 11 of my statement. I do mean *White* v. *Regester* as interpreted by Justice White. I mean such cases as the lower court opinion in the *Bolden* case; *Howard* v. *Adams County Board of Supervisors;* or *Zimmer* v. *McKeithen;* Justice White's dissent in the *City of Mobile* case; and there are a fair number of others—the fifth circuit—of that kind.

Senator HATCH. You have indicated that you agree with Justice White's interpretation of *White* v. *Regester*. What Justice White said was that an invidious discriminatory purpose can be inferred from factors of the kind relied on in *White* v. *Regester*.

Mr. Cox. Well, that is true, and I think you are right in taking me to task.

Senator HATCH. Well, my point is even Justice White found that there had to be discriminatory purpose present, in his *White* v. *Regester* decision, to facilitate making the determination of whether a violation occurred.

Mr. Cox. Let me restate what I meant to say because I do not mean, at this stage, to bring back intent or motive or purpose in anyway, shape, or manner. What I really mean is that Justice White's conclusions as to what facts would add up to a violation as applied in *White* v. *Regester* and in his dissenting opinion in the *City of Mobile*, and in the cases that I cite in the fifth circuit, is the body of law that I would expect to be applied.

I think part of the trouble here is, I think Justice White and Justice Stewart were really using the word "purpose" in two rather different senses. Often we do speak of the purpose of the statute, but we really do not mean what went on in the mind of the persons who voted for it. We mean purpose in the same sense that we say the purpose of a bicycle is to get along quicker than one could walk; what is its function? And I think Justice White was really using "purpose" in *White* v. *Regester* in that sense, and that is not really any different from results.

Senator HATCH. I beg to differ with that conclusion, Mr. Cox, as I read the decision and the dissenting opinions. I do not think any of the Justices differentiate in their use of the word "purpose." For instance, Justice White, in his dissent, says that the district court's decision was "fully consistent with our recognition in *Washington* v. *Davis* that an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."

I agree with your assertion that Justice White did indicate that, based on the facts in *Mobile*, he felt that the court should have found a discriminatory purpose. But I really think that they have

not differed on the standard with regard to intent. You would still differ with me on that point?

Mr. Cox. I respectfully disagree with you.

Senator HATCH. I see.

Mr. Cox. But I really cannot read their minds enough to say that you are wrong and I am right.

I would like to, for the sake of the record, just correct my statement to say that I agree with Justice White's opinion in *City of Mobile* as a guide to how proposed amendment of section 2 would operate. I really meant to say—I do not think I put it very clearly, and you are quite right in pointing out the inconsistency—I agree with his holding as to what facts add up to a violation. I clearly could not testify as I did and then incorporate the references to purpose, particularly as you interpret them. I could not say categorically you are wrong. I just meant going from the factors to the results.

Senator HATCH. Mr. Younger, do you have any comments regarding this discussion? You would agree with me, Professor Cox, that section 2 is a very important issue from either perspective, and that the majority of those who are arguing that we should maintain the "intent" test, rather than an "effects" test, are doing so with the right motive? Certainly this is true of the members of this committee who are arguing that. I am concerned about the 15th amendment standard of proof; I am concerned about this leading to pure proportional representation. Do you share any of that fear or worry yourself?

Mr. Cox. Well, but I think it has now been met by the addition of language, and I have been somewhat better informed by additional study of the case law. I did think that I wanted to chew it over in my mind rather than to answer it then and there during the hearings. I certainly admit that it is a very important question.

Senator HATCH. It certainly is. I am still disturbed by the "in and of itself" language of the saving clause. An expert lawyer like yourself knows that you can circumvent that language six ways from Friday, and that it really is no protection from a misuse of section 2.

Mr. Cox. But I do not see, Senator Hatch, any reason in the earlier cases to think that the courts—that will be chiefly the fifth circuit—concerned with applying the new law if it is amended as proposed would have such—I do not mean any offense—such zeal to pervert its real intent as to disregard the effect of the thrust of that last sentence and to say, well, we are not saying "in and of" extends as a scintilla. I am sure they would get reversed if they did.

Senator HATCH. Well, I might just mention that Justice Marshall, in dissent, in *Mobile* also suggested that proportional representation was a red herring. This was what the court's perfunctory response was to this suggestion by Justice Marshall in the *Mobile* v. *Bolden* case. In footnote 22, it stated:

> The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social factors" indicating that the group in question is without political influence. Putting to the side the evident fact that these quasi-sociological considerations have no constitutional basis, it remains far from

certain that they could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might.

Indeed, the putative limits are bound to prove illusory if the express purpose in forming their implication would be, as the dissent assumes, to redress the "inequitable distribution of political influence."

Senator Kennedy left to vote at an earlier time so that he could come back. He has some more questions for you.

Mr. Younger, I know we have kept you too long as it is, and I know you have got to get back to your practice.

Mr. YOUNGER. I would like to be excused.

Senator HATCH. If you could wait, Mr. Cox, we will excuse you, Mr. Younger, with our appreciation. I will leave for the vote now and Senator Kennedy will resume as soon as he returns.

Mr. Cox. Thank you, Senator.

Senator HATCH. We will recess until Senator Kennedy gets back. [Recess taken.]

Senator KENNEDY. May we come to order.

I apologize to the witnesses for the interruptions. I am afraid we are going to face them all day long.

I just have two areas that I would like to bring up and get the response of Professor Cox.

Some of the opponents have focused on the fact that our bill says the lack of proportional representation, in and of itself—those are the key words—is OK, and they claim that all a plaintiff would have to show is some very slight additional evidence. Some have referred to just a scintilla of evidence to strike at at-large elections, and they say that any law student could win those particular cases.

We have reviewed that in response to earlier questions. You have expressed your view, and I know that it is very helpful for us to address this issue because I think it is going to be one of the key elements on which Members of the Senate are going to make some judgments, and so I would like to ask you, as you have studied the *White* and the cases decided under it, do you think that the totality-of-circumstances rule in *White* would let the plaintiffs strike down at-large elections so easily? Haven't, really, the cases required a very substantial showing of exclusion from the process?

Mr. Cox. I think they do require a substantial showing, and they make clear that fears that mere proportionality would result in a finding of violation are unwarranted. They make clear fears that mere elections at large would be violations that are unwarranted.

The opinions are very explicit on those points and very explicit in reviewing all the evidence and focusing on the ultimate question as to whether there has been a systematic and substantial denial of effective participation to a minority group on account of race or color.

Senator KENNEDY. The other area is back to the question of the "intent" test or the "effects" test. You state that the "intent" test is inadequate to protect the rights fully, and Mr. Younger disagrees, because he notes that the circumstantial evidence is used to prove intent in criminal cases, and, to some extent, plaintiffs could put in much the same evidence under a liberal "intent" test as under the *White* v. *Regester*.

What is the difference in terms of a city's attorneys' ability to put in evidence for the defendant that would cloud the record with phony statements of nonracial intent?

Mr. Cox. One of the major differences in the trial of a case which focuses on results from a case that focuses on subjective purpose or, as I call it, because I think it is clearer, motive is that one could focus on results, on looking at what has happened and whether a racial and undemocratic injustice has happened, with the issue unobscured by declarations about motive and purpose, such as a purpose test at this stage would seem to invite.

We are all familiar with making legislative history, and the temptation to go and make legislative history filled with protestations of absence of any racial motive would be enormous. I do not think that is a temptation that should be encouraged.

Equally, a "results" test would eliminate the problem that otherwise arises of those who have participated in writing the ordinance or statute under pressure to take the stand to testify on the Bible that, no, my motive was not racial. One would exclude that sort of inquiry into state of mind, into, ultimately, the honesty of the witness. One would focus on what has happened, which is the real question when the contention is that a situation is unjust or unjustly excludes from participation in voting.

And it concentrates under the cases, Senator Kennedy, on everything that has happened, not on one or two factors, ignoring all the others, and the concentration on everything that has happened, I think, is a proper answer to the question, well, what if you have lack of proportionality plus a scintilla more? Well, the answer is, the court won't be measuring it that way. The court will look at all the circumstances and focus, I would think, on the ultimate question that I tried to phrase earlier.

Senator KENNEDY. There are those that say, in considering intent, you can look at the other evidence, other circumstantial evidence, rather than just having an "effects" test. What does that do to the——

Mr. Cox. An "effects" test does call for looking at all the circumstantial evidence.

Senator KENNEDY. OK. Now, there are those, though, that say, Look, let's take an "intent" test but also permit them to look at other factors as well. If that were to be the case, couldn't the defendant cloud the issues as you just stated?

Mr. Cox. I think he could, for the reasons I tried to explain, yes.

Senator KENNEDY. And that is the key difference. That would at least appear to me to be a key difference between the two different viewpoints.

Mr. Cox. Well, that would be a key difference between a reconstituted "intent" test that rejected *City of Mobile* and an "effects" test. But, of course, there are other key differences between the "intent" test, with purpose or intent as defined by the plurality in *Mobile* v. *Bolden*, and a "results" test. If I at any point said "effects" test, I meant to say "results" test at each point.

Senator HATCH. We have appreciated having you here today.

If I may ask one more question: Given the impossibility of proving intent, how do you account for the *Escambia County* and the

Lodge v. *Buxton* cases, both of which are cases since *Mobile* where the court has found intent to exist?

Mr. Cox. Senator, I am sorry. I was putting this thing in my ear and I missed the beginning of your question. I apologize.

Senator HATCH. Certainly, Mr. Cox.

Given the difficulties, which exist according to your statements, of proving intent, how do you account for the *Escambia County* case and the *Lodge* v. *Buxton* case, both of which have shown intent to exist since the *Mobile* decision?

Mr. Cox. Well, I would not say that there could be proven intent, but I think that the difficulties in the typical situation would be almost insuperable. But of course, sometimes there will be evidence, even in the form of admissions of a racial intent.

Senator HATCH. I might also mention there were no "smoking guns" in either of those cases. We have appreciated having you here as usual, and I personally admire you and look forward to having you here again in the future.

Mr. Cox. I appreciate both your too generous words and also your courtesies, gentlemen.

Senator HATCH. Thank you so much, Mr. Cox. I appreciate having you here.

Our next witness will be Prof. George Cochran of the University of Mississippi Law School. Professor Cochran formerly served 2 years as the director of the Center on Law and Poverty at Duke University. He is the author of a recent Law Review article on section 5 of the Voting Rights Act which will be placed in its entirety in the record.

Professor Cochran, we will turn to you at this time.

STATEMENT OF GEORGE C. COCHRAN, LAW CENTER, UNIVERSITY OF MISSISSIPPI

Mr. COCHRAN. Thank you, Senator Hatch, Senator Kennedy.

With the large number of witnesses which you have this morning, my statement will be outside the prepared text and short and, hopefully, to the point. I assume at this point my prepared statement is in the record, and the law journal article which I coauthored with Chief Judge William C. Keady of the northern district of Mississippi, which was placed in the record by Senator Thad Cochran in support of his bill, which is S. 1761, is already in the record.

Senator HATCH. Yes, that is already in the record, and we will place your statement and any other attachments you have in the record today at the close of your oral presentation.

Mr. COCHRAN. That law review article, from my perspective, was a good-faith effort to review 15 years of experience under section 5 of the Voting Rights Act. Our only purpose in writing the article was to make suggestions for improving its enforcement.

Among our conclusions, all of which, I think, are well documented, are four main ones: First, administrative preclearance by the Department of Justice has not been and is not fulfilling its service, either to political subdivisions or to minorities who are protected by the act. Indeed, administrative preclearance at this time does

not even incorporate the basic minimal safeguards provided by the Administrative Procedure Act.

Another problem with administrative preclearance is the methodological weaknesses in it. In my prepared statement and in the law review article, we speak to these. A good example of that is having 1 attorney and 11 paraprofessionals who preclear up to 7,500 preclearance petitions per year.

Another serious problem with administrative preclearance is its political vulnerability. Again, my prepared statement and the law journal article in the Kentucky Law Review cover the political vulnerabilities of the Department of Justice, not only in the past but in the present.

In January 1982, the Lawyers' Committee for Civil Rights Under Law prepared a document entitled "Justice Department Voting Rights Enforcement: Political Interference and Retreats." Two days ago, the Washington Post gave notice of a 75-page monograph prepared by the Leadership Conference on political interference within the Justice Department. These are two recent monographs on the political problems the Justice Department has vis-a-vis upholding its statutory responsibility.

I would like to have the Lawyers' Committee monograph placed in the record this morning. I have not seen the monograph prepared by the Leadership Conference.

Senator HATCH. Without objection, we will place that in the record.

Mr. COCHRAN. A third problem is judicial review with respect to administrative preclearance decisions. Access to judicial review by covered political subdivisions at this point is almost nonexistent. In 15 years of experience, there have only been 23 cases filed in the district court for the District of Columbia.

As bad as that experience has been, it is even worse with respect to protected minorities and a decision by the Attorney General's office to preclear a submission. Under the Supreme Court's decision in *Morris* v. *Gressette,* there is no judicial review at this point for aggrieved minorities.

The prepared statement for this morning is directed at that singular issue. If an amending process is to occur with respect to section 5, it is my position and the position of a number of other individuals who have testified before you, that the act should be amended to require or to permit judicial review of decisions by the Department of Justice to preclear.

Other problems focused on in the article relate to unsubmitted changes that are being made by covered political subdivisions and the Department of Justice's inability to deal with this problem.

Another problem is implementation of changes in covered political subdivision where objections have been entered.

These and many other issues are covered in detail in the law journal article. S. 1761, as proposed by Senator Cochran, is designed to meet these problems. I recognize the fact that the committee's attention has not been directed toward the mechanics of section 5, but if there are any questions with respect to our proposals, I would like to entertain them this morning.

One issue not covered either in the law journal article or the prepared testimony is that which focused this committee's attention

this morning: the House version of section 2 and the incorporation of what is perceived to be an "effects" test in the House version.

My position on this follows almost exactly that which was given by Professor Horowitz from Duke University in his discussion of the House bill and also by Professor Blumstein of Vanderbilt University. A similar position has been adopted by Prof. William Van Alstyne of the Duke University Law School, who is currently visiting at Berkeley.

He wrote me recently, on February 16, and I have been authorized to introduce his thoughts into the record as to his position with respect to section 2 as amended by the House. His thoughts are in the form of a letter to me on February 16. The relevant parts of his thoughts are as follows:

> Just this moment, I do not plan to go the long distance to Washington for the hearings on the Voting Rights Act. I have read all the material sent to me, and I think the House modification of section 2, with its "effects" change, is seriously mistaken. I think so because I believe it must inevitably operate as a double ratchet to create racially defined wards throughout most of the Nation, to deepen pernicious ward-based politics and race-based captive votes in large numbers of States and political subdivisions and, overall, to compel the worst tendencies toward race-based allegiances and divisions.
>
> The "double-ratchet" consequence proceeds from the bill because my impression is that the law would operate not merely to prevent any changes unaccompanied by new, race-based modifications, but that it would also operate to permit injunctions to issue when a proposal to make such race-based modifications is rebuffed, and the vote defeating the proposal is then challenged as action the effect of which is "dilutional" vis-a-vis the effect had the proposal been approved.
>
> Given current circumstances, outright extension of the act of 1965 without any changes is probably the best that might result. Even modest changes in the "bail-out" section would be difficult to expect. The topic is so complicated, and the presumption that any change proceeds from evil designs so entrenched, that I see no real prospect. The issue now is whether the very major and, in my view, seriously wrong change in section 2, so overwhelmingly passed in the House, will be approved. I hope it will not.

Senator HATCH. We are happy to have that letter in the record from Professor Van Alstyne, who is an acknowledged constitutional expert. I might add that we have requested him to prepare a statement for the record rather than have him come this distance to testify, and he has indicated that he will attempt to do that. I am sure, in his characteristic, scholarly way, this will add to that letter.

Professor Van Alstyne's letter will be placed in the record.

Mr. COCHRAN. I am not prepared to talk extensively about section 2. If there are any questions with respect to my thoughts on section 2, I again refer to Professor Horowitz's testimony, Professor Blumstein's, and Professor Van Alstyne's letter.

I can comment on the "effect" provision of section 5 and how it has been implemented and the potential for a carryover definition of section 5 case law into the section 2 area, if the committee is interested. At this point, I think I can open myself up to questions, because you have seen my prepared statement and the law review article.

Senator HATCH. I have your statement, and I appreciate your comments about section 2 and section 5.

I need to again leave to vote. I do not know whether Senator Kennedy has any questions for you, Mr. Cochran, but I think what I will do is to ask you to wait until he gets back to see if he has

any questions. If at all possible we would certainly appreciate your staying.

Our next witness will be Mr. Nathan Dershowitz. Mr. Dershowitz, let me just introduce you at this time so that, as soon as Mr. Cochran is through, you can come directly to the witness stand.

Mr. Dershowitz is, of course, the representative from the American Jewish Congress, and he is a noted advocate in his own right. We have had you appear before this committee on many occasions, and we have always enjoyed your appearances, whether or not you have agreed with us. So we are grateful to have you be the next witness.

Let me just say this. I will have some written questions for you, Mr. Cochran. We will keep this record open for all members of the committee to send written questions to you and we would appreciate it if your response could be as quick as possible, because we are going to try and conclude our hearings on Monday. Then, hopefully, we will act as a subcommittee and do the report that has to be done on this matter. If you will please wait until Senator Kennedy gets back. That will be very helpful.

Mr. COCHRAN. If I could accomplish one more small thing, the Leadership Conference on Civil Rights report entitled, "Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981–82", the monograph I referred to, has been handed to me, and I would like that also in the record.

Senator HATCH. All right, thank you. Without objection, it will be placed in the record at this point.

[The prepared statement of Mr. Cochran and additional material follow:]

PREPARED STATEMENT OF GEORGE COLVIN COCHRAN

I am George Colvin Cochran, Professor of Law at the University of Mississippi. Portions of my background which may be of interest to the Committee include service as law clerk to Chief Justice Earl Warren and two years as Director of the Center on Law and Poverty at Duke University.

Over a year and a half ago, the Honorable William C. Keady, Chief Judge of the United States District Court for the Northern District of Mississippi, and I became concerned with the fate of the Voting Rights Act as its time for renewal approached. Our analysis of the current political climate led us to the conclusion, based upon the existence of circumstances not present during the debates of 1970 and 1975, that credible reasons now exist for altering its provisions in general and Section 5 in particular. We then engaged in a joint effort to review pragmatically fifteen years of experience under the Act to assess Section 5's current strengths and weaknesses and to develop a proposal which we felt met objections posed by detractors of Section 5. We believe that the format developed leaves the protections offered solidly in place while insuring that the provisions of Section 5 can play a permanent, more meaningful role in the political process in the future. This work entitled Section 5 of the Voting Rights Act: A Time for Revision was published in the latest issue of the Kentucky Law Journal. The suggestions found therein are now incorporated into S.1761 which has been introduced by Senator Cochran.[1]

Since the empirical and legal basis for S.1761 has been exhaustively documented in our monograph, there is no reason to consume this Committee's time in covering that which has been made available to you and members of your staff. Rather, I intend to focus on one major weakness of Section 5--the failure to provide review of Department decisions not to object to preclearance submissions. In this context, I will propose a method of strengthening current enforcement which differs from that found in S.1761. The sole advantage to this proposal is that the major procedural revisions contemplated by Senator Cochran's bill need not be undertaken in order to remedy the defect which I will be discussing this morning.

As you know, the Department of Justice works within a sixty-day period in performing its preclearance function. Once a decision is reached,

the some seven thousand jurisdictions now covered may seek review in the District Court for the District of Columbia of a decision to object. No similar right, however, is granted to affected minorities with respect to a decision to preclear. This inequity is a result of the Supreme Court's decision of 1977 in Morris v. Gressette.[2] In that case, the Supreme Court rejected arguments concerning congressional intent, and held that the decision to preclear is nonreviewable. As characterized by Mr. Justice Marshall, "it matters not whether the Attorney General fails to object because he misunderstands his legal duty . . .; because he loses the submission; or because he seeks to subvert the Voting Rights Act"[3] for, under all circumstances, the decision not to object is unreviewable.

With the Department's decision-making process now immune from Article III intervention by or on behalf of those the Act is designed to protect, it is mandatory that Congress closely evaluate the procedure now employed by the Department to perform its preclearance function. Specifically, if it is determined that administrative preclearance cannot--by itself--fulfill the objectives of the 1965 legislation, then it is essential that corrective action be taken.

The most recent judicial pronouncement on the quality of the Department's work product is found in Mr. Justice Powell's dissent in Rome v. United States.[4] Taking note of the fact that the submission rate has now risen to over seven thousand a year, he concludes:

> [N]o senior officer in the Justice Department--much less the Attorney General--could make a thoughtful, personal judgment on the average of twenty-five preclearance petitions per day. Thus, important decisions made on a democratic basis . . . are finally judged by unidentifiable employees of a federal bureaucracy, usually without anything resembling an evidentiary hearing.

To determine the actual impact of such a massive "caseload" upon the interests of protected minorities, an understanding of the mechanics of preclearance is necessary.[5]

In order to amass pertinent information and to evaluate individual submissions, the Department maintains within its Voting Rights Section a "submissions unit" that has primary responsibility for the preclearance process. The unit consists of one attorney, a paraprofessional director and eleven paraprofessionals, sometimes referred to as paralegal analysts.

It is this group that is charged with the critical responsibility to determine, pursuant to Section 5, that individual submissions do "not have the purpose and will not have the effect" of abridging the right to vote. Information independent of submissions is gathered primarily by telephone from minority interest groups and individuals listed in a "permanent registry" maintained by the Department. Once assimilated, the paralegal assistants make the initial, and normally upheld determination with respect to whether or not the proposed changed has a discriminatory purpose or effect. This process has been characterized in a forthcoming book as one which relies upon "the preparation and analysis of . . . demographic and legal information [which] is in the hands of paraprofessionals who possess neither demographic/statistical skills nor legal training."[6]

In addition to the problem of data and legal analysis by unqualified paraprofessionals, studies indicate that the data upon which decisions are based may also be insufficient. A recent review of the submission unit's performance by the GAO reveals that fifty nine percent of sampled changes did not have all the data required by regulations. Furthermore, some submission files could not be located, and data inaccuracies were found to impair the ability of the Department to utilize its computer system to catalog changes. Indeed, a GAO representative testified before a House Committee that staff members "have no way of managing the data they get in from jurisdictions; who reported -- who gave their objections, who submitted submissions, who made changes they didn't submit."

Utilization of the permanent registry as a viable technique to secure needed input from minorities is likewise inadequate. The GAO report notes that a review of 271 randomly selected submissions reveals that only fifty-five percent contain comments by interested groups or persons. The GAO report also reveals that followup with those groups and persons is almost nonexistent "[T]he Department's [own] records show that individuals or groups commenting were informed of the review decision in less than 1 percent of the cases sampled. Consequently, mirority groups and individuals may not have adequate information to detect changes implemented despite the Department's objections." Re-

sponses from a sampling of minority interest groups by the GAO concerning their impressions of the effectiveness of Section 5 revealed similar deficiences: thirty-five percent had no knowledge of Department preclearance procedures; ninety percent were not on the mailing list, and over half were unaware of its existence; twenty-five percent knew of significant changes that had not been submitted; and eighty percent had rarely or never been consulted by Department representatives. Indeed, the GAO report concludes that "[T]his sense of removal from the decision process was reinforced by the minority respondents' belief that [Department] approval of changes opposed by minority leaders was a more important problem than a covered jurisdiction's failure to submit."

There is also a growing sense of frustration by those who perceive that the required adversarial and investigatory nature of the Department is becoming increasingly debilitated by professional relationships established between Department attorneys and local officials and their lawyers. The realities of the "lawyer-bureaucrat" bargaining process is perhaps the best portrayed by attachments to the testimony of state Senator Henry Kirksey of Mississippi. His black constituency had no alternative but to sit idly by while attorneys for the city of Jackson and Department officials exchanged ex parte correspondence on a first-name basis. The Department's final decision was a withdrawal of its previously-entered objection (a decision which is also nonreviewable) to a contested annexation. Needless to say, the Department's decision under these circumstances can never be perceived by interested minorities in Jackson, Mississipp, as an example of aggressive fulfillment of its responsibilities under the Act. Regardless of the correctness of the decision, the damage done is irreparable in terms of minority confidence in the process.

Senator Kirksey's testimony also typifies the not uncommon charge[7] that administrative preclearance has and will continue to be susceptible to political manipulation. Indeed, one need only to return to the original debates to find that--as structured-- the

level of administrative enforcement of Section 5 would vary depending upon the allegiences of those holding political power.[8]

For instance, various Republican members of Congress had this to say:

> [W]e view with much concern the broad discretionary power placed in the hands of the Attorney General . . . . Without suggesting any criticism of the present incumbent, we foresee a multitude of opportunities for political manipulation by an Attorney General who is inclined to do so. This is especially true since in recent times several Attorneys General, Republicans and Democrat, have been closely tied to the political campaigns prior to their taking office. Of all the grants of authority to the Attorney General . . . including the ability to consent (to preclearance) . . . it does not require a great deal of imagination to see that the authority to approve or disapprove State laws stands out as the power most subject to abuse.[9]

This Committee has now received sufficient testimony to place it on notice that administrative preclearance, from the perspective of protected minorities, is in a state of disarray. Whether it is a result of political abuse or because of deficiencies inherent in the process itself is irrelevant. For instance, in addition to Senator Kirksey, Joaquin G. Avila, Associate Counsel of the Mexican American Legal Defense and Educational Fund testified on February 1 that numerous election changes in Texas have been recently precleared despite contentions by minorities that they violated Section 5. Henry L. Marsh III, the black mayor of Richmond, Virginia, testified on January 28 concerning an experience of his with the Voting Rights Section:

> Before the [Virginia] General Assembly acted on . . . new districts, I met with officials of the Justice Department and specifically requested an opportunity to comment on any new districts submitted under Section 5 . . . . Justice Department officials assured me that there would be adequate opportunity for me to submit my comments to Department officials. Subsequently, this opportunity was denied. The new districts were passed by the General Assembly on August 11, 1981, signed by the Governor, and approved by the Justice Department the same day without giving any [minority] voters affected by the new districts or their representatives any opportunity to comment on them. Instead of going to single-member districts in . . . affected areas, the Virginia legislature enacted new multimember districts which diluted black voting strength.

On February 2, Ms. Abigail Turner from Mobile, Alabama, detailed before this Committee election changes submitted by Sumter County, which

over the objections of black voters, were precleared by the Department. Finally, Steve Suitts, Executive Director of the Southern Regional Council, the oldest biracial organization in the South, argued persuasively that on the basis of that organization's experience there is a "need to permit affected citizens the same right of judicial review as is available to covered jurisdictions which disagree with a ruling of the Justice Department under Section 5."

By excepting from review challenges by those whom the act was designed to protect, the Court's decision in Morris v. Gressette relegates minorities in covered states to rule by administrative fiat, a concept totally alien to the country's dedication to the concept of equal justice under Law. If Section 5 is to meet its objectives, their access to the Article III system must be insured.

The one remaining issue relates to venue. As is well known, in the intervening years since 1965, Section 5's coverage formula has expanded beyond the original six states falling within its jurisdiction and now includes Alaska, Arizona and Texas and parts of California, Colorado, Connecticut, Florida, Hawaii, Idaho. Massachusetts, Michigan, New Hampshire, New York, North Carolina, South Dakota and Wyoming. As made clear from the article I co-authored with Chief Judge Keady, the decision in 1965 to limit review jurisdiction to the District of Columbia has impacted in such a manner as to almost totally emasculate the concept of administrative control through judicial accountability in Section 5 cases. Again, as set forth in the detailed analysis found in our article, we contend that venue can and should be shifted to the United States District Court for the judicial district from which a submission is made. Adequate procedural protections, such as temporary restraining orders, automatic stays pending appeal and the like, may also be used in order to insure a mode of judicial review most sensitive to the interests of those who lay claim to aggrieved party status. Finally, and most obviously, the role which the award of attorneys fees can and must play is critical. An award is obviously proper for those who present meritorious claims. However, the federal courts must insure that fees are imposed against a private party, or his attorney, if suit is

o be found to be "frivolous, unreasonable, or groundless or maintained purely for the purpose of harrassment."[10]

I want to thank you again for inviting me here and if you have any questions concerning this testimony or S.1761, I more than welcome your inquiry.

FOOTNOTES

[1] The coauthor is not a relative of the Senator.

[2] 432 U.S. 491 (1977).

[3] Id. at 508 (dissenting opinion).

[4] 446 U.S. 156, 205 n.17 (1980) (dissenting opinion).

[5] The most recent evaluations of this process may be found in H.BALL, D.KRANE, T.LAUTH, COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE VOTING RIGHTS ACT (Unpub. ed. 1981) and REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT--ENFORCEMENT NEEDS STRENGTHENING (1978). Detailed coverage and citation to revelent documents supporting the analysis given in this testimony may be found in W. Keady, G. Cochran, Section 5 of the Voting Rights Act: A Time for Revision, 69 KY. L.J.1, 31-40 (reprint. 1981).

[6] COMPROMISED COMPLIANCE, note 5 supra at 90.

[7] See UNITED STATES COMM'N ON CIVIL RIGHTS, THE STATE OF CIVIL RIGHTS: 1979 at 37 (1980); REPORT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, JUSTICE DEPARTMENT VOTING RIGHTS ENFORCEMENT: POLITICAL INTERFERENCE & RETREAT (Jan. 1982)(Appendix A.)

[8] For one example see The Enforcement of the Voting Rights Act: Hearings Before the Civil Rights Oversight Subcomm. of the House Judiciary Comm., 92d Cong., 1st Sess. (1971) (allegations that the Department, under Attorney General Mitchell, was not fulfilling its responsibility).

[9] 116 CONG. REC. 6166 (1970) (emphasis added) (quoting H.R. REP. NO. 439, 89th Cong., 1st Sess 46) (1965) (separate views of Republican Representatives McCulloch, Poff, Cramer, Moore, MacGregor, King, Hutchinson, and McClory).

[10] Christianburg Garment Co. v. EEOC, 343 U.S. 412, 422 (1976).

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JUSTICE DEPARTMENT VOTING RIGHTS ACT ENFORCEMENT: POLITICAL INTERFERENCE AND RETREATS

January 20, 1982

Frank R. Parker
Barbara Y. Phillips
Voting Rights Project

Although there has not been a complete abdication of Voting Rights Act enforcement by the Justice Department, as evidenced by several objections to state and local redistricting plans and other legislation, Justice Department Voting Rights Act enforcement has been increasingly marked by political interference and significant retreats from strict enforcement of the Act. Rather than taking steps to block political meddling, high Justice Department officials seem to invite it by complying with congressional requests not to file and to amend pleadings and to withdraw Voting Rights Act objections. Major instances of political interference and revocation of prior policy are:

--After Republican Sen. Thad Cochran and Republican House Whip Trent Lott of Mississippi protested a 1976 Justice Department objection to a municipal annexation which diluted black voting strength in Jackson, Mississippi, the objection was revoked, allowing white voters in the annexed area legally to participate in Jackson elections.

--After Assistant Attorney General William Bradford Reynolds approved the filing of a Justice Department brief challenging failure to preclear an at-large election scheme in Edgefield County, South Carolina, Reynolds retrieved the brief after protests from South Carolina Senator Strom Thurmond, who grew up and began his political career in Edgefield County.

--After Republican Senator Jeremiah Denton of Alabama complained about the Justice Department's use of the term "white supremacy" in its complaint challenging at-large elections in Mobile, Alabama, Attorney General William French Smith ordered the complaint amended to delete the phrase and also ordered an overall review of the Justice Department's policy of intervening in vote dilution cases.

--President Reagan, after meeting with his cabinet and White House advisors, decided to announce he would sign the House-passed version of the extension of the Voting Rights Act. Attorney General William French Smith, upon hearing of the President's decision, rushed to the White House, demanded a meeting with the President, and got Reagan to change his position and to oppose three key provisions of the House bill.

--In 1980, the Justice Department filed an amicus curiae brief in support of black voters challenging at-large elections in Burke County, Georgia, and argued that the Voting Rights Act does not require proof of discriminatory intent. When the Supreme Court accepted review of the case in 1981, the Department reversed its position and decided not to file a brief in the Supreme Court.

--After a three-judge District Court in South Carolina decided against the Justice Department in a lawsuit to enforce a 1976 Voting Rights Act objection to an at-large voting plan in Sumter County, South Carolina, the Justice Department decided not to take an appeal. Black voter plaintiffs did appeal, however, the Justice Department was required to file a brief by Supreme Court rules (in which the Department restated its original position), and the Supreme Court this month summarily and unanimously reversed the District Court's decision.

DISCUSSION

City of Jackson, Mississippi, annexation. On December 3, 1976, the Attorney General lodged a Section 5 objection for dilution of black voting strength to annexation of a 40-square-mile area containing 32,490 persons, 74 percent of whome were white. This was the third annexation of predominantly white areas by Jackson since 1960. Jackson is governed by a three-member city council, all elected at-large. The Justice Department determined that the 1976 annexation "continues a trend dating back at least to 1960 of the annexation of areas of primarily white population, which has the effect of counteracting the impact of an otherwise growing black percentage." The effect of these annexations was to "more than offset the growth of the black population," and without which "the black population in the City of Jackson would be approaching a majority."

This Section 5 objection was ignored by the City of Jackson, and--despite repeated requests--the Justice Department refused to file any action to enforce it. Residents of the newly-annexed area were permitted to vote in the city elections of 1977 and 1981. In May, 1981, Rev. Jesse Jackson, Reps. John Conyers and Walter Fauntroy, and several other black leaders formerly requested the Justice Department to file suit to enforce this objection, but no action was filed. One month prior to the June, 1981 general election, James P. Turner, Acting Assistant Attorney General, wrote counsel for the City of Jackson:

> It is our understanding that the City intends to hold its 1981 elections by including in the electorate the areas annexed in 1976. Because of the short time remaining before the elections and the disruptive nature of this last minute litigation, we will not seek to enjoin or delay the election process. However, if the 1981 elections are conducted in a manner violative of federal law, and if the objection is not resolved and remains outstanding, we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act. We should advise you that the relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted.

On July 23, 1981--four and a half years after the objection was made--the objection was withdrawn. The letter withdrawing the objection contains evidence of several major irregularities:

(1) There is no evidence that Jackson officials ever specifically requested the Justice Department to reconsider its 1976 objection. A "transmittal" received on May 23, 1981 was merely interpreted by the Justice Department as a request for reconsideration, and then granted.

(2) The letter specifically notes that the Department's "thorough re-evaluation" included "consultation with the Deputy Attorney General." Justice Department regulations specifically delegate the Attorney General's Section 5 responsibilities to the Assistant Attorney General in charge of the Civil Rights Division. Consultation with the Deputy Attorney General, Edward C. Schmults, is outside the normal procedure followed in these cases.

(3) Justice Department regulations require that reconsideration of an objection can only be based on "a substantial change in operative fact or relevant law." 28 CFR § 51.45. This objection was reconsidered and withdrawn even though there was no change in the facts or the law.

(4) The standards applied in withdrawing the objection directly contradict the standards applied and litigated by the Justice Department in City of Rome v. United States and affirmed by the Supreme Court in 1980.

The withdrawal of the objection was the direct result of political interference by Senator Thad Cochran (R-Miss.) and Rep. Trent Lott (R-Miss.) in the Justice Department's enforcement of the Voting Rights Act. In a Jackson Clarion-Ledger article published the day before the objection was withdrawn, both Cochran and Lott admitted intervening with Justice Department officials on the Jackson objection. Cochran admitted a telephone conversation, "I only asked the high echelon people to take a look at the Jackson problem," and Lott admitted a face-to-face meeting with Deputy Attorney General Schmults. Cochran is the brother of Jackson City Commissioner Nielson Cochran, a member of the three-member Jackson City Council.

McCain v. Lybrand. In August, 1981, Assistant Attorney General William Bradford Reynolds signed and approved the filing of an amicus curiae brief supporting black voters' challenge to violations of the Voting Rights Act in Edgefield County, South Carolina. Then within 24 hours, just before the case was scheduled to be argued before a three-judge District Court in South Carolina, Reynolds reversed his position and ordered that the brief--which had already been sent to South Carolina for filing--not be filed. The black plaintiffs charged in their suit that the county violated the Voting Rights Act by changing from an appointed to an elected form of local government with at-large elections in 1966 without the required Section 5 preclearance. No black has served in a countywide office in Edgefield County in this century, despite the fact that the county is almost half black.

A spokesman for Senator Strom Thurmond's (R-S.C.) office admitted that the Senator had discussed the case with Justice Department officials, including Reynolds, but denied that he applied "any pressure." Reynolds claimed that he changed his mind on the basis of "new information" which showed that the issues would be fully presented without Department participation. He declined to disclose the source of this new information. (Richmond Times-Dispatch, Sept. 18, 1981.) Senator Thurmond was born, reared and educated in Edgefield County and started his political career there, serving as superintendent of eduction, county attorney, and state senator from Edgefield before he was elected governor.

Justice Department participation in a case can be very helpful, sometimes even critical, in Voting Rights Act cases before conservative Southern Federal judges. Laughlin McDonald, counsel for the private plaintiffs, said that it would have been "enormously helpful for somebody from the Justice Department to affirm their position that the use of at-large voting had never been precleared." The Voting Rights Act itself places primary responsibility for its enforcement on the Attorney General. In fact, the Act itself does not expressly provide for private suits. Since the suit alleged a failure to preclear--information which was within the particular knowledge of the Department--the Department-s failure to file its own suit, let alone support the private plaintiffs' case, represents a failure to perform its duties under the Act.

Bolden v. City of Mobile. On May 8 the Department of Justice filed a motion for intervention on the plaintiffs' side in Bolden v. City of Mobile, challenging the constitutionality of at-large elections in Mobile, Alabama. The Justice Department complaint contained the following paragraph:

> Black citizens of Mobile have been the victims of a long history of purposeful, official racial discrimination designed to segregate black persons from white persons, to deny the vote to black persons, to assure that black persons would not serve on the Mobile governing body and to maintain white supremacy.

This allegation received wide publicity. Subsequently, Republican Senator Jeremiah Denton, whose hometown is Mobile, protested the Justice Department's use of the term "white supremacy," and Attorney General William French Smith ordered the wording changed in response to Senator Denton's complaint. A UPI story in the Washington Post (May 16, 1981, p. A4) reported:

> Denton, whose hometown is Mobile, spoke to Smith twice this week about the government's action and expressed concern about the "presumptive and severe language" in the papers, a statement from his office said.
>
> Denton said Smith promised to see that different language was substituted, and also to look into the overall policy and manner in which the Justice Department intervenes in cases of this type.

Voting Rights Act extension. At a cabinet meeting on Wednesday, November 4, a number of Administrative officials, including Attorney General William French Smith, presented their views on what position the Administration should take on pending legislation extending the Voting Rights Act. Sources present indicated that Melvin Bradley, a black White House domestic policy advisor, impressively argued that this was an opportunity for the President to demonstrate his sensitivity to minority concerns, and that he should endorse the bill passed by the House of Representatives in October. After conferring with Edwin Meese, James Baker and Michael Deaver on Thursday, November 5, the President decided to announce on Friday that he would sign either a 10-year extension of the present act or the House bill. He also decided to indicate that if the Senate weakened the bailout provision of the House bill, he would support that too.

When told of the decision on Friday morning, Attorney General Smith, according to press reports, "became furious" and "charged off to the White House, demanding to see the President." He saw

the President around noon and "re-argued his case contending that Reagan should not flat out endorse the House bill, but instead, should specify a preference for certain amendments, including a weaker bail-out provision." (Los Angeles Times, November 8, 1981.)

"It was a pretty wild scene around here," said the White House aide.

President Reagan then changed his position in response to Smith's arguments, and later that day issued a statement supporting extension of the Voting Rights Act but refusing to endorse the House-passed bill at three critical points. He opposed the Section 2 amendment providing for a "results" test--"I believe that the act should retain the 'intent' test under existing law, rather than changing to a new and untested 'effects' standard"--and expressed his support for amendments to the bailout provision of the House bill--". . . I will support amendments which incorporate reasonable 'bail-out' provisions for states and other political subdivisions." He also advocated a 10-year extension, rather than the indefinite extension contained in the House bill.

According to the Los Angeles Times:

> "This has never happened before. It's the first time I've seen the President change his mind like this after having made a decision," said one White House advisor who asked not to be identified.

Rogers v. Lodge. This case involves a challenge to at-large, countywide elections for the county commission of Burke County, Georgia. Both the District Court and the Fifth Circuit held the at-large elections unconstitutional. In the Fifth Circuit, the Justice Department filed a lengthy amicus curiae brief in support of the plaintiffs, contending, inter alia, that discriminatory intent need not be proved to establish a violation of Section 2 of the Voting Rights Act, which the Department argued was intended by Congress to invalidate voting practices with a racially discriminatory effect which perpetuated the effects of prior purposeful disfranchisement of blacks.

Defendants appealed the Fifth Circuit decision to the Supreme Court, but at the last minute the Department reversed its position and decided against filing an amicus brief. The case is important because it is the first case in which the Supreme Court will have an opportunity to review or elaborate on its discriminatory purpose test announced in 1980 in City of Mobile v. Bolden.

The Department's retreat is particularly significant because in Mobile a majority of the Justices did not resolve the question of whether Section 2 of the Voting Rights Act prohibits voting practices which have only a discriminatory effect. Only the plurality (Stewart, Burger, Rehnquist, and Powell) contended that the Act required proof of discriminatory purpose.

Blanding v. DuBose. This is an action by the Justice Department and private plaintiffs to enforce a 1976 Section 5 objection to an at-large voting plan for election of the Sumter County, S.C., county commission. The defendants contended that although the change was objected to in 1976, it was precleared when it was submitted again in 1979 by the failure of the Attorney General to object again within the required 60-day period in the Act. The Department contended that the 1979 submission was merely a request for reconsideration, and not subject to the 60-day requirement applicable to Section 5 preclearance submissions.

The District Court entered summary judgment for the defendants in February, 1981. The Justice Department, however, decided not to take an appeal. Private plaintiffs appealed, and on January 11, 1982 the Supreme Court summarily and unanimously reversed the District Court's judgment, agreeing with the Department's interpretation. Even though the Department was not an appellant in the Supreme Court, it was, according to the Supreme Court's rules, required to file a brief as an appellee, in which it expressed its original position.

Here, the Justice Department retreated from its duty to enforce the Voting Rights Act by failing to take an appeal from an adverse District Court decision which clearly was wrong on the law. Newspaper accounts indicate that lawyers at the Interior Department are concerned that the Administration is acquiescing in adverse trial court decisions, and not appealing, even though the trial court decision is wrong and jeopardizes important governmental interests. There is a danger here that this policy may also be implemented in the Justice Department, and that the Department will refuse to press important issues on appeal from adverse District Court decisions which misinterpret the Voting Rights Act and implementing Justice Department regulations.

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February 16, 1982

Professor George Cochran
School of Law
The University of Mississippi
University, Mississippi 38677

Dear George:

Just this moment (Thursday, February 11) I do not plan to go the long distance to Washington for the hearings on the Voting Rights Act. I have read all the material sent me, and I think the House modification of Section 2 (with its "effects" change) is seriously mistaken. I think so because I believe it must inevitably operate as a double-ratchet to create racially-defined wards throughout much of the nation, to deepen pernicious ward-based politics and race-based captive votes in large numbers of states and political subdivisions, and overall to compel the worst tendencies toward race-based allegiances and divisions. The "double" ratchet consequence proceeds from the bill because my impression is that the law would operate not merely to prevent any changes unaccompanied by new, race-based modifications, but that it would operate also to permit injunctions to issue when a proposal to make such race-based modifications is rebuffed, and the vote defeating the proposal is then challenged as action the effect of which is "dilutional" vis-a-vis the effect had the proposal been approved.

Given current circumstances, outright extension of the Act of 1965 without any changes is probably the best that might result. Even modest changes in the "bailout" section would be difficult to expect; the topic is so complicated, and the presumption that any change proceeds from evil designs so entrenched, that I see no real prospect. The issue now is whether the very major (and, in my view, seriously wrong) change in Section 2, so overwhelmingly passed in the House, will be approved. I hope it will not.

My last word with Steve Markman was that only if in the Chairman's personal view would it seem that anything I might do near the end of the hearings could affect an outcome that seemed to be very close indeed, would I feel able to come the distance to appear. I think this very unlikely.

Cheers,

Bill

William Van Alstyne

WVA:ks

[illegible] A pre-print of [illegible] Mr Justice Stone. [illegible]

Section 5 of the Voting Rights Act: A Time for Revision[1]

William Colbert Keady*

George Colvin Cochran**

The Voting Rights Act of 1965[2] represents significant legislation which, notwithstanding certain limitations, has given life to the fifteenth amendment. Experience under the Act, and in particular Section 5,[3] shows that despite the assault upon our federalism,[4] affected jurisdictions have not suffered from its enactment but have in fact been strengthened politically on account of greater electoral participation on the part of minority voters. Furthermore, there is every reason to believe that the beneficial effects of this legislation would inure to the advantage of all jurisdictions to which it would be applied. The time has come to lay aside arguments concerning which region of our country has the worst record of excluding minorities from the political process. The Republic, given its historical pursuit of equality, can have no greater source of strength in the future than that deriving from the nationwide eradication of discrimination in matters of franchise.

The purpose of this article is not to laud the Voting Rights Act as ingeniously conceived legislation for preventing disenfranchisement of minorities; nor is it to condemn Congress for enacting and maintaining this regional[5] legislation based in large measure upon findings made in 1965.[6] It is also not the authors' intent to become ensnared in the ongoing dialogue concerning matters such as substantive interpretations given Section 5 by the courts and the Attorney General.[7] Furthermore, it is not the authors' wish that this discussion have the taint of past efforts which utilized the rhetoric of "nationwide application" as a vehicle to rid Section 5 of its vitality.[8] Rather, we believe there is much to be learned from the past sixteen years and that this experience, if correctly evaluated, clearly justifies the continuance of Section 5's preclearance requirement, a requirement, however, which should be administered by the judicial system created under Article III of our Constitution.

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Thus, this article is designed to proffer two explicit propositions: (1) Congress should amend Section 5 to provide for nationwide application; and (2) Section 5's procedural mechanisms should be revised to discard both a seldom used judicial remedy and a cumbersome administrative procedure and to replace them with a judicial remedy in the United States District Courts under conditions guaranteeing expeditious resolution of Section 5 preclearance requirements.

I. The Operation and Impact of Section 5

As originally enacted, Section 5 prohibited certain states and their political subdivisions from enacting or seeking to administer "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964"[9] without advance federal approval.[10] The Act was amended in 1970 to extend to political units which maintained a "test or device" with respect to voting and in which less than fifty percent of the eligible voting population registered or voted in the 1968 election.[11] In 1975, the Act was further broadened to include jurisdictions with more than five percent language minorities which, as of November 1, 1972, had election materials printed in English only and in which less than fifty percent of the voting age population registered and voted in the 1972 presidential election.[12]

With a legislative history indicating that the term "procedure" was considered "to be all-inclusive of any kind of practice"[13] relating to voting, the United States Supreme Court has, beginning with Allen v. State Board of Elections[14] in 1969, given the Section broad and wide-ranging scope.[15] Since the Act was designed to preclude "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race,"[16] Section 5 scrutiny is triggered if the change or modification has "a potential for discrimination."[17] Thus, the purpose for enacting a change in voting is irrelevant to a determination of whether the state or subdivision must comply with Section 5, and federal preclearance must be had even

if the legislation or other change was enacted for the purpose of complying with the Act.[18] Section 5 preclearance must be met whether the change is one in polling places,[19] candidate qualifications,[20] boundary alterations,[21] reapportionment,[22] redistricting,[23] annexations,[24] changes from ward to at-large elections,[25] alterations in procedures for casting write-in ballots,[26] or even with respect to a requirement that public employees take unpaid leaves of absence when campaigning for elective office.[27] Indeed, there would seem to be few state actions which relate to the electoral process that would not be subject to the proscriptions of Section 5.[28]

Pursuant to Section 5, voting changes are not given effect until the political unit in question receives a declaratory judgment in the United States District Court for the District of Columbia "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[29] Alternatively, the state or political subdivision may submit the proposed change to the Attorney General and enforce the new voting practice if no objection to the proposal is entered within sixty days after submission.[30] If neither action is taken prior to implementation, private parties or the Attorney General may bring suit before a local three-judge district court to enjoin enforcement.[31] In the latter instance, the sole issue to be addressed is whether the enactment is subject to Section 5; the district court is not empowered to determine whether the change has a discriminatory purpose or effect.[32]

The Act itself, in conjunction with a Section 5 preclearance requirement which is both "unusual, and in some aspects . . . severe,"[33] has produced startling results in the jurisdictions to which it applies. An analysis of black voter registration in the six states covered by Section 5 since its inception reveals the following dramatic increases:[34]

State	1964 % Black Registration	1968 % Black Registration	1971-72 % Black Registration	1976 % Black Registration
Alabama	23.1	56.7	57.1	58.1
Georgia	44.1	56.1	67.8	56.3
Louisiana	32.0	59.3	59.1	63.9
Mississippi	6.8	59.4	62.2	67.4
South Carolina	38.8	50.8	48.0	60.6
Virginia	45.8	58.4	54.0	60.7

1978 data shows that the South fares not significantly worse, and in come instances better, than any area of the nation with regard to the difference between black and white voter registration:[35]

Area	% White Registered	% Black Registered	Difference % B/W Registered
United States	63.8	57.1	6.7
Northeast	63.7	52.1	11.6
North Central	68.9	64.7	4.2
South	61.2	56.2	5.0
West	60.5	55.9	4.6

Furthermore, preliminary information concerning 1980 registration indicates that while 8.4% fewer blacks than whites registered throughout the entire country, the registration difference was only 6.9% in the South.[36]

The extent of black voting strength is perhaps best reflected in the numbers of black elected officials within the jurisdictions subject to Section 5. From 1974 to 1980, there was an increase of 63.5% in the number of black elected officials nationwide.[37] In four of the six states that have been covered by Section 5 since 1965, however, the increases were much higher.[38] Indeed, in 1980, Mississippi had the highest number of such officials of all states in the nation,[39] and Louisiana was second.[40] If the analysis is directed toward per capita black elected officials, i.e., ratio of black elected officials to black population, it is significant that three of the six affected states rank among the nation's ten highest in this regard.[41] Finally, the positive impact of Section 5 is perhaps best demonstrated by the startling fact that "a majority of white [congressional] representatives from the American South supported"[42] extension of the Voting Rights Act in 1975.

The preclearance mechanism has undoubtedly served to effectuate the right of minority voters to participate in the electoral process by identifying and preventing both obvious and subtle attempts to prevent electoral participation solely on the basis of race. Moreover, if preclearance were eliminated, it is probable that local and state governments would reinstate voting procedures which would irreparably harm black citizens and other minorities by impinging, directly or indirectly, upon their right of suffrage. The manner in which preclearance is currently implemented, however, should be cause for concern. The requirement should and must be extended to the remainder of the United States. In addition to retaining this requirement which has proved so effective in a limited portion of our country, such action would serve to insure that the proscription of disenfranchisement provided by the fifteenth amendment becomes a reality for minority voters nationwide.

II. Preclearance in the District Court for the District of Columbia: Desire for Uniformity and Mistrust of Southern Jurists

The principal rationale offered for the original decision in 1965 to limit jurisdiction of Section 5 declaratory judgment actions to a three-judge district court in the District of Columbia was to insure uniformity of interpretation.[43] Although not a single suit had been filed in the court seeking a declaratory judgment concerning the purpose or effect of a voting change,[44] the uniformity justification was again relied upon five years later when Section 5 was renewed as originally enacted.[45] Congressional critics, however, began to emphasize the weak underpinnings of the rationale. Senator Ervin, for example, unsuccessfully seeking to divest the court of plenary jurisdiction by means of amendment,[46] argued:

> There were many specious reasons given at the time of passage of this bill for denying all courts jurisdiction except the District Court of the District of Columbia. One was that we needed uniform interpretation. That was a specious reason, because we have 10 separate and distinct U.S. courts of appeals sitting in the 10 circuits handing down, in some cases, different interpretations of the

> law and those interpretations are ultimately made uniform by appeals to the Supreme Court of the United States.[47]

By the end of 1974 only five suits had been filed,[48] resulting in three published opinions.[49] Despite meager judicial activity, proponents for retention of the District of Columbia court as the only viable judicial avenue for preclearance maintained that "the United States District Court for the District of Columbia [is an] expert in the area, ha[s] developed familiarity with the impact of discriminatory voting systems,"[50] and "has built up a degree of expertise on the Voting Rights Act that is invaluable."[51] The response of legislators to suggestions that Section 5 jurisdiction be expanded to all United States District Courts because of minimal utilization[52] of the District of Columbia forum, however, revealed an assumption implicit in the Act[53] as expressed by Senator Tunney of California:

> I might say, in all honesty . . ., I think that in the area of civil rights there is a great deal of peer pressure on judges in the South . . . . I think there is a lot of peer pressure, and I would only have to point to the fact that recently the Supreme Court unanimously reversed a three-judge court in Mississippi that had approved a reapportionment measure . . . .[54]

The response by Senator Morgan of North Carolina to Senator Tunney's implicit attack upon the competence and integrity of southern jurists was direct and emotional:

> For the Senator from California . . . to stand here and say that the judges -- to indict the Federal judiciary in the South, is beyond my imagination.
>
> . . . .
>
> And for the Senator to say that just because the Supreme Court reversed a decision of a three-judge panel in Mississippi is an indictment of the Federal judiciary in the South which, again is beyond my comprehension, and I resent it . . . I resent it.[55]

During the House debates, Representative Kindness introduced an amendment to divest the District of Columbia court of sole jurisdiction.[56] His argument that there was "no particular expertise built up"[57] by that court was successfully countered by responses citing the "need for uniformity" and remarks making reference to the Supreme Court reversal of the three-judge court in Mississippi.[58] There was, however, yet another justification proffered which, until that time, remained undisclosed. As articulated by a major advocate of retaining Section 5 without amendment:

> [T]he Department of Justice desires to centralize all litigation about this matter right here in the District of Columbia. . . . The Department of Justice in this and other areas of national importance feels that they should build up a body of jurisprudence right in the District of Columbia and it is they, more than the civil rights group, that really want to locate this here, rather than the regional aspects.[59]

An examination of the relevant statistical data evinces the speciousness of this explanation and those that preceded it. During the years 1975 through 1980, only eighteen suits for declaratory relief were initiated,[60] resulting in seven published opinions.[61] Thus, after fifteen years of experience with the Act, only twenty-three suits have been filed, ten of which resulted in published opinions. It is therefore apparent that the quest for "uniformity" has never been realized, and the resulting "expertise" justification with respect to adjudicating "purpose or effect" transgressions can only be considered a myth.[62]

More important, the pattern established by covered jurisdictions of avoiding the District of Columbia court during this sixteen-year period[63] demonstrates that there is not, in fact, a functional judicial remedy for those situations where these jurisdictions have either refused or been unable to submit to the preclearance process of the Department of Justice. Such factors as time, distance, expense and other logistical burdens, or a notion of the futility of invoking such a judicial remedy may, collectively or individually,

compel affected jurisdictions to refrain from utilizing an isolated segment of the judicial system. Practically speaking, therefore, judicial review is not presently a feasible alternative.[64] Consequently, the legislative processes of over 7,000 political subdivisions[65] are now subject to the virtually unreviewable decision-making process within the Office of the Attorney General of the United States. As we shall see, the history and current status of this administrative process demonstrates the compelling need for its elimination.

III. Administrative Preclearance: The Birth and Evolution of a Congressional Afterthought

As originally proposed, preclearance was to be limited to declaratory relief before a three-judge court in the District of Columbia.[66] In the wake of hearings before a House Subcommittee, however, several legislators expressed concern over the probability of delays if this procedure were to be the sole avenue of relief for jurisdictions subject to Section 5.[67] Since validly enacted laws would be suspended pending declaratory relief, the consensus of opinion was that if such "drastic effects must be visited" on covered states, "resolution of this class of cases should be handled expeditiousyl [sic]."[68]

Testifying before the Senate Judiciary Committee, Attorney General Katzenbach recognized the tensions which result from state laws being held in such a lengthy state of suspended preclearance and proffered a remedy in the following dialogue:

> Senator ERVIN. It seems to me that is a drastic power which can hardly be reconciled with the federal system of government. . . .
>
> Attorney General KATZENBACH. I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations

> of that. It takes a long time. In the interval the purposes of the act are frustrated.
>
> Now, there may be better ways of accomplishing this. I do not know if there are. There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right; . . . except for the fact that some members of committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things -- perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens.[69]

Attorney General Katzenbach's suggestion of vesting the Attorney General with such discretion apparently impressed Congress[70] for the committee bill incorporated the 60-day administrative preclearance provision which -- without further debate on the issue -- became a permanent and the most important segment of the Voting Rights Act. Its inclusion may be best described as an "afterthought, . . . a practical way to avoid the onerous task of preparing and filing a lawsuit in the District of Columbia."[71] It soon became apparent, however, that such administrative preclearance was fraught with difficulties which were not and could not have been anticipated in 1965.

The 1970 congressional renewal hearings provided a forum for discussion of problems encountered during the first five years of the Section's operation. The major criticisms centered around administrative burdens resulting from the unexpected number of submissions to the Department of Justice and the potentiality that political considerations might enter into the Department's decision-making process. With regard to the former, Assistant

Attorney General David Norman, one of Section 5's original drafters,[72] expressed doubts as to the "effectiveness" of administrative preclearance[73] because of the Attorney General's inability to apply purpose or effect criteria to current submissions,[74] ever-increasing demands on limited personnel to make extensive, independent investigations of all submissions,[75] and the deluge of inconsequential changes submitted pursuant to the expansive interpretation accorded the Act in Allen.[76]

Prior to the Supreme Court's broad interpretation of Section 5 set forth in Allen,[77] neither the Department of Justice nor the affected jurisdictions were certain of the parameters of the Section.[78] The immediate impact of the ruling was therefore significant. In 1968, the year prior to the decision, there were only 110 submissions for preclearance to the Department; for 1970 that number had more than doubled to 255.[79]

Ostensibly as a response to these administrative burdens, Attorney General Mitchell presented a Nixon Administration bill to amend Section 5 to abrogate preclearance, both administrative and judicial, and vest the Department of Justice with sole power to invoke the jurisdiction of local three-judge courts nationwide when there was "reason to believe" that a "standard, practice or procedure with respect to voting . . . has the purpose or effect of denying or abridging the right to vote" on the basis of race.[80] Mitchell stressed the inefficiencies of administrative preclearance and contended that the Department not only was encountering difficulties in making informed judgments with respect to discriminatory effect[81] but was also unable, at that time, to monitor and secure submission of all changes.[82] Furthermore, the Attorney General argued that the need for conducting extensive investigations prior to making a determination hindered the Department in its effort to perform the tasks required of it under Section 5.[83] Thus, Mitchell's testimony can be perceived as an attempt to establish two points: (1) the impropriety of vesting what is essentially a judicial function in an administrative body not accompanied by procedural or due process safeguards;[84] and (2) the idea that no sensitive lawmaker "would . . . have [designed Section 5] as it [is] structured, because . . . the processes provided under which the Attorney General must make a

decision are not adequate. They result in arbitrary decisions without sufficient information."[85]

Congress found Mitchell's contentions unpersuasive,[86] perhaps in large measure on account of suspicions of legislators that considerations of a purely political nature served as motivation for the Administration's proposal. The tenor of the Nixon Administration and its perceived hesitancy to enforce vigorously the Voting Rights Act[87] served to bring to mind views expressed in 1965 in opposition to the Act:

> [W]e view with much concern the broad discretionary powers placed in the hands of the Attorney General . . . . Without suggesting any criticism of the present incumbent, we foresee a multitude of opportunities for political manipulation by an Attorney General who is inclined to do so. This is especially true since in recent times several Attorneys General, Republican and Democrat, have been closely tied to the political campaigns prior to their taking office. Of all the grants of authority to the Attorney General . . ., including the ability to consent to the entry of declaratory judgments . . ., it does not require a great deal of imagination to see that the authority to approve or disapprove State laws stands out as the power most subject to abuse.[88]

Such concerns surfaced in the disapproval of the Department's handling of Section 5 one year later when the House Civil Rights Oversight Subcommittee held hearings in response to complaints that "the Attorney General has failed . . . to carry out the intent of Congress, and has disregarded recent Supreme Court decisions protecting the right of all Americans to exercise their right to vote."[89] At the outset, fears of political manipulation were voiced in light of the fact that no suits had been filed with the District of Columbia court, and it appeared more than possible to Subcommittee

members that covered jurisdictions had reason to believe they would receive more "sympathetic consideration" from the Attorney General.[90] David Norman, who one year earlier expressed concern as to Section 5's effectiveness, was again the Administration's chief spokesman.

Norman countered the legislators' suspicions by explaining that any maladministration resulted from the increased burdens upon the Department arising from the broad construction of Section 5 mandated by Allen and the fact that many submissions raised complex issues dealing with "reapportionment, redistricting and . . . annexation[s]"[91] which would "best be treated in the courts."[92] Responding to the latter point, Congressman Wiggins recalled that administrative preclearance "was intended to permit an expeditious, prompt response on behalf of a State submitting a relatively minor problem and thus avoid unnecessary court delays" while it was "contemplated that complicated issues . . . would be resolved in the District Court for the District of Columbia."[93] Conceding that Wiggins' understanding "might have been discussed around the halls of Congress," Norman noted that "Congress didn't authorize the Attorney General to decide that this thing is tough and, therefore, it ought to go into court."[94] As a solution to the problem, he noted that the Department was considering proposing an amendment to Section 5 providing for an initial clearance of submissions before hearing examiners, with judicial review in a court of appeals under procedures authorized by the Administrative Procedure Act.[95] Subsequently, however, a representative of the Civil Rights Commission expressed his disapproval of this proposal on the ground that it would "create a very time-consuming, very dragged-out administrative procedure."[96]

At the close of the hearings, the House Subcommittee could arrive at only one solution - to force political subdivisions to engage in the "onerous task of preparing and filing a lawsuit in the District of Columbia."[97] This proposal mirrored that of the Director of the Civil Rights Commission, who suggested that "when questions [of preclearance] get that complicated . . . the Attorney General should just interpose an objection and allow the [covered] jurisdiction to go to court in the District of Columbia and resolve it in [that court]."[98]

Such an approach, however, presented the Subcommittee with a

dilemma inasmuch as this procedure could be conducive to even greater delay and therefore contrary to the Act's purpose. This problem was resolved by the determination that the burden should be placed upon the submitting authority since "[c]overed jurisdictions [are] supposed to avail themselves of the faster route to preclearance only when the submitted changes [are] readily assessable as nondiscriminatory."[99] Finally, the Report concluded that the Attorney General had failed to implement properly the preclearance procedure and that complaints of the Act's unenforceability would subside if the burden of proof were placed squarely on the shoulders of the submitting jurisdiction.[100] The Attorney General's regulation placing the burden of proof upon affected jurisdictions utilizing the administrative preclearance procedure,[101] as in declaratory judgment suits in the District of Columbia court,[102] was subsequently upheld by the Supreme Court in Georgia v. United States.[103]

A predominant concern raised during the course of the 1975 renewal hearings was the level of compliance with Section 5 within affected jurisdictions. In preparation for the renewal hearings, the United States Commission on Civil Rights submitted a detailed report to the President on the status and impact of the Act.[104] The Commission concurred in former Attorney General Mitchell's allegation that substantial noncompliance existed:

> Although jurisdictions have been in substantially greater compliance in the second 5 years than they were in the first 5 years of the act, review of the Justice Department's May 1974 computer printout reveals that a large number of counties have never made any submissions under section 5. Spot checks by Commission staff indicate that in some cases, at least, changes have been made but not submitted or reviewed. Noncompliance with the Voting Rights Act through failure to submit changes remains a problem in enforcement of the act.[105]

In light of these findings, the Commission recommended that Section 5 be extended because, inter alia, "[e]ven now some jurisdictions either are not fully aware of or fail to comply with

its requirements."[106] In addition to recommending that the Department take immediate steps to insure compliance,[107] the Commission deemed appropriate an amendment of Section 5 to provide for civil penalties[108] and an award of attorneys' fees to encourage private enforcement.[109] Finally, the report recognized that "[t]here is reason to believe that minority citizens in other jurisdictions encounter discrimination in the electoral process."[110] Although the Commission was in the process of undertaking a study concerning the possible inclusion of other jurisdictions under the Act, it strongly recommended that "Congress not await the Commission's forthcoming report before giving serious consideration to including an amendment to the extension of the Voting Rights Act to cover . . . minorities who, according to preliminary information, require the protection of this law."[111]

At the 1975 renewal hearings, Assistant Attorney General Pottinger underscored the continuing impact of Allen by pointing out that "most of our experience under § 5 has occurred within the past five years. Although 4,476 voting changes have been submitted under Section 5 since 1965, . . . [a]bout 93% of all changes have been submitted since 1970."[112] Conceding that administration of Section 5 had proved to be "more complex than was imagined in 1965,"[113] Pottinger attempted to defend the Department's record by addressing the criticisms contained in the Civil Rights Commission report. With respect to the allegations of noncompliance, the Assistant Attorney General testified that an extensive departmental staff review of all state election laws in a number of Section 5 jurisdictions had been initiated to uncover changes which had not been submitted,[114] and the Federal Bureau of Investigation had been asked "to determine whether changes relating to voting may have been adopted in a manner such as ordinance, resolution, etc., which may not be reflected in the state statutes."[115] Pottinger acknowledged that there were "quite a number of unsubmitted changes" and revealed the results of a preliminary review:[116]

State	Number of Unsubmitted Changes	State	Number of Unsubmitted Changes
Alabama	70	Mississippi	14
Arizona	9	North Carolina	15
Georgia	158	South Carolina	34
Louisiana	16	Virginia	2

Because of the Department's perception of a trend "in the nonsubmitting direction," annual and semiannual audits were thought likely to be forthcoming.[117] In Pottinger's estimation the problem was remediable[118] and he rejected as too "punitive" the Civil Rights Commission's proposal for the imposition of civil penalties, a process he described as "get[ting] money penalties against Governors . . . ."[119]

Other portions of Pottinger's testimony indicate agreement with the view of the Civil Rights Commission that activity proscribed by Section 5 was not endemic to covered jurisdictions. Even though the extent of "wholesale deprivations in the black or chicano" communities was minimal in 1975 as compared with ten years earlier, "in parts of California, Arizona, Colorado, New York, maybe New Jersey, . . . problems do exist."[120] Although the Department was powerless under the Act to address registration and voting difficulties encountered by minorities in certain portions of New York,[121] striking similarities were perceived between "racial gerrymanders" in Mississippi and in a portion of New York subject to Section 5.[122] Despite this observation, Pottinger advocated an extension of the Act in order to allow Section 5 jurisdictions to establish in 1981 "that they are now on a par with Northern States."[123]

The Section 5 portion of the Report issued by the Senate Judiciary Committee focused upon data compiled over the ten-year period with respect to submissions and Department objections[124] and concluded that "past experience ought not to be ignored in terms of assessing the future need for the Act."[125] From this premise the conclusion logically followed that "objections [previously] entered . . . to Section 5 submissions clearly bespeak the continuing need for [the] preclearance mechanism."[126] Quoting Pottinger's testimony with approval, the Report indicated that coverage through the 1980

Decennial Census was deemed critical because even though "[S 5] has been effective in preventing discrimination[,] . . . it has never been completely complied with in the covered jurisdictions[,] and . . . the guarantees it provides are more significant to the country than the slight interference to the federal system."[127]

Dissenting committee members pointed to what they considered to be the slight "evidential value" of the original criteria used in determining which areas would be subject to Section 5, concluding:

> All of us would support a voting rights law applying equally to all citizens throughout the country in which the presumptions were the same for all States and political subdivisions, but believe it is unfair to make the States covered by the temporary legislation assume the burden of proof of their innocence of any violation of voting rights . . . .[128]

This concern with the limited extent of the Section's jurisdiction manifested itself in activity on the Senate floor.[129] Senator Stennis of Mississippi contrasted the large number of black elected officials in covered jurisdictions to the number of such officials in the rest of the nation[130] and introduced a bill to amend Section 5 to allow for nationwide coverage.[131] The proposal was objected to on the ground that requiring preclearance from every jurisdiction in the country "would mean that the Justice Department's resources would be strained beyond limits in trying to evaluate every city council, every county board of supervisors ordinance, and every State legislative law that was passed."[132]

Notwithstanding President Ford's recommendation that Section 5's protection be extended to all citizens of the United States since "what is right for fifteen states is right for fifty states"[133] and despite accusations that the stance of those opposed to nationwide coverage was grounded upon the fact that "other States do not want to have to clear their voting laws with the Attorney General,"[134] the amendment was tabled by a vote of fifty-eight to thirty-eight.[135] The Senate rejected a subsequent bill offered by Senator Nunn incorporating nationwide application by a vote of forty-eight to

forty-one[136] with the opposition again observing that "it would be impossible for the Attorney General to go to court and preclear all the districts"[137] and arguing that "[t]he effect would obviously be that it would be impossible for the Attorney General to do it, and we would not even have a Voting Rights Act."[138] Hence, with no enlightened proposals for the enhancement of the administrative process, Section 5 mechanisms remained unchanged.[139]

Concern with the efficacy of administrative preclearance outlined above remain viable today. An examination of data from the past six years reveals a steady increase in the rate of submissions accompanied by a constant decrease in the percentage of objections.[140]

Year	Submitted Changes	Objections Interposed	% Objections
1975	2,078	138	6.64
1976	7,472	151	2.02
1977	4,007	104	2.59
1978	4,675	49	1.04
1979	4,750	45	.94
1980	7,340	51	.69

Indeed, the deluge of submissions provoked the following analysis by Justice Powell:

> [N]o senior officer in the Justice Department--much less the Attorney General--could make a thoughtful, personal judgment on an average of twenty-five preclearance petitions per day. Thus, important decisions made on a democratic basis . . . are finally judged by unidentifiable employees of a federal bureaucracy, usually without anything resembling an evidentiary hearing.[141]

As noted earlier, the limited judicial review afforded covered jurisdictions has resulted in a restricted utilization of that alternative.[142] Furthermore, administrative review of Section 5 submissions often takes place in the face of approaching elections whose occurrence is contingent upon the Department's determination.[143]

These realities combine to render crucially important the decisions made by these "unidentifiable employees" of the Justice Department. This process is equally critical to the interests of minorities in light of the plenary authority afforded the Attorney General's decision. Under the Supreme Court's decision in Morris v. Gressette,[144] the decision of the Department is not subject to review. With respect to a decision not to object to a proposed electoral adjustment, "it matters not whether the Attorney General fails to object because he misunderstands his legal duty . . .; because he loses the submission; or because he seeks to subvert the Voting Rights Act"[145] for, under all circumstances, the decision is unreviewable.

With the Department's decision-making process now virtually immune from judicial intervention, it is critical that the procedures employed by the Department in performing the preclearance function be closely evaluated. As a congressional "afterthought", this delegation of authority is practically without legislative history.[146] It is nonetheless indisputable that present administrative practices are markedly divergent from those which could have been reasonably foreseen by Congress in 1965.

The Department has adopted the same standards for review as those employed by the District of Columbia District Court in declaratory judgment actions.[147] As such, the administrative preclearance procedure now requires review of the multitude of political, social, economic and legal criteria employed by that court[148] to determine whether the purpose/effect standard has been met. To amass pertinent information and evaluate its content, the Department maintains within its Voting Rights Section a "submission unit" which has primary responsibility for the preclearance process. This unit consists of one attorney, a paraprofessional director and eleven paraprofessionals, sometimes referred to as paralegal analysts,[149] and is instructed to look for "suspicious type changes"[150] which include "at-large elections, reductions in the number of polling places, changes in the location of polling places and redistricting."[151] Among the staff's responsibilities is investigation of motive and impact, which in turn is largely accomplished by "telephone calls to on-site persons."[152] Information independent of the submission is gathered from minority interest groups and other interested individuals within

the submitting jurisdiction,[153] and in turn assimilated in a decision-making process relying upon "the preparation and analysis of . . . demographic and legal information [which] is in the hands of paraprofessionals who possess neither demographic/statistical skills nor legal training."[154] Thereafter, the paralegal assistants make the "initial (and normally upheld) determinations with respect to whether or not the proposed change has a discriminatory purpose or effect."[155]

A recent review of the submission unit's performance by the Government Accounting Office (GAO) revealed that "59 percent of [sampled] changes . . . did not have all data required by Federal regulations."[156] In addition, the inefficiency of the unit was found inasmuch as "some submission files could not be located and data inaccuracies . . . limited the use of the Department's computer system which maintains data on identified changes."[157] Indeed, a GAO representative testified that staff members "have no way of managing the data they get in from the jurisdictions; who reported --who gave their objections, who submitted submissions, who made changes that they didn't submit."[158]

Utilization of a "permanent registry" (a compilation of individuals and groups interested in submissions)[159] and other techniques for obtaining relevant information from minority groups was likewise found inadequate.[160] After noting that a review of 271 randomly selected submissions showed that only fifty-five percent contained comments by interested groups or persons, the Report commented upon the followup with respect to those groups or persons: "[T]he Department's [own] records showed that individuals or groups commenting were informed of the review decision in less than 1 percent of the cases sampled. Consequently, minority groups and individuals may not have adequate information to detect changes implemented despite the Department's objections."[161] Similarly, responses from a sampling of minority interest groups as to their impressions of the effective ness of Section 5 revealed the following: thirty-five percent had no knowledge of Department preclearance procedures; ninety percent were not on the mailing list, and over half were unaware of its existence; twenty-five percent knew of significant changes that had not been submitted; and eighty percent

had rarely or never been consulted by Department representatives.[162] Indeed, "[t]his sense of removal from the decision process was reinforced by the minority respondents' belief that [Department] approval of changes opposed by minority leaders was a more important problem than a covered jurisdiction's failure to submit."[163]

Given the fact that an immense number of submissions are received by the Department and must be reviewed by a small number of personnel within only sixty days,[164] each passing day becomes critical. Although in Georgia v. United States[165] the Supreme Court agreed with the Department's argument that the 60-day period may be tolled by a request for additional information, the process has been described as "hectic, with letters usually being mailed at the last possible moment,"[166] and the request for additional information is often reserved as the Department's "trump card."[167] The GAO Report made corroborative findings as follows:

> [I]n about 6.8 percent of the submissions reviewed, a Department decision was not rendered until at least 100 days from the initial receipt of the submission.
>
> Despite [the requirement that submissions be handled expeditiously] over 50 percent of . . . requests [for additional information] were made on the 60th day after receipt of the initial submissions, over 70 percent were made at least 55 days after receipt, and only 2 percent within 30 days.
>
> In over 50 percent of the cases reviewed, the Department did not notify jurisdictions of its decision until at least 56 days after it had complete information. Notification was given within 30 days for fewer than one out of every six changes.[168]

In addition to the GAO Report, several reported decisions confirm the fact that the Department has encountered difficulties in complying with the time limitation. Not only have objections been imposed on the last day,[169] but the Department has found it necessary to argue,

unsuccessfully, that Georgia allows tolling periods for more than one request for additional information.[170]

Although it has expended a great deal of professional energy in other areas,[171] the Department remains plagued by the continuing serious problem of covered jurisdictions failing to preclear all voting changes. The GAO Report's conclusion on this issue is unmistakedly clear:

> The Voting Rights Act has been in effect for over 12 years, yet there is little assurance that covered States and localities are complying with the act's preclearance provision. We found that the Department of Justice had limited formal procedures for determining that voting changes were submitted for review as required by the act or for determining whether jurisdictions implemented changes over the Department's objection.[172]

The Report also reveals that the Federal Bureau of Investigation "identified 102 unsubmitted changes [on behalf of the Department] of which 60 were still unsubmitted as of October 1976."[173] Moreover, although "[the] Attorney General objected to 257 of the reported 13,433 submissions . . . the Department has not initiated formal monitoring procedures for making sure that jurisdictions do not implement a voting change over the Department's objection."[174] A study paralleling that of the GAO indicates that perhaps the GAO Report even understates the problem.[175] Continuing activity in the lower courts dealing with unsubmitted changes[176] and a compilation by former Texas Representative Barbara Jordon listing sixty counties and 170 Texas cities which have never submitted a change[177] evince the fact that the problem of unprecleared changes is a significant one.[178]

There is also a growing sense of frustration by those who perceive that the required adversarial and investigatory nature of the Department is becoming increasingly debilitated by "professional" relationships established between Department attorneys and local officials.[179] Those who take this point of view perceive a negotiating process between "fraternal professionals" which, while

conducive to Section 5 compliance, results in enforcement at a "suboptimal level."[180] The problems posed by this relationship are indicated in this discussion of the process:

> [T]he almost unanimous selection by covered jurisdictions of the administrative procedure option . . . when they seek to comply with the preclearance requirement is indicative of their preference for the kinds of outcomes which are obtainable through the lawyer-bureaucrat bargaining process. These enforcement practices when coupled with the inability of the Department of Justice to detect many of the unsubmitted voting changes, or to follow up effectively to make certain that jurisdictions do not implement changes to which the Department had [sic] objected, suggest an enforcement pattern in which state and local governments retain a considerable amount of discretion over the manner in which they exercise their reserved power to conduct elections.[181]

The Civil Rights Commission lends credence to this conclusion when it states that while it is "evident that minorities still need the protection of the Voting Rights Act,"[182] the unfortunate "lack of enforcement by the executive branch of Government" remains a problem.[183]

The nationwide aspects of voter discrimination have also affected the Department's activities in the last five years. Responding to a portion of the critique by the GAO as to the manner in which it utilizes its professional resources,[184] the Department pointed out that since "Section 5 does not reach all jurisdictions . . ., litigation is required to challenge many dilutive apportionment plans."[185] It noted that four constitutional dilution suits had been filed since 1976, that sixteen were under "serious investigation" and that a study had been completed of "40 northern and western states

to uncover dilution problems."[186] As a result, an investigation of "three northern cities" was soon to be undertaken.[187]

IV. The Proposal

The most salient conclusions to be derived from the foregoing examination are easily summarized. First, the present avenue of judicial preclearance is totally inadequate. Second, the administrative preclearance alternative has sufficiently served the interests of neither covered jurisdictions nor minority citizens. Third, both methodological weaknesses and political vulnerabilities of the administrative remedy render the decisions of the Attorney General highly suspect from the viewpoint of covered jurisdictions and minority citizens alike. Fourth, as statistics have shown, an ever-increasing rate of submissions for preclearance can be expected in the future. This burden will remain insurmountable if the Department continues in its role as the only viable avenue for preclearance, a state of affairs incompatible with the expeditious, considered treatment envisioned by the formulators of the remedy. Fifth, the problem of unsubmitted changes continues unabated and the Department appears unable to devise a monitoring mechanism capable of assuring compliance with the Act. Finally, the question whether covered jurisdictions implement electoral changes despite objection from the Attorney General remains unanswered.

The Department was surely correct when, in responding to the GAO Report, it argued that too much was being expected from the Voting Rights Section and that the Act, as presently structured, "relies to a considerable extent on voluntary action by the covered jurisdictions" as well as "private lawsuits [for] effective enforcement."[188] Indeed, such conclusions merely restate in another form a critique made by a staff attorney nearly a decade ago who, after reviewing the judicial construction given Section 5, concluded that "the Attorney General [was] playing a role in [its] enforcement . . . far beyond that originally envisioned."[189]

Despite the serious flaws evident in this procedure, however, they in no way detract from the fundamental proposition that the

social benefits generated by the preclearance requirement clearly outweigh its present inadequacies. Indeed, the mere presence of preclearance has a deterring effect on public officials who, but for its existence, would be far less concerned with avoiding discriminatory actions resulting in impediments to the effective utilization of the franchise by minorities.

It is the authors' proposal that, with the exclusion of states or political subdivisions having a de minimis percentage of minorities,[190] Section 5 be amended to provide for nationwide application and that political units be required to bring a declaratory judgment action in local United States District Courts for preclearance of electoral alterations. The amended statute would provide that any state or political subdivision desiring to implement a voting change having a "potential for discrimination,"[191] be required, prior to such implementation, to file a complaint naming the United States as a defendant in the United States District Court for the judicial district in which the submitting jurisdiction is located.[192] The relief sought would be identical to that currently found in Section 5 proceedings, namely, a declaration that the proposed change does not "have the purpose and will not have the effect of denying the right to vote on the basis of race or color." The burden of proof would continue to fall upon the submitting political unit.

Upon filing the complaint, appropriate notice would be required to inform interested parties other than the United States that the political unit is proposing a change within the scope of Section 5. This notice should take two forms: first, publication in local newspapers for three consecutive weeks; and second, actual service of the complaint upon interested persons or organizations who could have their names placed in a "permanent registry" to be kept in the office of each district court clerk. Any person residing within the political subdivision or any organization existing therein desiring to object to the proposed voting change would be allowed to intervene as a matter of right within sixty days after publication or receipt of the complaint.

Appended to the complaint should be that information now required by regulations issued by the Attorney General.[193] The United States would be allowed sixty days to answer, with a tolling of the period

occurring after one request for additional information. This tolling period would also apply to private parties, and any supplemental information provided to the Department would be served on those persons or organizations receiving the complaint. If the United States fails to answer, and if no person or organization intervenes within the specified period, the court would enter an uncontested judgment allowing the jurisdiction to implement the proposed change. The rendering of such judgment would not, however, preclude subsequent constitutional challenges. Obviously, the judgment could be set aside as provided in Federal Rule of Civil Procedure 60(b),[194] in which event the action would be calendared for trial as though the allegations of the complaint had been controverted in the first instance.

Preclearance actions would be given a priority setting in the district court, with a statutory right of mandamus available to insure promptness, e.g., sixty days after the Section 5 issue is joined. Decisions adverse to the United States or intervening parties should be automatically stayed upon filing notice of appeal, with an expedited appeal granted as a matter of right. Expedited appeals should also be granted to submitting jurisdictions desiring review of adverse Section 5 decisions.

Moreover, if the defense should include constitutional counterclaims, the Section 5 portion would be separated from other issues which may be reserved for later determination. In any case, resolution of the Section 5 issue would be appealable by the aggrieved party on an expedited basis as an interlocutory order. Where the appellant or appellants are private parties, a cost-free transcript would be provided. Appellate courts should handle Section 5 appeals on a priority identical to that currently afforded criminal cases.[195]

The authors are convinced that the proposal and suggested guidelines for its implementation would facilitate more expeditious and thoughtful resolution of the questions surrounding Section 5 changes in voting matters. In the first place, it is likely that many petitions filed under the revised procedure, absent any objection, can be disposed of summarily. In such cases, federal preclearance would be expeditiously obtained, with the political unit free to implement the voting change upon reasonable notice to the

public. The proposed amendments would also allow a local district court to determine all statutory and constitutional issues in one lawsuit, something that is now forbidden by Section 5.[196] Moreover, if the latest Department of Justice compilations are empirically sound[197] (51 objections out of 7,340 submissions in 1980), the minimal increase in caseload for the federal judicial system which this proposal would bring about is surely a small price to pay for a procedure which insures more meaningful participation by affected minorities in the electoral process.

Resolution of Section 5 conflicts would be further expedited under this proposal since the burdens heretofore placed upon the Department will be shared with those most affected by the Act, namely, minority voters. Given the broad provision for intervention of outside parties, the protection of minority interests will no longer hinge upon determinations made by "unidentifiable employees" within the office of the Attorney General. Moreover, with the United States retained as a defendant, the expertise and experience of those attorneys in the Voting Rights Section can be employed where they are most needed: in complex matters such as annexations, reapportionment and redistricting which "account for over two-thirds of . . . Section 5 objections."[198] Finally, the provision of an automatic stay coupled with the right to an expedited appeal renders any decision adverse to the United States or intervening minority parties by a "biased forum" totally meaningless since no change can be implemented until it receives appellate approval.[199]

An award of attorneys' fees is also critical to effective implementation of the proposal. Since "Congress depends heavily upon private citizens to enforce the fundamental rights involved,"[200] the 1975 amendments included an incentive for private parties to bring meritorious actions by allowing a court to assess a reasonable attorney's fee in such actions.[201] This provision derives from the recognition that "[f]ee awards are a necessary means of enabling private citizens to vindicate these Federal rights."[202] The Committee studying the proposed amendments found that

> fee awards are essential if the Constitutional requirements and federal statutes . . . are to be enforced. We find that the effects of such

> fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.[203]

As the Second Circuit noted:

> Attorneys' fees are awarded to recompense those who by helping to protect basic rights are thought to have served the public interest. A principal purpose of the legislation is to encourage people to seek judicial redress of unlawful discrimination.
>
> In short, imposition of full attorneys' fees is a useful and needed tool of the court to fully protect plaintiffs' rights as American citizens and voters. . . .[204]

It must be noted, however, that the attorneys' fees provision is a two-edged sword inasmuch as fees may be imposed against a private party, or his attorney, if intervention is found to be "frivolous, vexatious or brought or maintained for harassment purposes."[205] The attorney fee provision therefore operates to make certain that frivolous litigation will be minimal while at the same time encouraging the initiation by private parties of well-founded claims of discriminatory disenfranchisement.[206]

Finally, this proposal contemplates that the problem of noncompliance with the Act be addressed in traditionally equitable terms, thus forcing political units to realize that such failures to obey the law inevitably pose threats of dire consequences both to the political unit and its citizens.[207] Furthermore, it would seem that this problem will diminish because of two considerations. First, as noted earlier, there is presently minimal participation by minorities in the preclearance process as currently structured by the Department of Justice. Under the proposal, a substantial measure of participation by minorities in the process should result in a "brooding presence"[208] ever ready to raise the noncompliance issue in a readily-accessable forum. Second, familiarity with the local district court as the forum in which all disputes may be resolved by traditional means as

opposed to the current alien and distant administrative remedy should enhance participation in the preclearance process.

V. Conclusion

The federal judiciary has historically been the guardian of the constitutional rights of all citizens. In that capacity, no more important business concerns the courts than the vital function of shielding from unlawful state action every citizen's right of franchise. It is time--indeed long past time--to invoke the full authority of federal judges throughout the United States in an effort to realize the fundamental objectives of Section 5. The process of administrative preclearance represents an unfortunate failure on the part of the Congress to utilize that segment of government traditionally vested with the duty of preserving federal rights. The time for change is now.

FOOTNOTES

*Chief Judge, United States District Court for the Northern District of Mississippi. J.D. 1936, Washington University School of Law. Judge Keady has just completed a three year term as a member of the Judicial Conference of the United States.

**Professor of Law, University of Mississippi Law Center. J.D. 1964, University of North Carolina. Professor Cochran clerked for Mr. Justice Reed in 1964-65. The authors wish to acknowledge, with gratitude, the invaluable assistance provided by Judy M. Guice, law clerk to Chief Judge Keady.

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without the prior written consent of the authors. Copies of this pre-print may be obtained by contacting the Kentucky Law Journal.

[2] 42 U.S.C. §§ 1971, 1973 through 1973dd-6 (1976 & Supp. III).

[3] 42 U.S.C. § 1973c (1976).

[4] See, e.g., Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 48 (1978) (Powell, J., dissenting) ("§ 5 represents an 'uncommon exercise of congressional power,' . . . and the Justice Department has conceded in testimony before Congress that it is a 'substantial departure . . . from ordinary concepts of our federal system.'"). Accord, United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting); Morris v. Gressette, 432 U.S. 491, 504 (1977) (an "extraordinary remedy"); Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) ("an unusual, and in some aspects a severe, procedure").

[5] See note 12 infra for a compilation of covered jurisdictions.

[6] For a history of events leading up to enactment, see Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan. L. Rev. 1 (1965); Cox, Constitutionality of the Proposed Voting Rights Act of 1965, 3 Hous. L. Rev. 1 (1965); Hamilton, Southern Judges and Negro Voting Rights: The Judicial Approach to the Solution of Controversial Social Problems, 1965 Wis. L. Rev. 72; Comment, Voting Rights Act of 1965, 1966 Duke L. J. 463. See generally City of Richmond v. United States, 422 U.S. 358, 379-80 (1975) (Brennan, J., dissenting); South Carolina v. Katzenbach, 383 U.S. 301, 318-25 (1966). For a complete discussion of prior federal efforts to enforce the fifteenth amendment, see Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523 (1973); Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051 (1965).

[7] For a critical analysis of the Act as currently construed, see Thernstrom, The Odd Evolution of the Voting Rights Act, 55 Pub. Interest 49 (1979); The Ghost of Reconstruction, Wall St. J. May 22, 1979, at 26, col. 1. See also Binion, The Implementation of Section 5 of the 1965 Voting Rights Act: A Retrospective on the Role of the Courts, 32 W. Pol. Q. 154 (1979); MacCoon, The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965, 29 Cath. U. L. Rev. 107 (1979); Note, "Discriminatory Purpose," "Changes," and "Dilution": Recent Judicial Interpretations of § 5 of the Voting Rights Act, 51 Notre Dame Law. 333 (1975).

[8] See notes 80 and 136-38 infra and accompanying text for an example of such an effort.

[9] 42 U.S.C. § 1973c (1976).

[10] The term "political subdivision" encompasses all entities exercising any control over the electoral process. See 435 U.S. at 125. See also 439 U.S. at 44 (impact of change on electoral process compatible with "control" definition).

[11] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314-15. Section 5 now provides in pertinent part:

> Whenever a State or political subdivision . . . [covered under section 4] . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on . . . [the applicable date of comparison: i.e., November 1, 1964 for jurisdictions covered in 1965; November 1, 1968 for those covered in 1970; and November 1, 1972 for those covered in 1975] . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [section 4(f)(2), protecting

> certain language minorities from denial or abridgment of their right to vote], and unless and until the court enters such judgment no person shall be denied the right to vote forfailure to comply with such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification . . . has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973c (1976).

"Test or device" includes literacy and educational achievement tests, good moral character requirements and voucher systems. 42 U.S.C. § 1973b(c) (1976).

[12] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400-02. This change was in great measure designed to bring Texas within the preclearance requirements. Briscoe v. Bell, 432 U.S. 404, 406 (1977); H.R. Rep. No. 196, 94th Cong., 1st Sess. 17-22 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 25-30 (1975).

Original coverage extended to the states of Alabama, Virginia, Georgia, Louisiana, Mississippi, and South Carolina, as well as to Yuma County (Arizona), Honolulu County (Hawaii), and 39 counties in North Carolina. H.R. Rep. No. 397, 91st Cong., 1st Sess. 3 (1969). Coverage now extends to the states of Alaska, Arizona, Texas and parts of California, Colorado, Connecticut, Florida, Hawaii, Idaho, Massachusetts, Michigan, New Hampshire, New York, North Carolina, South Dakota and Wyoming. See 46 Fed. Reg. 879-80 (1981).

[13] Voting Rights: Hearings on S. 1564 Before the Senate Judiciary Comm., 89th Cong., 1st Sess. 192 (1965) [hereinafter referred to as Hearings on S. 1564] (testimony of Attorney General Katzenbach), quoted in 393 U.S. at 566.

[14] 393 U.S 544 (1969).

[15] See 439 U.S. at 37-42; Perkins v. Matthews 400 U.S. 379, 387-95 (1971).

[16] 393 U.S. at 565.

[17] 439 U.S. at 42 (emphasis in original).

[18] 393 U.S. at 565 n.29.

[19] E.g., 400 U.S. at 388.

[20] E.g., Hadnott v. Amos, 394 U.S. 358, 365-66 (1969); 393 U.S. at 570.

[21] E.g., 400 U.S. at 388.

[22] E.g., Wise v. Lipscomb, 437 U.S. 535, 542 (1978); Beer v. United States, 425 U.S. 130, 133 (1976).

[23] E.g., Georgia v. United States, 411 U.S. 526, 531 (1973).

[24] 422 U.S. at 378-79.

[25] E.g., 400 U.S. at 394; 393 U.S. at 569.

[26] 393 U.S. at 570.

[27] 439 U.S. at 43.

[28] For examples of changes affecting voting which do not have the "potential for discrimination," see Roman, Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy, 22 Am. U. L. Rev. 111, 131 (1972).

[29] 42 U.S.C. § 1973c (1976).

[30] Id.

[31] Id.; 393 U.S at 558-59.

[32] 393 U.S. at 558-59 n.19. For a discussion of the equitable powers of a local three-judge court, see Berry v. Doles, 438 U.S. 190 (1978).

[33] 393 U.S. at 556.

[34] Data for 1964 and for 1971-72 was derived from Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 94th Cong., 1st Sess. 658 (1975) [hereinafter referred to as 1975 Senate Hearings]. Data for 1968 was obtained from H.R. Rep. No. 397, 91st Cong., 1st Sess. 4 (1969), while 1976 data was derived from U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Registration and Voting in November 1976--Jurisdictions Covered by the Voting Rights Act Amendments of 1975, Table 2, series P-23, No. 74 (1978).

[35] U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Voting and Registration in the Election of November 1978, Table 2, series P-20, No. 344 (1979).

[36] U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Voting and Registration in the Election of November 1980, Table B, series P-20, No. 359 (Advance Report 1981).

[37] In 1974 there were 2,991 black elected officials, while the number rose to 4,890 in 1980. Compare Joint Center for Political Studies, 1974 Roster of Black Elected Officials (1975), reprinted in 1975 Senate Hearings at 659-60 (2,991 black elected officials) with Joint Center for Political Studies, 1980 National Roster of Black Elected Officials 4-5 (1981) (as corrected by Errata) (4,890 black elected officials).

[38] These four states and their respective percentage increases are as follows: Georgia, 81.8% (137 black elected officials in 1974; 249 in 1980); Louisiana, 143.6% (149 black elected officials in 1974; 363 in 1980); Mississippi, 102.6% (191 in 1974; 387 in 1980); and South Carolina, 105.2% (116 in 1974; 238 in 1980). Compare Joint Center for Political Studies, 1974 Roster of Black Elected Officials (1975), reprinted in 1975 Senate Hearings at 659-60 with Joint Center for Political Studies, 1980 National Roster of Black Elected Officials 4-5 (1981) (as corrected by Errata).

[39] Mississippi had 387 black elected officials in 1980. Joint Center for Political Studies, 1980 National Roster of Black Elected Officials 158 (1981) (as corrected by Errata).

[40]Louisiana had 363 black elected officials in 1980. Id. at 123 (as corrected by Errata).

[41]A ranking of states by per capita black elected officials, from most per capita to least per capita, reveals the following:

Black Per Capita Elected Officials

State	Total Pop. 15 & Over[a] (in thousands)	Black Pop. 15 & Over[a] (in thousands)	Blacks as % Total Pop. 15 & Over	No. Blacks of BEO	Per Capita BEO
Ark.	1,669.6	262.4	16	227	1,156
D.C.	585.0	402.9	69	261	1,544
Miss.[b]	1,800.8	604.5	34	387	1,562
Ok.	2,177.5	143.0	7	77	1,857
La.[b]	2,977.3	838.1	28	363	2,309
Ky.	2,685.4	186.1	7	71	2,621
S.C.[b]	2,219.9	646.6	29	238	2,717
Conn.[c]	2,563.4	146.7	6	53	2,768
Mo.	3,818.7	382.2	10	136	2,810
Mich.[c]	7,280.6	812.2	11	284	2,860
Ala.[b]	2,837.5	686.3	24	238	2,884
Kan.	1,844.2	82.3	4	28	2,939
R.I.	761.5	20.6	3	7	2,943
Minn.	3,152.0	29.6	1	10	2,960
W. Va.	1,427.6	49.3	3	16	3,081
Ariz.[b]	1,753.5	50.1	3	14	3,579
N.C.[c]	4,345.1	905.1	21	247	3,664
Ga.[b]	3,884.0	957.9	25	249	3,847
Ill.	9,004.9	1,146.9	13	298	3,849
Ore.	1,851.3	23.5	1	6	3,917
Nev.	473.9	25.3	5	6	4,217
Ohio	8,584.5	791.5	9	186	4,255
Tenn.	3,334.7	490.8	15	112	4,382
N.J.	5,990.5	662.5	11	151	4,387
Ind.	4,224.2	293.1	7	66	4,441
Colo.[c]	2,059.1	67.4	3	15	4,493
Wash.	2,896.0	63.3	2	14	4,521

Del.	465.5	63.9	14	14	4,564
Iowa	2,293.1	29.5	1	6	4,917
Neb.	1,237.6	34.6	3	7	4,943
Cal.[c]	17,482.4	1,241.8	7	237	5,240
Wisc.	3,687.3	105.7	3	20	5,285
Tex.[b]	9,734.9	1,156.6	12	196	5,901
Mass.[c]	4,770.4	168.4	4	27	6,237
Penn.	9,582.6	809.2	8	129	6,273
Md.	3,356.4	643.9	19	85	7,575
Va.[b]	4,039.8	721.6	18	91	7,930
Fla.[c]	6,702.6	880.0	13	109	8,073
N.Y.[c]	14,879.9	1,938.6	13	200	9,693
Alas.[b]	286.5	N/A	N/A	3	N/A
Haw.[c]	717.2	N/A	N/A	1	N/A
Idaho[c]	640.5	N/A	N/A	0	N/A
Maine	841.2	N/A	N/A	2	N/A
Mont.	597.0	N/A	N/A	0	N/A
N.H.[c]	649.5	N/A	N/A	1	N/A
N.M.	901.1	N/A	N/A	2	N/A
N.D.	511.5	N/A	N/A	0	N/A
S.D.[c]	542.3	N/A	N/A	0	N/A
Utah	919.2	N/A	N/A	0	N/A
Vt.	375.9	N/A	N/A	0	N/A
Wyo.[c]	299.7	N/A	N/A	0	N/A

a) Since census data is broken down only by age 0 to 5, 5 to 14, 15 to 24, etc., population figures include those persons age 15 to 18, even though they are ineligible to vote.

b) Entire state covered by § 5. See 46 Fed. Reg. 879-80 (1981).

c) Parts of state covered by § 5. See id.

The foregoing data is drawn from a variety of sources. Since 1980 census data was unavailable for all states, 1980 population figures are projections derived from U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Illustrative Projections of State Populations by Age, Race & Sex: 1975 to 2000, Table 6, series P-25, No. 796 (1979) (series II-C which assumes zero net interstate

domestic migration since 1975). Black population data for 1980 is unavailable for those states which had an estimated black total population in 1975 of less than 25,000. The figures regarding the numbers of black elected officials are derived from Joint Center for Political Studies, 1980 National Roster of Black Elected Officials 4-5 (1981) (as corrected by Errata). The average number of blacks per black elected official in all states for which data is available is 4,185. The average for states which are completely covered by the Act (for which data is available) is 3,841, while the average for all states not covered at all by the Act (for which data is available) is 3,889.

[42]Black, Racial Composition of Congressional Districts and Support for Federal Voting Rights in the American South, 59 Soc. Sci. Q. 435 (1978). The author continued:

> This expression of approval represented a significant shift in the position of the southern congressional delegation, which had long opposed any federal regulation of voter qualifications . . . and appeared to indicate the acceptance by southern white politicians of the legitimacy of participation by blacks in the region's electoral process.

Id.

[43]See Hearings on S. 1564, supra note 13, at '69-73 (testimony of Attorney General Katzenbach). See also 111 Cong. Rec. 10354-55 (remarks of Senator Hart); id. at 15663 (remarks of Congressman Celler).

[44]GAO Report on the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 95th Cong., 2d Sess. 184 (1978) [hereinafter referred to as GAO Report Hearings]. Even though there were no suits filed in the district court, 436 submissions to the Attorney General were made during the same time period.

[45]See, e.g., 116 Cong. Rec. 6509 (1970) (D.C. Court insures "consistency and uniformity" with respect to the Act's construction).

[46]Id. at 6506, 6511.

[47]Id. at 6508. See also id. at 6519.

[48]GAO Report Hearings, supra note 44, at 184. In stark contrast is the fact that § 5 had generated 4,476 administrative submissions by 1975. See Appendix, infra.

[49]City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974), vacated, 422 U.S. 358 (1975); Beer v. United States, 374 F. Supp. 363 (D.D.C. 1974), rev'd, 425 U.S. 130 (1976); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973).

[50]S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975).

[51]121 Cong. Rec. 24114 (1976) (remarks of Senator Tunney).

[52]H.R. Rep. No. 196, 94th Cong., 1st Sess. 112 (1975). See also 121 Cong. Rec. 24716 (1975) (proposed amendment by Senator Scott to divest District of Columbia court of sole jurisdiction).

[53]Although distrust of southern federal judges was referred to in the 1965 debates by opponents, e.g., 111 Cong. Rec. 9245 (1965) (remarks of Senator Ervin), during the 1970 renewal hearings Joseph Rauh, general counsel for the NAACP, met the issue head on. Responding to a question concerning an alternative proposal that would allow the Attorney General to bring suit in local federal courts for substantive violations, he stated:

> What stops these things [discriminatory voting changes] now is they have got to come for approval to the Attorney General or the district court here, people who are sympathetic to civil rights. That wouldn't happen under [the proposal]. Under [it] the Attorney General each time would have to get the facts, [and] start a suit in hostile territory. . . .

Amendments to the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 91st Cong., 1st & 2d Sess. 132 (1970) [hereinafter referred to as 1970 Senate Hearings] (testimony of Joseph L. Rauh, Jr., General Counsel for the Leadership Conference on Civil Rights) (emphasis added).

Indeed, in a judicial milieu in which southern judges were steadily handling an increasing caseload of school integration and civil rights cases, 116 Cong. Rec. 6166 (1970) (remarks of Senator Holland), one senator paralleled Mr. Rauh's analysis by arguing that a decision was made to move § 5 cases "into a forum which was partially, if not totally, predisposed to be blind and deaf to any arguments fostered by the Southern States." Id. at 5686 (remarks of Senator Thurmond).

[54]121 Cong. Rec. 24114-15 (1975). See also id. at 24717 (similar analysis by Senator Tunney).

[55]Id. at 24725.

[56]Id. at 16900.

[57] Id.

[58] Id. at 16900-01 (remarks of Congressman Edwards). For remarks typifying the scope of debate on the issue, see, e.g., id. at 16267 (Congressman Butler alleging no expertise in District of Columbia court and "political bias" against southern judges); id. at 16283 (Congressman Kindness claiming an insult to southern judiciary); id. (Congressman Sieberling describing need for uniformity); id. at 16289 (Congressman Conyers arguing that southern judges are easily intimidated).

[59] Id. at 16289 (remarks of Congressman Drinan).

[60] Letter from Gerald W. Jones, Chief, Voting Section, to Professor George C. Cochran (March 25, 1981); Interview with Barry Weinberg, Deputy Chief, Voting Section (June 8, 1981).

[61] Hale County v. United States, 496 F. Supp. 1206 (D.D.C. 1980); Mississippi v. United States, 490 F. Supp. 569 (D.D.C. 1979), aff'd, 444 U.S. 1050 (1980); City of Dallas v. United States, 482 F. Supp. 183 (D.D.C. 1979); Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), aff'd, 446 U.S. 156 (1980), rehearing denied, 447 U.S. 916 (1980); Charlton County Bd. of Educ. v. United States, 459 F. Supp. 530 (D.D.C. 1978); Wilkes County v. United States, 450 F. Supp. 1171 (D.D.C. 1978), aff'd, 439 U.S. 999 (1979); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978).

[62] At the present time, however, the District of Columbia Circuit Court of Appeals pays homage to the "uniformity" rationale, Harper v. Levi, 520 F.2d 53, 72 (D.C. Cir. 1975). Furthermore, three

members of the Supreme Court have adhered to the proposition that since "frontline judicial responsibility for interpreting and applying [§ 5's] substantive standards" has been vested with the District Court for the District of Columbia, "the considerable experience which that court has acquired . . . enhances the respect to which its judgments are entitled." 422 U.S. at 381 (Brennan, J., dissenting, joined by Justice Douglas and Justice Marshall).

In a totally unrelated area, the District of Columbia District Court has experienced a slightly increased caseload. Section 4(a) of the Act, 42 U.S.C. § 1973b(a) (1976), includes a "bail out" provision which allows a jurisdiction to escape § 5 coverage by bringing a declaratory judgment action and proving that no "test or device" has been used in the jurisdiction "during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." Id. Pursuing an independent line of research, Justice Powell uncovered twenty-eight successful bailout suits brought by political subdivisions located in states not covered by the Act. City of Rome v. United States, 446 U.S. 156, 198 (1980) (Powell, J., dissenting).

[63]This pattern of avoidance is clearly evidenced by the startling number of administrative submissions during the period. For example, during the years 1975 through 1980, there were 30,322 administrative submissions (see Appendix infra), as compared to only 18 suits for declaratory relief filed during the same period. Interview with Barry Weinberg, supra note 60.

[64]See note 143 infra for an example of a situation in which judicial review was not chosen. See also note 181 infra and accompanying text for a discussion which reflects the view that the "politics" of administrative preclearance results in a preference by political subdivisions for that alternative.

This conclusion, however, fails to answer the question of why only 23 suits have been filed in the context of 815 objections by the Department of Justice since 1965.

[65]446 U.S. at 205 n.17 (Powell, J., dissenting).

[66]S. 1564, 89th Cong., 1st Sess., 111 Cong. Rec. 5403-04 (1965) (the original bill introduced).

[67]The problem was analyzed as follows:

> The District Court for the District of Columbia already has a huge backlog of over 4,000 civil cases. With the median time of 28 months required from the time of filing an action in this court to the disposition after trial, this provision of the . . . bill will contribute to a long delay in the hearing of such cases. In the meantime, State voter qualifications and standards are suspended without relief.

H.R. Rep. No. 439, 89th Cong., 1st Sess. 42 (1965) (footnotes omitted) (separate views of Republican Representatives McCulloch, Poff, Cramer, Moore, MacGregor, King, Hutchinson, and McClory).

[68]Id.

[69]Hearings on S. 1564, supra note 13, at 237 (testimony of Attorney General Katzenbach).

[70]520 F.2d at 65 (similar review of legislative history). See also Morris v. Gressette, 432 U.S. at 503 n.18.

[71]The Enforcement of the Voting Rights Act: Hearings Before the Civil Rights Oversight Subcomm. of the House Judiciary Comm., 92d Cong., 1st Sess. 92 (1971) [hereinafter referred to as House Oversight Hearings] (letter from Howard A. Glickstein, Staff Director, United States Commission on Civil Rights, to John N. Mitchell, Attorney General, Nov. 3, 1970).

[72]1970 Senate Hearings, supra note 53, at 513 (testimony of David L. Norman, Deputy Assistant Attorney General, Civil Rights Division).

[73] Id. at 514. In this regard, Norman stated:

> The first point I want to make about section 5 . . . is that when States submit proposed voting changes to the Attorney General, those changes normally come to us in the form of a statute or an ordinance. I have not seen a statute or an ordinance which you could tell on its face, by reading it, that its purpose [sic] or its effect was discriminatory.

Id.

[75] Id. In regard to the investigatory procedure, Norman testified:

> When the statutes or ordinances are submitted to the Attorney General, we read them to determine if there is discrimination there. In order to find out anything more about the statute or ordinance, it requires some investigation and inquiry. In order to find out whether there is a discriminatory purpose, one might have to search through legislative journals or newspapers. It is almost impossible to probe into the minds of legislators to determine what purpose they had.
>
> In order to determine whether there is any discriminatory effect, or a potential discriminatory effect, we often have to interview witnesses, interview people in the communities about what they think. In order to determine the effect, we very often have to obtain maps, precinct maps, for example, when a change involves changing a precinct line.

Id.

[76] Norman noted that "[a]mong the little known facts, I think, is that the way we read [Allen] almost every change affecting voting has to be submitted to the Attorney General, no matter how trivial, how wise, how beneficial a change might be, it must be submitted." Id. at 506. See also 116 Cong. Rec. 6159 (1970) (Sen. Dole making point that most submissions invoke inconsequential changes).

[77] See notes 14-28 supra and accompanying text for a discussion of the scope and impact of the Allen decision.

[78] See generally MacCoon, supra note 7, at 108; Roman, supra note 28, at 125-26. During the 1965-70 period, the Department devoted the most significant portion of its time to registration matters. See 1975 Senate Hearings, supra note 34, at 584 (testimony of Assistant

Attorney General Pottinger). See also U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After 25 (1975) [hereinafter referred to as Ten Years After], reprinted in Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess. 969-1466 (1975).

[79] See Appendix infra. Furthermore, the Allen decision influenced not only the submission process but also the review process itself. As of January 29, 1970, there had been a total of 436 submissions since the Act's inception. Of 22 objections interposed, 18 came in the year following Allen. 1970 Senate Hearings, supra note 53, at 505 (testimony of David Norman). See also Appendix infra.

[80] The amendment in its entirety provided:

> (a) Whenever the Attorney General has reason to believe that a State or political subdivision has enacted or is seeking to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting which has the purpose or effect of denying or abridging the right to vote on account of race or color, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order or a preliminary or permanent injunction, or such other order as he deems appropriate.
>
> (b) An action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the House Judiciary Comm., 91st Cong., 1st Sess. 282 (1969) [hereinafter referred to as 1969 House Hearings].

Couching his presentation in terms of a need to expand the Act "nationwide," see, e.g., id. at 238, Mitchell spent a significant amount of time attempting to defend the amendment before unsympathetic congressional committees. See id. at 218-45, 272-307 (1969); 1970 Senate Hearings, supra note 53, at 182-212, 220-53. Despite adversity from the committees, the Nixon proposal did secure House passage. H.R. 4249, 91st Cong., 1st Sess., 115 Cong. Rec. 38535-37 (1969).

[81] 1970 Senate Hearings, supra note 53, at 198-99 (testimony of Attorney General Mitchell). See also 116 Cong. Rec. 6156 (1970) (Senator Gurney setting forth argument that low rate of objections evinces the fact that the department is not adequately fulfilling its responsibilities).

[82] 1970 Senate Hearings, supra note 53, at 197-99 (testimony of Attorney General Mitchell). See also 116 Cong. Rec. 6156 (1970) (Senator Gurney noting that jurisdictions often fail to submit changes).

[83] 1970 Senate Hearings, supra note 53, at 198-99 (testimony of Attorney General Mitchell).

[84] See id.

[85] Id. at 204.

[86] Reports by responsible subcommittees rejected any of Mitchell's proposals amending § 5. See, H.R. Rep. No. 397, 91st Cong., 1st Sess. 8-9 (1969) ("The committee is convinced that section 5 procedures are an integral part of the rights afforded by the 1965 act."). Although President Nixon argued that the administration bill was "comprehensive and equitable," 116 Cong. Rec. 5532 (1970) (letter from President Nixon to Minority Leader Ford, Dec. 10, 1969), the debilitating aspects of the substitute were abundantly clear to various members of Congress. See, e.g., id. at 6356 (no private suits; tedious and time-consuming litigation would ensue). A proposed amendment by Sen. Ervin to authorize suits by the Department of Justice in local courts was also rejected. Id. at 6515-22. But see note 80 supra indicating passage of Nixon proposal by House.

[87] See e.g., House Oversight Hearings, supra note 71, at 8-9 (newspaper article in the Baltimore Sun, May 14, 1971 at 1 concerning

Attorney General Mitchell's inclination not to enforce the Act). See also Nixon, R.N.: The Memoirs of Richard Nixon 440 (1978) (expressed determination to terminate "punitive requirements" of civil rights enforcement in the South).

[88]116 Cong. Rec. 6166 (1970) (emphasis added) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 46 (1965) (separate views of Republican Representatives McCulloch, Poff, Cramer, Moore, MacGregor, King, Hutchinson, and McClory).

[89]House Oversight Hearings, supra note 71, at 3 (statement of Representative Edwards). Chairman Edwards noted: "Civil rights groups claim that the Department of Justice has abdicated its responsibility by failing to object to a single reregistration proposal and by simply not requiring countries [sic] to submit their reregistration plans." Id. at 2.

[90]Id. at 32 (statement of Representative Waldie).

[91]Id. at 7 (testimony of David Norman).

[92]Id. at 10.

[93]Id. at 11 (testimony of Representative Wiggins).

[94]Id. (testimony of David Norman).

[95]Norman described the proposal as follows:

> [T]he Department of Justice is now developing a proposal to amend section 5 . . . in order to provide for a full-scale administrative hearing under a hearing examiner when it is determined that a submission involves complex issues of fact. The final determination in such a case would be subject to judicial review in a court of appeals. We believe that such an amendment would facilitate proper evaluation by the Attorney General of voting changes, such as reapportionments and annexations, which require

> examination of complicated and often extensive demographic information.

Id. at 6. See also id. at 7 (utilization of Administrative Procedure Act).

[96] Id. at 107-08 (testimony of Howard A. Glickstein, Staff Director, United States Commission on Civil Rights). The Civil Rights Commission's director acknowledged his unhappiness "with the fact that so many hours of Justice Department legal talent has to be expended on these submissions" but noted that "there would be equal amount of Justice Department manpower spent" if the submitting jurisdictions instead brought declaratory judgment actions in the District of Columbia court. Id. at 107.

[97] Id. at 92. House Oversight Hearings, supra note 71, at 92.

[98] Id. at 108. See also Enforcement of the Voting Rights Act of 1965 in Mississippi: A Report of the Civil Rights Oversight Subcommittee of the House Judiciary Committee, 92d Cong., 2d Sess. 12 (Comm. Print 1972).

[99] Enforcement of the Voting Rights Act of 1965 in Mississippi: A Report of the Civil Rights Oversight Subcommittee of the House Judiciary Committee, 92d Cong., 2d Sess. 12 (Comm. Print 1972).

[100] Id. at 7. Specifically criticized were the "impartial administration" test applied to voting changes and the failure of the Department to incorporate therein a "rebuttable presumption" that all submissions were discriminatory. Id. at 7-8.

[101] The Department regulation regarding burden of proof provides in pertinent part:

> [T]he burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. . . . If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

46 Fed. Reg. 878 (1981).

[102]383 U.S. at 335 (1966).

[103]411 U.S. 526, 538-39 (1973).

[104]Ten Years After, supra note 78.

[105]Id. at 28 (footnote omitted).

[106]Id. at 345.

[107]The recommendation was as follows:

> The Department of Justice should assume the responsibility for developing a system which ensures the discovery and systematic review of election law changes. The Department also should take legal action to prevent the implementation of uncleared changes and give greater publicity to the requirements of section 5 to increase the timely submission of changes for the Attorney General's review.

Id. at 347.

[108]The report stated:

> Congress should amend the Voting Rights Act to provide for civil penalties or damages

> against State and local officials who violate section 5 of the act by enforcing or implementing changes in their electoral laws and procedures without having first obtained preclearance form the Attorney General of the United States or the District Court for the District of Columbia.

Id. at 346 (original italic typeface omitted).

[109] Id. at 353.

[110] Id. at 356.

[111] Id. (original italic typeface omitted). This study was never completed because of insufficient personnel to perform the onerous task of analyzing voting practices in each state. Telephone conversation with Thelma Grevins, U.S. Comm'n on Civil Rights (March 27, 1981). Commissioner Robert S. Rankin concurred in the report's recommendations, "not because some irregularities still exist in the South and elsewhere--to some extent they exist nationwide--but for the improvements that have resulted from this act." Ten Years After, supra note 78, at 363.

[112] Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess. 169 (1975) [hereinafter referred to as 1975 House Hearings] (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division).

[113] Id. at 170.

[114] 1975 House Hearings, supra note 112, at 170 (testimony of Assistant Attorney General Pottinger).

[115] Id.

[116] Id. at 301. See also 1975 Senate Hearings, supra note 34, at 583 (testimony of Assistant Attorney General Pottinger).

[117] 1975 House Hearings, supra note 112, at 301 (testimony of Assistant Attorney General Pottinger).

[118] The Senate Subcommittee received the following assurance:

> But we believe that we can handle [the problem] with the resources we have. It is true that this review has turned up a lot of different information that must be reviewed by attorneys in our division, and they are working hard without any real complaints. But I can tell you that late at night we are encountering more lawyers, perhaps from voting rights section, working on these matters very diligently, in order to make resolutions of each of them.

1975 Senate Hearings, supra note 34, at 563.

[119] 1975 House Hearings, supra note 112, at 298 (testimony of Assistant Attorney General Pottinger).

[120] 1975 Senate Hearings, supra note 34, at 567 (testimony of Assistant Attorney General Pottinger).

[121] See id. at 596.

[122] Pottinger and Senator Tunney engaged in the following exchange:

> Senator TUNNEY. What about the kind of gerrymandering that takes place where there may be a relatively large concentration of blacks and that community is split up into, say, five districts, guaranteeing that there is a relatively small minority of blacks in each one of the districts? . . .
>
> Mr. POTTINGER. Oh, yes, clearly. Incidentally, [an assistant] has pointed out [an exhibit demonstrating this kind of districting in Mississippi] . . . that is very similar to the problem we encountered in New York . . . .

Id. at 553. As an example of such activity in northern jurisdictions, an objection letter was placed in the record which revealed the following:

> First, with respect to the Kings County congressional redistricting, the lines defining district 12 and surrounding districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. Moreover, it appears that other rational and compact alternative districting could achieve population equality without such an effect.
>
> Similarly, in the Kings County senate and assembly plans . . . the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining these districts are diffused into a number of other districts.

Id. at 667 (letter from J. Stanley Pottinger to George D. Zuckerman, Assistant Attorney General of New York, April 1, 1974). For the subsequent history of the legal impact of this objection, see United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

[123] 1975 Senate Hearings, supra note 34, at 552.

[124]S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975). The data revealed that during that period the Department had objected to 163 of the 4,476 submissions. Id.

[125]Id. at 18.

[126]Id. at 16.

[127]Id. at 18 (quoting testimony of Assistant Attorney General Pottinger). These conclusions, however, are incompatible with the Supreme Court's characterization of § 5 as a "substantial departure" from the traditional notions of federalism. See note 4 supra for the Court's comment on the section.

The House Report adopted an analysis similar to that of the Senate, concluding that § 5 "has contributed to the gains thus far achieved in minority political participation, and . . . serves to insure that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success." H.R. Rep. No. 196, 94th Cong., 1st Sess. 11 (1975).

[128]Id. at 73 (separate views of Senators Eastland, McClellan, Thurmond and Scott).

[129]The House debates followed a similar pattern. 121 Cong. Rec. 16241-16292; 16763-16787; 16880-16917 (1975).

[130]Senator Stennis noted:

> Mississippi has 191 black elected officials. I say that proves participation better than any other single statistic could, and more black elected officials than any State in the Nation except Michigan,

which is much larger, and they have only 194 as compared to 191 in Mississippi.

Here are the specifics on some other States. California has only 132 black elected officials. It is the highest populated State in the Nation. New York, the second highest population in the Nation, only 174. Illinois, only 152.

121 Cong. Rec. 24108 (1975). See notes 34-41 supra and accompanying text for extensive treatment of such data.

[131]The amendment was described as a "re-run" of a previous proposal by Senators Talmadge and Nunn. Compare 121 Cong. Rec. 24139 (1975) (Talmadge amendment) with id. at 24220 (Stennis amendment). Arguments for nationwide coverage were premised on, among other things, fifteenth amendment litigation arising in Indiana, New York, Hawaii and Illinois, and the fact that low black voter registration existed in many areas of the country. Id. at 24139-41.

[132]Id. at 24142 (remarks of Senator Tunney).

[133]Id. at 24220 (letter from President Ford to Senate Majority Leader Mansfield, July 21, 1975). In his letter, President Ford stated:

Numerous civil rights leaders have pointed out that substantial numbers of Black citizens have been denied the right to vote in many of our large cities in areas other than the seven Southern states where the present temporary provisions apply. Discrimination in voting in any part of this nation is equally undesirable.

Id.

[134]Id. at 24229 (remarks of Senator Johnston). Senator Ribicoff of Connecticut, in support of the amendment, noted:

On February 9, 1970, the same problem was before the U.S. Senate on the question of busing, and at that time I thought it was only eminently fair that the entire Nation should have the same rules . . . .

> I think if we are ever going to have equity and understanding in this Nation, we cannot have one set of rules for one section of the country and another set of rules for another section of the country. The North should be willing to be bound by the same rules as the South.

Id. at 24221. See also id. at 23738-39 (Senator Javitts expressing expressing pleasure that certain portions of New York were covered).

[135] Id. at 24240.

[136] Id. at 24766-69.

[137] Id. at 24768 (remarks of Senator Brooke).

[138] Id. (remarks of Senator Brooke).

[139] That the procedure had already reached the point of breaking down and/or becoming subject to abuse was also a point of reference during the debates. See, e.g., 212 Cong. Rec. 24119-20 (1975) (Senator Nunn accusing the Department of being the cause for a lost election by a black candidate); id. at 24705 (Senator Scott describing the "harassment implicit in a scenario where over 2,200 submissions have been made by Virginia with only eight objections entered"); id. at 24729 (Senator Allen questioning the effectiveness of the Act when there had been only 163 objections out of 4,476 submissions); id. at 24732 (enlargement of alcove near registra's office required preclearance; hallway could not be widened for 60 days); id. at 24733(detailed list of de minimis changes having to be precleared).

[140] See Appendix infra.

[141]446 U.S. at 205 n.17 (Powell, J., dissenting) (emphasis in original). See also 438 U.S. 190, 201 n.6 (1978) (Powell, J., concurring) ("Even if the Attorney General had no duties other than those imposed on him by § 5, one might doubt whether it would be possible for him to pass judgment, with care and sensitivity, upon each change in election laws or procedures submitted for his approval.")

[142]See notes 63-65 supra and accompanying text for a discussion of the limited utilization of the judicial alternative.

[143]See, e.g., 430 U.S. at 169 (Brennan, J., concurring) (noting that elected officials' compliance with Department suggestion that state and assembly districts include 65% minority populations was "prompted by the necessity of preventing interference with the upcoming 1974 election").

[144]432 U.S. 491 (1977).

[145]Id. at 508 (Marshall, J., dissenting).

[146]See notes 66-71 supra and accompanying text for a discussion of the origins and legislative development of administrative preclearance.

[147]Section 51.39 of the Department's regulations provides in pertinent part:

> (a) Section 5 provides for submission to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5 . . . .
>
> (b) Guided by the relevant judicial decisions, the Attorney General shall base a determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

46 Fed. Reg. 878 (1981).

[148] The District of Columbia court now refers to what it calls "voluminous evidence" needed when cases are heard under § 5. Rome v. United States, 472 F. Supp. at 244.

For purposes of deccerning effect, the court engages in a highly critical review reminiscent of decisions before Mobile v. Bolden, 446 U.S. 55 (1980). See, e.g., White v. Regester, 412 U.S. 755 (1972); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub. nom., East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975). But see Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981). The starting point for this examination is a review of basic demographic data. This includes registration by race, both in its raw form, Hale County v. United States, 496 F. Supp. at 1207; City of Rome v. United States, 472 F. Supp. at 224; Wilkes County v. United States, 450 F. Supp. at 1173; and in the context of cartographic presentations demonstrating, among other things, locations and/or concentrations of minorities within the submitting jurisdiction, Donnell v. United States, C.A. No. 78-0392 (D.D.C. July 31, 1979), aff'd mem., 444 U.S. 1059 (1980); Mississippi v. United States, 490 F. Supp. 569. The electoral history of the political subdivision prior to the proposed

change is also to be considered. 496 F. Supp. at 1208; 472 F. Supp. at 223-24; 450 F. Supp. at 1173.

Thereafter, a sensitive, in-depth inquiry is undertaken in order to evaluate and make findings on such issues as: barriers to registration prior and subsequent to 1965, 496 F. Supp. at 1211; 472 F. Supp. at 224; 450 F. Supp. at 1176; barriers to voting, including an analysis of educational levels of minorities and their occupational and economic status, and conclusions reached--if needed--with respect to reduced participation in the electoral process, 496 F. Supp. at 1213-14; 472 F. Supp. at 224-26; 450 F. Supp. at 1176; barriers to the election of minority candidates, including statistical evaluations of elections in which blacks have participated as candidates, 496 F. Supp. at 1212-14; 472 F. Supp. at 225; 450 F. Supp. at 1174; the existence of block voting, 496 F. Supp. at 1212-13; 472 F. Supp. at 226-27; 450 F. Supp. at 1174; election requirements which may impede the effective utilization of the franchise, 472 F. Supp. 221; current ability of minority voters to affect the outcome of elections, id. at 225; racial composition of the governmental workforce, id.; responsiveness or the lack thereof by elected officials to the needs of the minority community, 496 F. Supp. at 1212; 472 F. Supp. at 225; and the history of minority appointments to office, 472 F. Supp. at 225; 450 F. Supp. at 1174.

The observations derived from these inquiries are synthesized for the purpose of determining whether there is a "'sweeping and pervasive' [history] of past discrimination and a present disproportion of minority electoral participation." 496 F. Supp. at 1216. If such a finding is made, and if a covered jurisdiction is unable to show that its "elected officials [have remedied] the effects of [past] discrimination," 450 F. Supp. at 1176, then voting changes which, on their face, would seem to be devoid of adverse impact are proscribed. See 496 F. Supp. at 1206 (adjustment from district to at-large election violates § 5 even though blacks have a majority of the voting age population); Donnell v. United States, C.A. No. 78-0392 (D.D.C. July 31, 1979), aff'd mem., 444 U.S. 1059 (1980); 490 F. Supp.

at 575 (65% minority population voting districts required to give blacks an opportunity to elect candidate of their choice). But see 425 U.S. at 130.

Finally, in determining whether a change violates the "purpose" proscription, the District of Columbia court employs two divergent analyses. The first adopts the current constitutional tests for purposeful discrimination, e.g., historical background and the sequence of events leading up to the decision. Compare Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) with 496 F. Supp. at 1218; 472 F. Supp. at 243. The second initially involves a cartographic analysis to determine if minority populations have been "diluted or fragmented." Donnell v. United States, C.A. No. 78-0392 (D.D.C. July 31, 1979), aff'd mem., 444 U.S. 1059 (1980); 490 F. Supp. at 569. If such is the case, an unarticulated balancing test is employed which weighs the explanations offered for a redistricting or reapportionment scheme against alternative plans which do not result in such fragmentation. If the justifications offered for a plan entailing fragmentation are weak, and significant vote dilution is perceived, the proposed change will be determined to be motivated by an improper purpose which abridges the right to vote on account of color. Donnell v. United States, C.A. No. 78-0392 (D.D.C. July 31, 1979), aff'd mem., 444 U.S. 1059 (1980).

[149] Report of the Comptroller General of the United States, Voting Rights Act--Enforcement Needs Strengthening 54 (1978) [hereinafter referred to as GAO Report], reprinted in GAO Report Hearings, supra note 44, at 65-155. A second "litigative unit" employs 1 assistant for litigation, 13 attorneys and 2 paraprofessionals. Id. The "submission unit" employs "law students, . . . college graduates who qualified for . . . GS 5-10 level job[s], and others [who] have been clerical employees." H. Ball, D. Krane & T. Lauth, Compromised Compliance: Implementation of the Voting Rights

Act 86 (Unpub. ed. 1981) [hereinafter referred to as Compromised Compliance]. Hiring criteria include intelligence, willingness to deal with people, and writing ability. Id. at 86-87.

[150]Compromised Compliance, supra note 149, at 91 (citing interview with David Hunter, Staff Attorney, Voting Section, Civil Rights Division, September 1, 1977).

[151]Id.

[152]Id.

[153]Id. at 90. The Department maintains a "permanent registry" of persons and groups that desire notice of submissions. 46 Fed. Reg. 877 (1981).

[154]Compromised Compliance, supra note 149, at 90. See note 149 supra for a description of the unit's hiring criteria.

[155]Id. A paralegal's decision to object to a submission is, however, given closer scrutiny by superiors than a decision not to object. Id. at 92. Thus, error is more likely in a "no objection" finding. Id. (citing Hunter interview).

[156]GAO Report, supra note 149, at 17.

[157]Id. at 18.

[158]GAO Report Hearings, supra note 44, at 13.

[159]See note 153 supra for reference to this registry.

[160]GAO Report, supra note 149, at 15-16.

[161]Id. at 16.

[162]Compromised Compliance, supra note 149, at 193 (reviewing results of GAO survey).

[163]Id.

[164]In 1980, the submission unit received 7,340 submissions, or approximately 29 per working day. See Appendix, infra. Thus, to avoid a backlog of submissions, paraprofessionals must rule on more than two submissions each day. See note 149 supra and accompanying text for a discussion of the submission unit.

[165]411 U.S. 526 (1973).

[166]Compromised Compliance, supra note 149, at 91.

[167]Id. at 120.

[168]GAO Report, supra note 149, at 18.

[169] E.g., 435 U.S. at 116 (objection on 60th day); McRae v. Bd. of Educ., 491 F. Supp. 30, 33 (N.D. Ga. 1980) (objection entered within statutory time frame since day submission received not included in 60-day period).

[170] See Garcia v. Uvalde County, 455 F. Supp. 101, 105-06 (W.D. Tex. 1978) aff'd mem. 439 U.S. 1059 (1979) (objection interposed 205 days after submission; held, 60-day period commences when "the submitting authority complies with the Attorney General's request for additional information" and the "Attorney General may not further postpone the commencement of that period by requesting more information which the submitting authority has already stated is unavailable"); Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979) (objection entered 210 days after receipt of all available information; same holding); Garza v. Gates, 482 F. Supp. 1211, 1213 n.3 (W.D. Tex. 1980) (objection interposed two years after the Department was notified that requested information was not available; held, based on Garcia and other prior reported decisions, reapportionment at issue became effective 60 days after response to the Department, the court stating that "[t]he lapse of [such a long time] suggests an incredible and inexcusable lapse of diligence on the part of the Department").

[171] In the intervening years, the Department devoted substantial litigative energy to establish the proposition that "court ordered" reapportionment should, in some instances, be integrated with the preclearance process. McDaniel v. Sanchez, 49 U.S.L.W. 4615 (U.S. June 1, 1981) (proposals reflecting policy choices of elected representatives--regardless of constraints limiting the choices available--require preclearance); 437 U.S. 535 (1978) (divided court distinguishing between legislative and judicial plans; plan which is prepared and becomes effective as a result of court order can qualify as legislative judgment of covered jurisdiction); Morris v. Gressette, 432 U.S. 491, 496 n.8 (1977) (distinguishing, for purposes of preclearance, plans adopted by a covered jurisdiction in constitutional litigation "on [their] own authority" as compared

to that which is court ordered); Connor v. Johnson, 402 U.S. 690, 691 (1971) ("A [reapportionment] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act").

The Department also argues that state court decrees affecting voting are subject to preclearance. Compare Williams v. Scafani, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) (questioning constitutionality of any requirement which would require executive officers of states to submit state court decrees to the Department) with MacCoon, supra note 7, at 118 (attorney employed by Voting Rights Section arguing that nonreviewability of state court decisions creates an "unwarranted gap" in enforcement).

Alleged illegal activity occurring in state elections is also contended to be a change subject to preclearance. In United States v. St. Landry Parish School Bd., 601 F.2d 859 (5th Cir. 1979), the court was faced with an argument by the Department that alleged vote-buying of minority voters was a "change" and, not having been precleared, required that an injunction issue from a previously-convened local three-judge court. Labeling the claim "frivolous," the court concluded:

> Surely Congress did not intend the Attorney General and the District Court for the District of Columbia to waste their time considering voting procedures that a state does not wish to enact or administer. But this would be the result if we required the state to submit for approval, as a new voting procedure, those actions of state officials which conflict with the state's required procedures.

Id. at 864. See GAO Report Hearings, supra note 44, at 162 (letter from Kevin D. Rooney, Assistant Attorney General for Administration, to Senator Ribicoff, June 7, 1978) (position of Department that such activity violates Act). See also Miller v. Daniels, No. 80 Civ. 7082 (ADS) (March 2, 1981) (the Department argument rejected on basis that it "would be pointless to require the state to seek approval for practices that it condemns and that it has no desire to enact or administer".

[172]GAO Report, supra note 149, at 10. See also id. at 12 (Voter Education Project allegedly identifying 44 significant unsubmitted election laws in Georgia between August 1965 and March 1976); id. at 13 (reviewing data submitted by Department to the Congress at 1975 extension hearings); id. at 12 (finding that, as of November 1976, five covered jurisdictions made no submissions, and, in seven other states having covered subdivisions, there were less than 12 submissionn each).

[173]Id. at 14.

[174]Id. at 15.

[175]Compromised Compliance, supra note 149, at 202-203 (41% of Georgia and Mississippi county attorneys contacted have never submitted a voting change).

[176]See, e.g., Dotson v. City of Indianola, No. GC-80-220-WK-0 (N.D. Miss. May 14, 1981) (three-judge court); Gamble v. Town of Clio, C.A. No. 80-456-N (M.D. Ala. March 5, 1981) (three-judge court).

[177]GAO Report Hearings, supra note 44, at 189-90.

[178]With respect to the GAO's criticisms, the Department's response reflected that no changes are anticipated:

> We do not believe our procedures for monitoring future compliance with our objections require revision. We have a registry of 408 organizations and individuals who are notified of submissions. Those who comment on a submission are then notified if we interpose an objection. These groups and persons are in the best position to become aware of implementation of such changes and bring them to our attention.

GAO Report Hearings, supra note 44, at 157-58. (letter from Kevin D. Rooney, Assistant Attorney General for Administration, to Senator Ribicoff, (June 7, 1978)).

Turning to other aspects of the Report, the Department did admit to missing files, id. at 159, as well as to some disorganization. With respect to the latter, an "administrator" had been hired to improve "record-keeping and filing procedures." Id. at 158. Issues relating to rendering preclearance decisions

without all necessary data having been submitted, and not handling the submissions within the 60-day period, were dealt with by a conclusion that perhaps the GAO did not fully understand the procedures employed, id., and that full utilization of the statutory period (and the Georgia extension) was necessary in many instances "for a full and adequate analysis." Id. at 159.

[179]Compromised Compliance, supra note 149, at 184.

[180]Id. at 130.

[181]Id. at 160 (footnote omitted).

[182]United States Comm'n on Civil Rights, The State of Civil Rights: 1979, at 33 (1980).

[183]Id. at 37.

[184]The Report noted "limited litigative efforts" on the part of the professional staff, finding--among other things--that "only 1 of the 13 staff attorneys [had] represented the Department in court on more than six cases," although 7 had been in the section from 1 to 3 years. GAO Report, supra note 149, at 28. Indeed, with respect to evaluating litigation activity it was discovered that no listing of cases in which the section had been involved was available, thus necessitating an independent review by the GAO. Id. at 74 n."a". As subsequently described, "the [GAO] report . . . has a listing of voting section litigation. And

just for illustration, our [the GAO's] staff Had to develop that list. No place in the Department of Justice was there such a list compiled or anything like that." GAO Report Hearings, supra note 44, at 14.

[185]GAO Report Hearings, supra note 44, at 162 (emphasis added) (testimony of John Ols of the GAO).

[186]Id.

[187]Id.

[188]Id. at 156 (letter from Kevin D. Rooney, Assistant Attorney General for Administration, to Senator Ribicoff, June 7, 1978). The Department did feel, however, that it played a "substantial role in monitoring compliance." Id.

[189]Roman, supra note 28, at 125.

[190]Compare note 41 supra with Roman, supra note 28, at 131 (the latter suggesting a cutoff at the "five or ten percent" level).

[191]There are, of course, many arguments for statutorily curtailing the scope of the Allen line of decisions. E.g., Roman, supra note 28, at 131. On a time/benefit basis, however, legislative endeavors to define these instances would--at best--prove unrewarding. Specifically, there can be no doubt that even minor changes carry the proscribed "potential for discrimination" and can, in many instances, affect the outcome of elections. See, e.g., Voting Rights Renewal to Spark First in Congress,

39 Cong. Q. 633, 637 (April 11, 1981) (38 polling places moved from predominantly black district; change not announced until day of election). For a description of the political pressures brought to bear in this situation to insure no interference from the Department of Justice, see Compromised Compliance, supra note 149, at i-vii.

[192]One consequence of this, of course, is to allow forum shopping in certain cases, e.g., statewide reapportionment. The automatic stay provision proposed in this article will, however, diminish whatever benefits a covered jurisdiction would expect to derive from this procedure.

[193]See 46 Fed. Reg. 875-76 (1981).

[194]Fed. R. Civ. P. 60(b) (providing for setting aside judgment for mistakes, inadvertance, excusable neglect, newly-discovered evidence, fraud, etc.).

[195]See Fed. R. App. P. 45(b).

[196]The fact of the matter is that, in addition to § 5 issues, many cases present fourteenth and fifteenth amendment claims. As a result the current process can, in many instances, present a procedural morass. For example, the Senate Judiciary Committee approved the following procedure:

> A correct application of Section 5, for example, was demonstrated in Gaillard v. Young . . . which involved the reapportionment of the City Council of Charleston, S.C. The district court invalidated the existing apportionment plan on grounds of "population inequality" and then deferred consideration of any new plan pending Section 5 review. A number of plans were submitted to the Attorney General, who objected

> to all but one. That one was then submitted to the local district court which concluded that the plan would not meet the population equality requirements of the fourteenth amendment. The court then invited the litigants in the reapportionment case to present plans, and after selecting the one best meeting the population equality requirements of the fourteenth amendment, ordered that plan submitted for Section 5 review. Only after the Attorney General decided not to object to this last plan did the district court order it implemented.

S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975). The Supreme Court approved the Gaillard analysis in McDaniel v. Sanchez, 49 U.S.L.W. 4615 (U.S. June 1, 1981).

[197]Although the terminology employed may leave the point unclear, it is an honest attempt to reflect a continuing, serious concern of the authors. The Court's decision in Georgia v. United States, 411 U.S. 528 (1979), authorized a decision-making process for § 5 submissions in which no reason need be given for objecting to a submission, i.e., a conclusion that the Attorney General "had not been persuaded" was sufficient. Id. at 543 (White, J., dissenting). The decision to preclear is also unaccompanied by an explanation. Thus, not operating in a context of documented accountability, there is no way anyone can make a reasoned determination as to whether the number of objections in any given year actually reflects how many submitted changes were violative of § 5. Put another way, whether the objection rate should have been more or less is a question impossible to answer.

[198]GAO Report Hearings, supra note 44, at 162 (letter from Kevin D. Rooney, Assistant Attorney General for Administration, to Senator Ribicoff, June 7, 1978).

[199]The proposal also carries with it the distinct benefit of terminating the three-judge court procedure currently employed. As one commentator pointed out ten years ago, the procedure presents innumerable difficulties including "overcrowded docket; disruption of judges' schedule; absence of intermediate appellate

procedure; and burden on the Supreme Court." Ammerman, Three-Judge Courts: See How They Run!, 52 F.R.D. 293, 304 (1971). In 1975 Congress recognized these shortcomings and repealed those provisions of the code which required the convening of a three-judge court before declaring a state or federal statute unconstitutional. S. Rep. No. 204, 94th Cong., 2d Sess. 8-9 (1975) (legislative history of P.L. 94-281 which repealed 29 U.S.C. §§ 2281-82). In spite of Chief Justice Burger's suggestion that "[w]e should totally eliminate the three-judge courts that disrupt district and circuit judges' work," Remarks of Warren E. Burger before American Bar Association, San Francisco, Calif., Aug. 14, 1972, reprinted in [1976] U.S. Code Cong. & Ad. News 1990, Congress chose to retain the three-judge panel for § 5 cases.

It has been the experience of one of the authors that, given the sweeping reach of Allen, the three-judge court normally upholds the single judge's decision for a temporary restraining order. Yet, as a matter of law, this may not be done until, at the least, various papers are mailed among the various judges, or at the worst, a duplicative hearing is conducted by the full three-judge court.

[200] S. Rep. No. 295, 94th Cong., 1st Sess. 40, reprinted in [1975] U.S. Code Cong. & Ad. News 774, 807.

[201] 42 U.S.C. § 1973l(e) (1976) provides: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Passage of the provision was in response to testimony exemplified by the conclusion that, at least in one state, "twice as many lawsuits and possibly three times as many lawsuits have been filed by private plaintiffs challenging racial discrimination in voting and elections as have been filed by the Attorney

General." 1975 Senate Hearings, supra note 34, at 132 (testimony of Frank Parker, representing Lawyers' Committee for Civil Rights Under Law).

[202]S. Rep. No. 295, 94th Cong., 1st Sess. 40, reprinted in [1975] U.S. Code Cong. & Ad. News 774, 807.

[203]Id. at 808 (footnote omitted).

[204]Torres v. Sachs, 538 F.2d 10, 13-14 (2d Cir. 1976).

[205]Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1976); Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1027-29 (2d Cir. 1979); Flora v. Moore, 461 F. Supp. 1104, 1119-22 (N.D. Miss. 1978), aff'd mem., 631 F.2d 730 (5th Cir. 1980).

[206]See, e.g., 538 F.2d 10 (award of $23,252); Donnell v. United States, C.A. No. 78-0392 (D.D.C. February 24, 1981), appeal docketed, No. 81-1471 (D.C. Cir. April 23, 1981) (§ 5 case; award of $73,669.88 to private intervenors); Commonwealth of Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977), aff'd mem., 573 F.2d 1301 (3d Cir. 1978) (award of $199,788).

[207]See, e.g., Dotson v. City of Indianola, No. GC-80-220-WK-0 (N.D. Miss. May 14, 1981) (unless and until the City of Indianola, Mississippi obtains clearance of its four 1965-67 annexations in accordance with § 5, all future elections must be conducted on the basis of the city boundaries as they existed before the unprecleared annexations were made, and citizens residing in such annexed areas may not participate in future municipal elections either as electors or as candidates); Gamble v. Town of Clio, C.A. No. 80-456-N (M.D. Ala. March 5, 1981) (ordered government officials living in annexed areas which were not precleared to be removed from office, and special elections were ordered within the old municipal boundaries).

[208]Super Tire Engin. Co. v. McCorkle, 416 U.S. 115, 122 (1974).

WITHOUT JUSTICE

A Report on the Conduct of the Justice Department in Civil Rights in 1981-82

The Leadership Conference on Civil Rights

PREFACE

Over the past year, the Leadership Conference on Civil Rights and its allies have had major and well publicized differences with the Reagan Administration over its policies on equality of opportunity. We have asserted and continue to assert that in dealing with school desegregation, voting rights, affirmative action in employment, discrimination in private schools and other matters of economic and social justice, the Reagan Administration is seeking to close doors of opportunity only recently opened to people who have suffered discrimination.

In recent months, however, we have become increasingly concerned about a separate issue -- whether, regardless of one's views about the merits of the Administration's policies, the Department of Justice, as the agency charged with enforcement of civil rights law, has abided by the basic rules that govern our legal system.

To investigate this issue, the Leadership Conference established a committee of lawyers headed by William L. Taylor, Chairman of the Conference's Committee on Enforcement and Compliance. The report which emerged from the

committee's investigation is the work of the following lawyers in addition to Mr. Taylor: Michael Sussman of the National Association for the Advancement of Colored People, Janet Kohn of the AFL-CIO, John Shattuck and David Landau of the American Civil Liberties Union, Donna Lenhoff of the Women's Legal Defense Fund, Lani Guinier and Elaine Jones of the NAACP Legal Defense and Educational Fund, Arlene Mayerson of the Disability Rights and Education Fund, Phyllis Segal of the NOW Legal Defense and Education Fund, Marcia Greenberger of the National Women's Law Center, and Ralph Neas, Director of the Leadership Conference. Lea Adams, of the Center for National Policy Review, provided invaluable secretarial assistance.

The report contains a detailed account of improper activity by the Department of Justice that I find shocking and alarming. The excesses revealed should be of concern not just to black people, Hispanic Americans, women, handicapped people and others who have been victimized by discrimination, but to all Americans who cherish the Constitution and the system of ordered liberty it has created.

February 15, 1982

Benjamin L. Hooks, Chairman
Leadership Conference on
Civil Rights

INTRODUCTION AND SUMMARY

The Attorney General of the United States serves as the government's chief law enforcement officer and runs the largest law office in the country.

His authority stems principally from two sources -- the Constitution and Acts of Congress. [1/] Under the Constitution the President is charged with the duty to "take care that the laws be faithfully executed"; [2/] the Attorney General is a principal instrumentality for carrying out that responsibility. The basic limitations on the authority of the Attorney General under our constitutional framework are also clear. Simply stated, the Attorney General does not make the law (a power which belongs to Congress), nor does he definitively interpret the Constitution and laws (a power which resides in the Supreme Court); rather, as part of the executive branch, his duty is to enforce the law.

As enforcer of laws enacted by Congress, the Attorney General is responsible for administering a host of statutes designed to protect the rights of citizens. For the past quarter of a century, the implementation of civil rights statutes has been a central role of the Department of

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1/ See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 587 (1952).

2/ Article II, Section 3.

Justice. These statutes cover a broad range, authorizing the Department to file suits in federal court to protect the rights of minorities, women and other disadvantaged groups to equal treatment in such areas as education, employment, housing, voting and public facilities. 3/

3/ The principal statutes include the Civil Rights Act of 1957 which established the Civil Rights Division in the Department of Justice and authorized the Department to sue for denials of the right to vote; the Civil Rights Act of 1964 which authorized Justice Department suits to redress discrimination in public schools, public facilities, employment, federally financed activities and other areas; the Voting Rights Act of 1965 which gave the Department additional special responsibilities for preventing voting discrimination; and the Civil Rights Act of 1968 which authorized the Department to file suits against housing discrimination. More recent legislation has given the Department additional authority to seek redress for sex discrimination, discrimination against handicapped persons and against persons confined to mental and penal institutions.

Prior to 1957, the Department's principal statutory duties concerned the enforcement of criminal civil rights laws. It did take positions in other cases however. In 1838, Attorney General Grundy intervened to aid the Spanish government in recovering black Africans who had been kidnapped by Spaniards and escaped to the United States. The Attorney General claimed that the Africans were "merchandize", returnable under a treaty with Spain providing for the return of "ships and merchandize" -- a position rejected by the Supreme Court. The Amistad Case, 40 U.S. 518 (1841). In 1851, Attorney General Cushing issued an opinion that fugitive slaves could be reclaimed as property under the laws of states and territories -- a view later relied upon in the Dred Scott decision. In contrast, in 1954 the Attorney General as a friend of the court in the Brown case, forcefully argued for the invalidation of state laws mandating segregation in public education.

During these twenty-five years, except in one period [4], the Department of Justice has adhered to its basic responsibility to enforce the laws as enacted by Congress and interpreted by the courts. Now, in the Reagan Administration, there has been a radical change. As is documented in the pages of this report [5], under the leadership of Attorney General William French Smith and Assistant Attorney General William Bradford Reynolds, the Justice Department, in the short span of one year has

- repudiated the Supreme Court's definitive interpretation of the Constitution and laws and announced that it would refuse to enforce the law of the land [6];
- abruptly switched sides in cases pending before the Supreme Court and announced that it would seek the overturning of Supreme Court

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[4] During the tenure of Attorney General John Mitchell under President Nixon, the Justice Department renounced the use of certain enforcement techniques provided by Congress and failed to enforce school desegregation decisions of the Supreme Court. See, Report by the Lawyers' Review Committee to Study the Department of Justice (1972).

[5] The principal sources of information for this Report are testimony, speeches and other public utterances of officials of the Department of Justice and other members of the Administration. The report also relies on legal briefs, Departmental memoranda and correspondence that have come into our possession. In a few instances information has come from sources who do not wish to be identified. We have used this information only when corroborated by another source.

[6] See Chapter 1.

decisions of very recent vintage, in disregard of the importance of certainty and continuity in the law [7];

- sought to undermine confidence in the judiciary by launching a sweeping attack on the federal courts for performing their constitutional role of protecting the rights of minorities from intrusions of majority will [8];
- established itself as the locus of anti-civil rights activity in the federal government, reaching into other agencies to try to curb policies deemed overly protective of civil rights [9]; and
- cooperated in the corruption of the legal process by allowing its decisions to be shaped by appeals from politicians not based on law.[10]

The common thread running through these actions is a desire by the Reagan Administration's Justice Department to narrow the remedies available to minorities, women, handicapped people and others when their rights have been denied. In fact, even when the protection of civil rights was being accomplished through means that the Administration says it favors -- the voluntary initiatives of local officials or

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7/ See Chapters 1, 3 and 4.

8/ See Chapter 2.

9/ See Chapter 3.

10/ See Chapter 5.

of business and labor -- the Justice Department has announced its opposition. 11/

But the ramifications of the Justice Department's conduct go far beyond the positions it has taken in any particular case or any set of issues.12/ When a citizen, an institution or a state or local government violates the Constitution, the damage done to our legal system is unfortunate but remediable. If, however, the actions of the highest law enforcement officials in the nation place the powerful Executive branch in conflict with the Constitution and the courts, the rule of law itself is imperiled.

The restraints upon unlawful and improper activities by the Executive branch are fragile indeed. Curbing the excesses reported in these pages requires a Congress prepared to put aside political considerations in order to protect our Constitutional system, lawyers conscious of their obligation to defend the judicial system, an alert press and an informed citizenry. It is to all of these audiences that this report is addressed.

11/ See discussion of the Seattle case, p. 21 and the Weber case, p. 48 .

12/ People may disagree vigorously with a Supreme Court decision that busing is required to remedy state-imposed school segregation or that affirmative action is proper to redress employment discrimination, and yet realize that under our Constitutional system, the Court is the final arbiter. If our Constitutional system is ignored in dealing with the rights of one group, the rights of all are endangered.

CHAPTER 4: VOTING -- SPEARHEADING RETRENCHMENT ON BASIC RIGHTS

I. The Voting Rights Act

In the almost quarter of a century that the Justice Department has had major statutory responsibility for civil rights enforcement, the Department has not always been in the vanguard of the development of federal equal opportunity policy. Other departments and the President himself often have taken the lead, for example, to assure that the federal government assumed broad responsibility for preventing taxpayer dollars from being allocated to discriminatory institutions.

Yet, except during the tenure of John Mitchell as Richard Nixon's Attorney General, the Department has always striven to develop the law in ways which assure victims of discrimination a real prospect for redress in the courts. When other agencies have resisted (the Interstate Commerce Commission, for example, on the issue of segregation in transportation terminals), Justice often has intervened forcefully to define and assist the rights of minorities.

That has now changed. As noted in Chapter 1, it was the Justice Department, not the Department of the Treasury, that took the lead in defying the law to try to restore tax exemptions to racially discriminatory pri-

vate schools. 73/ As detailed in Chapter 3, it is the Justice Department that is seeking to override the policies of the Department of Labor in order to narrow the equal employment responsibilities of federal contractors and that is also challenging EEOC's effort to secure affirmative action in federal employment. 74/

In fact, under the leadership of Attorney General Smith and Assistant Attorney General Reynolds, the Justice Department has become the locus of efforts in the Reagan Administration to narrow and weaken civil rights prctections. Nowhere has this become more evident than in the role the Department has taken with respect to the Voting Rights Act of 1965.

When the Reagan Administration took office in January 1981, no civil rights issue loomed larger than extension of the Voting Rights Act, key provisions of which were scheduled to expire in August 1982. Recognizing that factual information would be needed on the current status of voter protections, the Judiciary Committee of the House of Representatives began work early, holding comprehensive hearings beginning in the Spring of 1981. On July 31, 1981, the Committee, by a vote of 23-1, reported a bill to extend the Voting Rights Act, with two

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73/ Chapter 1, pp. 15 ff.

74/ Chapter 3, pp. 45 ff.

important strengthening amendments [75] and an amendment permitting jurisdictions which demonstrate full compliance with the law over a ten-year period to bail out from the special requirements of the Act. [76] On October 5, 1981, after rejecting weakening amendments by wide margins, the House passed the Committee bill by an overwhelming vote of 389-24. The votes on amendments and on final passage reflected strong bipartisan support for the Committee bill from all regions of the nation.

All during this period, The Justice Department assiduously refrained from taking any position on the legislation, stating that it was preparing an analysis for the President. On October 2, virtually the eve of the House consideration of the bill, the Attorney General sent the President his memorandum, which profferred five alternatives for Mr. Reagan to consider. The bill reported 23-1 by the Juciciary Committee (and later passed by the House) was not among these options; indeed all five were considerably weaker. [77]

After passage of the House bill, however, the Administration could no longer avoid the issue. At a Cabinet

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75/ The first amendment restores an effect standard to Section 2 of the Act. The second amendment provides for an extension of the bilingual provisions.

76/ 97th Congress, 1st Session, Report No. 97-227, September 15, 1981.

77/ Report to the President from the Attorney General, Amending the Voting Rights Act, October 2, 1981, pp. 1-2.

meeting on November 4, there was an extensive debate on the voting rights legislation, with several officials advocating Administration approval of the House-passed bill and Attorney General Smith arguing for weaker alernatives. On November 5, it has been reported 78/, the President decided that he would announce the next day his readiness to sign either a 10-year extension of the Act, a modified version of the House bill or the House bill itself. 79/

But, according to undenied accounts, on learning of the President's decision on Friday morning, November 6, the Attorney General "became furious" and "charged off to the White House demanding to see the President." He saw the President around noon and "reargued his case, contending that Reagan should not flat out endorse the House bill, but instead, should specify a preference for certain amendments, including a weaker bail-out provision."

Mr. Smith succeeded in his mission. When he testified before a Senate Judiciary Subcommittee on January 27, 1982, the Attorney General was able to represent the Reagan Administration as excluding the House-passed bill from the options it supported. 80/

78/ Los Angeles Times, November 8, 1981, p. 1.

79/ Id.

80/ Statement of William French Smith before the Senate Subcommittee on the Judiciary, Concerning the Voting Rights Act, January 27, 1982.

Voting is widely regarded as the most basic of civil rights and the Voting Rights Act as the most successful civil rights law ever enacted. The Justice Department has special responsibilities with respect to voting because, in contrast to education, housing, employment and other areas, it is the only Federal department that is vested with substantial enforcement duties. By using his role and influence first to delay and then to shape Administration policy in opposition to a strong voting bill with broad bipartisan support, Mr. Smith has indelibly stamped the Justice Department as the place to go for the weakening of civil rights protections.

II. Non-Enforcement of Voting Rights [80a/]

Doubts about the Department's commitment to the protection of voting rights have been reinforced by its performance in several important cases in which the Department was called upon to exercise enforcement duties under the Voting Rights Act. [81/] As in the education cases dis-

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80a/ Substantial portions of this section are taken with permission from a report by Frank R. Parker and Barbara Y. Phillips of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law, entitled "The Justice Department and Voting Rights Act Enforcement: Political Interference and Retreat." (1982)

81/ In a number of other cases, however, the Department has straightforwardly taken action under Section 5. It has, for example, rejected reapportionment plans in New York, Virginia and Georgia as having a discriminatory impact on minorities.

cussed in Chapter 1, the Department's record has been marked by abrupt changes in positions that its predecessors had taken in court. In several instances, the impetus for these reversals has been pressure exerted by Republican members of Congress [82/] and the Department's actions have been in conflict with the requirements of the law.

A. City of Jackson, Mississippi Annexation

On December 3, 1976, the Attorney General lodged an objection under Section 5 of the Act [83/] to an annexation by the City of Jackson. The Department concluded that the annexation, which covered a 40 square mile area containing 32,490 people, 74 percent of whom are white, would dilute the voting strength of blacks, a violation of the law. This was the third annexation of a predominantly white area by Jackson since 1960. Jackson is governed by a three-member city council, all elected at-large. The Justice Department determined that the 1976 annexation "continues a trend dating back at least to 1960 of the annexation of areas of primarily white population, which has the effect of counteracting the impact of an otherwise growing black percentage." The impact of these annexations was to "more than offset the growth of the black population;" without

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82/ See Chapter 5.

83/ Section 5 requires election changes by covered jurisdictions to be precleared by the Department of Justice or the district court for the District of Columbia.

them, "the black population in the City of Jackson would be approaching a majority."

This Section 5 objection was ignored by the City of Jackson, and -- despite repeated requests -- the Justice Department failed to file any action to enforce it. Then, a month before the June 2, 1981 municipal election, the Acting Assistant Attorney General (the official to whom Justice Department regulations delegate the Attorney General's Section 5 responsibilities) wrote to the City that:

> It is our understanding that the City intends to hold its 1981 elections by including in the electorate the areas annexed in 1976 ... [I]f the 1981 elections are conducted in a manner violative of federal law, and if the objection is not resolved and remains outstanding, we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act ... [T]he relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted.

On July 23, however, the objection was withdrawn in a letter which evidences major irregularities:

-- The letter notes that the Department' "thorough reevaluation" included "consultation with the Deputy Attorney General." Consultation with the Deputy Attorney General, Edward C. Schmults, is outside the normal procedure followed in these cases.

-- Justice Department regulations require that reconsideration of an objection can only be based on "a substantial change in operative fact or relevant law." 28 C.F.R. §51.45. This objection was reconsidered and withdrawn even though there was no change in the facts or the law.

-- The standards applied in withdrawing the objection directly contradict the standards applied and litigated by the Justice Department in City of Rome v. United States and affirmed by the Supreme Court in 1980.

The withdrawal of the objection was the direct result of political interference by Senator Thad Cochran (R-Miss.) and Rep. Trent Lott (R-Miss.) in the Justice Department's enforcement of the Voting Rights Act. 84/

B. McCain v. Lybrand

In August 1981, Assistant Attorney General Reynolds approved the filing of an amicus curiae brief supporting black voters' challenge to Edgefield County, South Carolina's implementation of election law changes without the

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84/ The Clarion Ledger (Jackson), July 22, 1982, p.1,18A.

required Section 5 pre-clearance. Such implementation before pre-clearance violates the Voting Rights Act. Then within 24 hours, just before the case was scheduled to be argued before a three-judge District Court in South Carolina, Reynolds reversed his position and ordered that the brief -- which had already been sent to South Carolina for filing -- not be filed.

A spokesman for Senator Strom Thurmond's (R-S.C.) office admitted that the Senator had discussed the case with Justice Department officials, including Reynolds, but denied that he applied "any pressure." Reynolds claimed that he changed his mind on the basis of "new information" which showed that the issues would be fully presented without Department participation. He declined to disclose the source of this new information. 85/

Justice Department participation in a case can be very helpful, sometimes even critical, in Voting Rights Act cases. Here, counsel for the private plaintiffs said that it would have been "enormously helpful for somebody from the Justice Department to affirm their position that the use of at-large voting had never been precleared." 86/ The Voting Rights Act itself places primary responsibility for its enforcement on the Attorney General. Since the suit alleged a failure to preclear -- information which was

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85/ Richmond Times-Dispatch, September 18, 1981, p. 1, 14.

86/ Id., statement of Laughlin McDonald.

within the particular knowledge of the Department -- the Department's failure to file its own suit, let alone support the private plaintiffs' case, represents a failure to perform its duties under the Act.

C. Bolden v. City of Mobile

On May 8, 1981, the Department of Justice filed a motion to intervene on the plaintiffs' side in the retrial of Bolden v. City of Mobile, which challenges the constitutionality of at-large elections in Mobile, Alabama. The Justice Department complaint contained the following paragraph:

> Black citizens of Mobile have been the victims of a long history of purposeful, official racial discrimination designed to segregate black persons from white persons, to deny the vote to black persons, to assure that black persons would not serve on the Mobile governing body and to maintain white supremacy.

This allegation received wide publicity. Subsequently, Republican Senator Jeremiah Denton, whose hometown is Mobile, protested the Justice Department's use of the term "white supremacy," and Attorney General Smith ordered the wording changed in response to Senator Denton's complaint.[87/]

87/ The Washington Post, May 16, 1981, p. A4.

D. Rogers v. Lodge

This case involves a challenge to at-large, county-wide elections for the county commission of Burke County, Georgia. Both the District Court and the Court of Appeals held these elections unconstitutional. In the Court of Appeals, the Justice Department filed a lengthy amicus curiae brief in support of the plaintiffs in whic it argued that discriminatory intent need not be proved to establish a violation of Section 2 of the Voting Rights Act. That provision, the Department argued, was intended by Congress to invalidate voting practices with a racially discriminatory effect which perpetuated the effects of prior purposeful disfranchisement of blacks.

When the defendants appealed to the Supreme Court, the Department at the last minute reversed its position and decided against filing an amicus brief. The case is important because it is the first opportunity for the Supreme Court to review or elaborate on the discriminatory purpose test which four members of the Court announced in 1980 in City of Mobile v. Bolden.

E. Blanding v. DuBose

The Justice Department and private plaintiffs brought this suit in 1980 to enforce a 1976 Section 5 objection to an at-large voting plan for election of the Sumter County, S.C. county commission. The defendants claimed that although the change had been objected to in 1976, it subse-

quently received the necessary preclearance owing to a failure of the Attorney General to object again when the change was resubmitted in 1979. The Department opposed this claim, taking the position that it had done everything legally necessary and that preclearance had never been obtained.

In February 1981, the District Court ruled for the defendants. Surprisingly, the Justice Department decided not to appeal that decision. The private plaintiffs did appeal, and therefore, under the Supreme Court's rules, the Department was required to file a brief. Pressed now to take a stand, it reiterated the position it had taken before the District Court. In January 1982, the Supreme Court summarily and unanimously reversed the District Court's judgment, agreeing with the interpretation of the law that the Department had advanced at the outset but which it had sought to abandon by failing to appeal the negative trial court ruling. This sequence of events shows an arguably more subtle retreat from the Department's duty to enforce the Voting Rights Act than some of the examples described above, but it is no less serious: the law is equally undermined by a flat refusal to initiate enforcement and by failure to appeal from a decision in which the Government's position is erroneously rejected.

CHAPTER 5: UNDUE POLITICAL INFLUENCE

Edward Bates, who served as President Lincoln's Attorney General, articulated a standard for the office to which his successors might aspire. Bates said,

> "The office I hold is not properly political, but strictly legal; and it is my duty above all other ministers of state to uphold the law and resist all encroachments, from whatever quarter, of mere will and power."

This credo no doubt is easier to establish than to follow. The Attorney General and his staff cannot determine their legal course in a hermetically sealed environment. Especially in cases involving issues of national significance, it is appropriate for the Department of Justice to collect information from a variety of sources and to listen to the views of those who have knowledge and judgment to offer. Since the Department is publicly accountable, it should give respectful ear to the opinions of citizens and and their elected representatives.

But even with wide latitude given for the proper role of "politics" in Justice Department Law enforcement, a review of the record reveals that the Reagan Administration's Justice Department has permitted political considerations to corrupt fair administrtation of the law. Members of Congress and political advisors to the Administration have boldly and successfully pressured the leaders of the Department to change and weaken positions in civil rights cases. The Attorney General, his Deputy and the Assistant Attorney General for Civil Rights have failed to resist these "encroachments of will and power," and have allowed this influence to circumvent the channels normally relied upon for fair decision-making.

For example, in the North Carolina higher education case, detailed in Chapter 1[88/], it was the intervention of Senator Jesse Helms (R-N.C.) that led to the negotiated settlement of a lawsuit alleging discrimination in the state university system. The negotiations proceeded in the absence of the Civil Rights Division lawyers who had worked on and were familiar with the case and without the knowledge of lawyers representing minorities who were parties to the proceedings. As noted, the government ended up settling the lawsuit in a fashion which violated the

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88/ See p. 26.

department of Education's own published criteria and without specifying commitments which the state had made in previous negotiations.[89/]

In the Seattle School case discussed in Chapter 1 [90/] political influence was initiated by the Attorney General of the State of Washington and capped by a memo to the Attorney General and two of his lieutenants from Lyn Nofziger, then the President's key political advisor. In April 1981, Washington Attorney General Ken Eikenberry embarked on a series of meetings and correspondence designed to persuade the Justice Department to reverse in the Supreme Court the position it had successfully argued in the district court and court of appeals. In his correspondence, Mr. Eikenberry did not advance legal arguments, but rather said:

> "Our reports have it that in the Supreme Court the United States will once again elect to oppose the State of Washington in this litigation. I believe that such a position would be absolutely contrary to the policies of President Reagan's administration and certainly contrary to the theme of his campaign for the Presidency..." [91/]

89/ See p. 28-29.

90/ See p. 21.

91/ Letter from Ken Eikenberry to Deputy Attorney General Schmults, August 4, 1981. On the same date Mr. Eikenberry sent a copy of the letter to Lyn Nofziger and Dick Richards, Chairman of the Republican National Committee, with a plea for their intervention.

On August 24, 1981, Mr. Nofziger sent a memo to Justice officials Smith, Schmults and Reynolds and to Presidential advisor Edwin Meese. The memo stated:

> "I enclose for your perusal a letter to me of August 4, from Ken Eikenberry, the Attorney General of the State of Washington, and a longtime Reagan worker and supporter.
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> "Not surprisingly he, like 99.9% of the people who have supported Ronald Reagan in the past, is at odds with mandatory school busing, as I think we all are.
>
> "Surely, if we are going to change the direction of this country, mandatory school busing is a good place to make changes -- as I thought we would do because that was what the President wanted."

Lawyers for the Seattle School Board and civil rights groups did not become aware of any of this correspondence until the Department announced its change of position. Mr. Reynolds, asked by an NBC correspondent whether the White House had sought to exercise political influence in the case, denied it even after being confronted with the Nofziger memo. 92/

92/ Interview shown on NBC Television, October 16, 1981. Along with political interference, decision-making at the Department of Justice may be tainted

Other instances in which Republican members of Congress intervened and apparently played a decisive role in getting the Department to reverse a previous position include:

-- After talking to Senator Strom Thurmond (R-S.C.) about the case, Assistant Attorney General

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by racial attitudes held by some of its high officials. While preconceptions concerning race are rarely articulated and difficult to pin down, some insight is provided by a memorandum to Assistant Attorney General Reynolds by Robert J. D'Agostino, Deputy Assistant Attorney General for Civil Rights, concerning a school and housing desegregation suit filed by the Department in Yonkers, New York in 1980. The Yonkers case contained several counts. In one, the Department, after investigating the methods for assigning students to classes for the emotionally disturbed, alleged that some black students were improperly classified as emotionally disturbed. Mr. D'Agostino wrote, "Why improperly?...Blacks, because of their family, cultural and economic background are more disruptive in the classroom on the average. It seems that they would benefit from such programs." (Memorandum to William Bradford Reynolds, Assistant Attorney General-Designate, dated July 21, 1981, page 2.)

In another count, the Department alleged that local officials had deliberately segregated government supported housing on a racial basis and requested a remedy that would allow black people opportunities to live in unsegregated areas. D'Agostino reacted, "What is the nature of Yonkers' violation? They were stupid enough or altruistic enough to voluntarily participate in programs to build low-cost and subsidized housing..." (July 21, 1981 memo to Reynolds, page 3). Requiring officials now to provide units in unsegregated areas would place "burdens" on those areas, he claimed.

On the basis of these comments, D'Agostino called for a thorough review of the Yonkers case, concluding, "I see absolutely no reason to pursue this case in its present form." (July 21 memo, page 3).

Attorneys in the Civil Rights Division protested the D'Agostino memorandum as racially insensitive. (See The Washington Post, September 10, 1981, page A17). None of D'Agostino's superiors, however, has ever publicly indicated that his comments were in any way improper.

Reynolds reversed himself and decided not to join in a voting rights enforcement suit in Edgefield County, South Carolina -- Strom Thurmond's childhood home. 93/

-- After Republican Senator Thad Cochran and Congressman Trent Lott of Mississippi protested a longstanding Department objection to an annexation of white voters by the City of Jackson the objection was revoked peremptorily. Senator Cochran, brother of a member of the Jackson City Council, acknowledged that he had "asked the high echelon people to take a look at the Jackson problem." 94/

-- When the Justice Department filed a complaint in an important voting rights case alleging a history of official action to maintain "white supremacy" in Mobile, Alabama, Senator Jeremiah Denton protested vigorously. The Attorney General responded by directing the filing of an amended complaint deleting the phrase. 95/ Veteran lawyers could not recall another instance when a complaint already filed was changed to accommodate a political protest.

-- The Department weakened its position in a Texas prisons case after an exchange of letters between Republican Gov. William P. Clements, Jr. and Deputy Attorney General Schmults. The Civil

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93/ See Chapter 4, p. 59.

94/ See Chapter 4, p. 57.

95/ See Chapter 4, p. 61.

Rights Division attorney sent to represent the Department's modified position in court was later reprimanded summarily for not advocating the weakened posture with sufficient vehemence. 96/

-- Responding to pressure from Congressman Trent Lott, who obtained support in his campaign on this issue from a cryptic note by the President, the Department of Justice lobbied strenuously and successfully for a change in the IRS policy against tax exemptions for segregating and discriminating private schools. (The New York Times, February 3, 1982, p. A1, 21) (See Chapter 1, pp. 15ff)

A common thread runs through the exercise of pressures on the Justice Department by office holders and other Republican politicians. In each instance enumerated, the primary claim of the politicians was that the Justice Department position should reflect the wishes of those who elected Ronald Reagan. 97/ In no case is there evidence that the Justice Department recognized that arguments of voter sentiment are completely inappropriate when majority will is being used to trammel minority rights. In all cases the Department simply succumbed to the pressure being exerted.

96/ See, St. Louis Dispatch, December 7, 1981, p. 1.

97/ A prime example of political intervention is the Justice Department's conduct in the case challenging the congressional extension of time for state ratification of the Equal Rights Amendment and claiming that state ratification may be rescinded. While cooler heads ultimately prevailed to some extent, the conflicting signals that the Depart-

The Department's posture of acquiescence has not been altered even when the political intervention was heavy-handed and arrogant. Perhaps the most graphic example of

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ment issued on this case served to create immense confusion.

In the trial court, the case presented two quite different sets of questions. There were, of course, the substantive questions raised by the plaintiffs concerning extension and rescission. But separate from these were questions as to whether the case was properly in federal court at all. The Justice Department strongly urged that there was not a proper federal case here, but went on (since, rightly or wrongly, the court might not accept that position) to argue vigorously in support of Congress' action and against the plaintiffs' position on the merits. On December 23, 1981, on the eve of the final opportunity for state legislative ratification, the trial court rejected Justice's views (and the parallel views of the National Organization for Women, which had intervened in the case on the federal government's side), ruling for the plaintiffs on every issue.

On January 4, 1982, Assistant Attorney General Paul McGrath told the press that the Department would appeal the trial court's decision, but declined comment on the position the Department would take. News reports on this announcement prompted intense political pressure on the White House to instruct the Justice Department to shelve plans for appeal. Right-wing organizations -- including the Conservative Caucus, Jerry Falwell's Moral Majority, the National Conservative Political Action Committee and Phyllis Schlafly's Eagle Forum -- led this opposition, and it was reported that the President himself called the Attorney General personally on the matter. (The New York Times, January 13, 1982, p. A14).

The next day a press release from the Attorney General's office "clarified" the situation:

> "As required by its obligations to defend acts of Congress, the Justice Department will appeal the case to the Supreme Court, taking the position at this time that judicial intervention in this matter is premature.
>
> "The Department's position that the case is not ripe for decision is based on the fact that ratification of the proposed Amendment has not as yet occurred and will never occur if three additional states do not ratify the Amendment by the July 1, 1982 deadline. The

political over-reaching came in a prison case in Mississippi. In April 1981, a hearing was scheduled before U.S. District Judge William C. Keady, at the request of the Department, to determine whether the State of Mississippi was attempting to circumvent Judge Keady's orders on jail standards at the Mississippi State Penitentiary at Parchman. The Depart-

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> Department will oppose NOW's effort to expedite the appeal, since the entire matter may be rendered moot in the months ahead.
>
> "The appeal is grounded on considerations of ripeness and is consistent with statements by Attorney General William French Smith calling on the courts to exercise judicial restraint. The Department at this time is not taking a position on the merits."

The key to parsing that statement appears to lie in its last sentence: the Department, finding itself between the position it had taken thus far in the case as counsel for the defendant federal official and the political position of the White House in opposition to the ERA, and subjected to clamors not to adhere to the former, but instead to bow to the latter, was looking for a way to avoid committing itself again on the substantive issues.

Indeed, when the Department filed a response to NOW's request that the Court expedite the case in order to remove the cloud the lower court's decision had cast over the continuing ratification efforts just at the critical moment, that response strongly urged that the Court not expedite the case. Even the plaintiff states agreed with NOW that expedited review was in the Nation's best interest. Again the suspicion was inevitable that the Department was searching for a way to avoid or to delay as long as possible taking a position on the substantive issues.

As it turned out, the Court has put the case on its calendar, deferred all questions until later stages of the process, and "stayed" the lower court's judgment until the Supreme Court's final determination. Only time will reveal whether the Department continues to succeed in finding ways to avoid the merits of this issue.

ment's attorneys asked the judge to allow federal agents, including the FBI, to visit county jails to check on whther State prisoners were being inadequately housed. Congressman Trent Lott convinced Deputy Attorney General Schmults to ask the court for a three-week delay in the lawsuit. As a result of those discussions, Mr. Schmults sent a letter to the Mississippi State Attorney General. Schmults failed, however, to inform the Civil Rights Division attorney representing the United States in court of his action. The Division lawyer first learned of the Department's change in position when the State's attorneys read the letter aloud in court. According to newspaper accounts, "Judge Keady later agreed to the compromise negotiated through Lott's office, a congressionally inspired deal that allows state officials, rather than federal agents, to inspect the jails." 98/

That did not end the matter. In October 1981, Congressman Lott still was not satisfied by reports he was receiving from Mississippi concerning the Department's position in the pending case. He fired off a letter to Deputy Attorney General Schmults complaining by name of Division lawyers "seeking perversely to compel even more restrictive standards on the local facilities ... This is contrary to common sense and to my understanding with you.

98/ The Clarion Ledger (Jackson), July 22, 1981, p. 1A.

I expect the situation to be corrected without delay." Congressman Lott continued to vent his fury at this perceived breach in Mr. Schmults' commitment to him. "I want to know," the letter demanded, "with reference to chapter and verse of the civil service statutes, why [the lawyer] has not been fired. There are too many lawyers ready and eager to carry out Ronald Reagan's policies to permit those policies to be subverted by mere civil servants." 99/ The Department's responsiveness to this type of political intervention can only encourage bolder and bolder attempts to subvert the legal process.

99/ Letter from Representative Trent Lott to Deputy Attorney General Edward Schmults, October 21, 1981. While the attorney has not been dismissed, it does not appear that the Department has ever written Mr. Lott to suggest that his actions constituted improper interference with the Department's performance of its legal and professional responsibilities.

CONCLUSION

A legal system can be fair and just only if the people who administer it have certain qualities: open-mindedness, a willingness to investigate the facts of each case thoroughly, a readiness to enforce laws with which they may disagree, and an ability to recognize their own preconceptions and biases and to seek to set them aside in carrying out the law. These qualities are difficult to define with precision and even more difficult to attain.

But one thing has become painfully clear. At the Justice Department in 1982, these basic qualities of fairmindedness and fidelity to law are lacking. Instead, power and prejudice hold sway.

Senator HATCH. With that, we will recess until Senator Kennedy gets here and resumes his questions. If he does not have any, than we will call on you, Mr. Dershowitz.

On second thought, Mr. Cochran, so that we will not waste this time, I have some questions for you. I wonder if you would mind my staff addressing them to you.

Mr. COCHRAN. Fine.

Senator HATCH. I am pressured by this voting, and it looks as if it is going to go on all day.

Go ahead, Mr. Markman.

Mr. MARKMAN. Professor Cochran, could we ask just two or three questions for the record? I think the most critical question that Senator Hatch did want to ask you would be precisely what judicial construction of the "effects" test in section 5 can shed some light with respect to how the "results" test will be interpreted in the context of section 2? What are the lessons that can be drawn there?

Mr. COCHRAN. Well, the Supreme Court has written one lesson in the case of *Beer* v. *United States*. The Court's opinion in *Beer* indicates that for purposes of applying the "effects" test under section 5, that voting changes should be looked at to insure that no retrogression of voting strength has occurred. That is the one Supreme Court decision.

There are numerous district court cases coming out of the D.C. circuit, however, applying the "effects" test differently. The D.C. court has adopted what seems to be a *White* v. *Regester* "effects" test approach in order to explore all the nuances—sociological, political, and legal—of a given community in order to determine

what the District of Columbia Court describes as whether or not given districts give blacks an opportunity to elect a candidate of their choice.

In interpreting the definitional parameters of districts which gives blacks an opportunity to elect the candidate of their own choice, the District Court for the District of Columbia is implementing what seem to be 65 percent voting districts for covered jurisdictions; that is, a 65-percent level of minority populations in a given district is viewed by that court as one which will "give blacks an opportunity to elect a candidate of their choice." You can say blacks or Mexican Americans or whatever the protected minority level may be.

The 65-percent rule, which is becoming more and more common in section 5 proceedings, is something that had its beginning stage in *United Jewish Organizations* v. *Carey* and is now being carried over into a proper interpretation of section 5 as to whether or not a given political subdivision's voting scenario has the effect of denying minorities an opportunity to elect a candidate of their own choice.

Mr. MARKMAN. Where did the 65-percent rule come from in the context of section 5?

Mr. COCHRAN. Where it came from? In the *UJO* case, it came from a phone call from an unknown staff member at the voting rights section of the Department of Justice to attorneys representing the State of New York. Where it has come from in litigation in the District Court for the District of Columbia is through expert testimony by an individual by the name of Dr. James Lowen, who is an expert witness utilized by the Department of Justice. He uses a mathematical analysis which takes into account past elections which minorities have lost and projects what percentage figure is necessary in future elections to "give blacks an opportunity to elect candidates of their own choice," which seems to be equated with racial characteristics of that group. His figures compute to the 65-percent level.

Senator KENNEDY. Professor, we apologize for the circumstances this morning, but they are completely outside of our control.

Mr. COCHRAN. That is quite all right, sir.

Mr. MARKMAN. I am finished, Senator.

Senator KENNEDY. I had one area. Senator Cochran came and presented your paper to the committee, and it was very helpful.

I will ask my staff to direct some questions to you.

Mr. WIDES. Professor, you raise a question about the decision in *Morris* v. *Gressette* and what you say is an inequity in the existing law because the submitting jurisdiction, if the Attorney General objects, can take a second bite at the apple by going to court and then appealing that up through the courts, but if the Attorney General does not object, no matter how off-base or unjustified that decision seems, the Supreme Court has said that minority groups cannot appeal that.

Mr. COCHRAN. That is right.

Mr. WIDES. What would you propose in the way of a change in the law that would remove that inequity?

Mr. COCHRAN. I would legislatively overrule *Morris* v. *Gressette*. I do not think that section 5 can function in an environment where

minorities in this country perceive the section 5 administrative preclearance process as one that is not clean and cleansed of factors unrelated to the merits of a preclearance petition, so I would overrule *Morris* v. *Gressette* and give them access to the article III system to litigate it.

Mr. WIDES. Do you mean not clean because of the danger or the perception of political pressure?

Mr. COCHRAN. No, not clean because of the mechanics of preclearance itself. When you have a department that is using paraprofessionals to preclear under the supervision of one attorney, you have problems, and second, the perceived increasing political pressures on that department and its impact on minorities in this country, and that is bad for the country, and it is something that can easily be dealt with by kicking this into the article III system to give some sense of justice to a decision to preclear.

Mr. WIDES. Does that mean you think the law should be amended so that both sides—the submitting jurisdiction and the minority groups concerned about a change—should each be able to have the right to go into court to appeal or to question the Attorney General's decision on an objection?

Mr. COCHRAN. Well, no. A political subdivision, if there is a decision not to preclear, they can seek judicial relief—

Mr. WIDES. Now.

Mr. COCHRAN [continuing]. Via declaratory judgments from the District of Columbia court.

Mr. WIDES. And you say the minorities should have that, too, so it is evenhanded?

Mr. COCHRAN. Yes. It has to be balanced out so minorities have the same access as political subdivisions.

Mr. WIDES. To the courts.

Mr. COCHRAN. And then, of course, I diverge from those who advocate this in my venue proposals. There are some who would advocate that venue should remain in the District of Columbia courts. I look at section 5 and its extension to Alaska, Hawaii, New York, and innumerable States, and conclude that section 5 can work very well and very comfortably with local U. S. district courts having jurisdiction if adequate protections are built in for minorities.

Mr. WIDES. Thank you.

Senator KENNEDY. Thank you very much, professor. We appreciate your presence here. We would like to, on this issue, maybe get back to you again on the language of what might be proposed as an amendment.

Mr. Dershowitz—Nathan Dershowitz, American Jewish Congress.

STATEMENT OF NATHAN DERSHOWITZ, AMERICAN JEWISH CONGRESS, ACCOMPANIED BY MARC D. STERN, STAFF COUNSEL, AMERICAN JEWISH CONGRESS

Mr. DERSHOWITZ. Senator Kennedy, I would like to note before I start my appreciation to the subcommittee for inviting the American Jewish Congress to come to testify today.

I would like to also note that we agree with, as a general matter, the comments made by Senator Hatch in his introduction. The conflict between intent and effect is certainly not a glamorous issue. It

is a difficult issue to deal with, but the fact that it is a difficult and complex issue does not in any way reduce the fact that it is a very important issue. We are appreciative of these hearings and the opportunity to express ourselves and what we think on this very complex and difficult issue.

With certain understandings and reservations which we explain below, we endorse S. 1992 and urge its enactment. The changes in the political life of this country, most notably in the South, which have occurred as a result of the Voting Rights Act are substantial and cannot and should not be minimized. Most egregious and discriminatory practices have been eliminated in all but a small number of jurisdictions. Minority participation in voting has increased substantially. More members of minority groups than ever before hold elected office and, more significantly, minority groups exert political influence in an even greater number of jurisdictions.

Still, as the case law and other issue developments show, the millenium has not yet arrived. The preclearance provisions of the Voting Rights Act are not uniformly observed. Study after study demonstrates that many changes subject to the preclearance provisions of section 5 are not, or have not been, submitted to the Attorney General. Those plans which have been submitted are not always accepted and sometimes are even blatantly unacceptable.

Until it can be said with certainty that the right to the franchise—the effective use of the franchise—is universally respected and minority groups are confident of their ability to freely exercise that right, there will be a need for the current preclearance sections of the Voting Rights Act. That hour has not yet arrived. Accordingly, those sections of the Voting Rights Act which are due to expire this coming August should be extended without change.

Likewise, we believe that the Senate should, as did the House of Representatives, approve the extension of the minority language provisions of the act. The bilingual provisions have markedly improved the participation of language minorities, notably Hispanics, without imposing substantial costs, either financial or otherwise, on local and State governments. They have encouraged and assisted language minorities to take their rightful place in the electoral process, though here, too, the effect of the previous exclusionary policies has not yet been fully undone. The bilingual provisions, therefore, should be extended.

While we recognize the need for amendments to section 2, we are reluctant to endorse the amendments to section 2 contained in S. 1992. S. 1992 would amend section 2 in order to overrule the decision of the U. S. Supreme Court in *City of Mobile* v. *Bolden,* which held that a violation of section 2 may be established only by proof of discriminatory intent.

S. 1992 would substitute a results test for the Court's intent standard. It would outlaw any practice "which results in a denial or abridgment" of the right to vote, provided that:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

In our view, this proposal is vague and inherently self-contradictory. We believe that the proposed section 2 may be applied by the

courts and legislatures so that, in practice, it implements a system of proportional representation; that is, a system in which effectiveness of the franchise is measured by the skin color of the persons elected. This is particularly so because the House Committee report changes the definition of dilution by omitting one of the factors previously considered by the courts, namely responsiveness. Although responsiveness is difficult to analyze and prove, it is a factor which serves to shift the emphasis away from statistical analysis to political factors.

Although we understand that this conclusion is not intended by the sponsors of S. 1992, we are not satisfied that the statutory language or legislative history is sufficiently clear to preclude such an interpretation. It may be that our reservations are unwarranted or that the legislative history would be sufficient to clarify that S. 1992 goes no further than we believe the Voting Rights Act should.

If the committee, however, is convinced that the bill should be amended, we propose adoption of a standard based in large measure upon the Supreme Court's decision in *White* v. *Regester* a case decided 7 years before *Bolden.* The concept, expressed so well by Justice White in *White* v. *Regester,* is that to sustain a claim of a violation:

> It is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.

This concept is developed in more detail in the Fifth Circuit's decision in *Zimmer* and in the Supreme Court's earlier decision of *Whitcomb* v. *Chavis.*

Our written submission explains in depth our opposition to proportional representation, reviews in detail the state of the law before and after *Bolden,* and explains why the language we propose satisfies these concerns in terms of the applicable law. I will not reiterate that now but note only that some elements of pre-*Bolden* cases which we view as important do not seem to be included in the word result used in section 5.

Nevertheless it seems clear that there is a good deal of common ground between S. 1992 and the positions we are asserting. We believe that the following principles, all of which are said to be embodied in S. 1992, should govern the revision of section 2:

One, there is no need to prove malevolent intent by direct evidence. I think all parties concede that there is no need for a "smoking gun."

Two, the qualitative burden of proof imposed by the Supreme Court in *Bolden* was too high; in any event, it is of uncertain meaning.

Three, section 2 should not embody the effect standard applicable to section 5; that is, a guarantee against a retrogression in minority political power.

Four, the Voting Rights Act should not be construed to impose a system of proportional representation, nor should the primary focus in determing a violation of the act be on the basis of race or ethnic background of the person elected.

Five, the failure of a minority group to elect its members is a relevant evidentiary fact.

Six, section 2 should apply to all types of voting discrimination by all jurisdictions.

Seven, a violation of section 2 occurs when, after a detailed analysis of the operation of the political system of a jurisdiction the record discloses that minority groups are excluded from the opportunity to influence the political system on racial or ethnic grounds.

We believe that all of these objectives can be met with carefully drafted language tracking the concept as expressed by the majority of the Supreme Court in *White* v. *Regester,* which I quoted earlier.

We do not believe that the present section 2 accomplishes this objective.

Senator KENNEDY. So from what I understand, you feel that the test in *White* v. *Regester* is all right.

Mr. DERSHOWITZ. We feel that the test in *White* v. *Regesteris* acceptable.

Senator KENNEDY. Really, the question is whether the language of 2 tracks that.

Mr. DERSHOWITZ. Our feeling is, and listening to the people who had testified earlier, I have the feeling that if we had an expansive view of intent or a restrictive view of effect, either side of the two extremes, we would not be here debating.

The problem is trying to take a complex issue and trying to say: "Which of two words do you choose?" Well, there has been a lot of litigation on the issue, and one cannot resolve difficult, complex issues by saying, choose either the word intent or the word effect. It depends upon what you mean. I think that was the cause of most of the disagreement that I heard this morning between Professor Younger, on the one hand, and Professor Cox, on the other hand; they were not necessarily disagreeing in substance Each one was using a word and then saying: "Where does this word lead you?" There is where the problem is with this complex piece of legislation.

If, for example, Senator, the amendment that were added to eliminate the proportional percentages would be clarified and expanded, that could be a solution I think would be acceptable; or if the word intent were expanded in order to show that it really encompasses the pre-*Bolden* concepts, I think that would be acceptable.

I think, to a large extent, we are having a problem because we are trying to take difficult concepts and resolve them into one word. I don't think it works.

Senator KENNEDY. Could you give us some suggested language?

Mr. DERSHOWITZ. Yes, we will. Basically, it will be tracking the concepts that are contained in *White* v. *Regester,* and and the *Whitcomb* v. *Chavis* the *Zimmer* concepts that were enunciated earlier. I think that would solve the problem.

Senator KENNEDY. You heard the concern that Professor Cox had with the "intent" test and being able to consider the other circumstantial evidence that it might invite, statements or comments that would make it more difficult to reach a judicial outcome, develop, really, bascially, a phony record on it. I am wondering if you would just give us your reaction.

Mr. DERSHOWITZ. My reaction is that, of course, could happen. It is difficult, if not impossible, to distill the mental elements that are necessary if one looks at the word "intent" in terms of a "smoking gun." But I think the nature of the discussion has been that one is talking about a more expansive view of intent and looks at certain critical factors for purposes of deciding what goes into that mental element. That will alleviate the problem, I think.

Senator KENNEDY. I do not know whether you have further comments. What I would like to do, pending the return of the chairman, is perhaps have Mr. Brink come on up as we did with the earlier witnesses, and if you would remain and move over, and perhaps we could have some exchange here which would help to enlighten the record, if that is agreeable, and then we can come back to some questions. Would that be satisfactory?

Mr. DERSHOWITZ. Certainly.

[The prepared statement of Mr. Dershowitz and additional material follows:]

PREPARED STATEMENT OF NATHAN Z. DERSHOWITZ

The American Jewish Congress welcomes this opportunity to testify on S. 1992 (H. 3112), a bill to extend the Voting Rights Act of 1965, and to amend certain of its provisions. With certain understandings and reservations explained below, we endorse this bill and urge its enactment. Although the explanation of our reservations, which relate solely to the proposed revisions of § 2 of the Act, takes up the bulk of this testimony, this allocation should not be viewed as an indication that we do not wholeheartedly support strong federal legislation to protect the franchise of all Americans.

The American Jewish Congress is a membership organization of American Jews founded in 1918. One of its most deeply felt, and most vigorously pursued, organizational purposes is the elimination of the blight of racial discrimination from all aspects of American life. Nowhere is the elimination of this blight more important than in the exercise of the franchise, whether through denial of access or through sophisticated devices which improperly frustrate its effective exercise. In a democracy, there should be no need to justify at length legislation designed to overcome the exclusion of whole segments of the population from participation in political power.

The Voting Rights Act of 1965, and particularly § 5, which requires certain jurisdictions, chiefly, but not exclusively, in the South, to "pre-clear" changes in electoral practices with either the Attorney General or the District Court for the District of Columbia, provides the necessary assurances that the right to the franchise -- "the right preservative of all other rights" --

will not be abridged in violation of the Fourteenth and Fifteenth Amendments by those jurisdictions which have a history of racial discrimination in voting. It is unfortunate that, over one hundred years since the enactment of those Amendments, it can still not be said with confidence that all states and their political subdivisions abide by those guarantees. Since the most recent census, for example, the Attorney General has rejected, under § 5, reapportionment plans in several states.

To be sure, significant progress has been made. The changes in the political life of this country, most notably in the South, which have occurred as a result of the Voting Rights Act are substantial, and cannot and should not, be minimized. The most egregious discriminatory practices have been eliminated in all but a small number of jurisdictions. Minority participation in voting has increased substantially. More members of minority groups than ever before hold elected office, and more significantly, minority groups exert political influence in an even larger number of jurisdictions.

S. 1992 (H. 3112) recognizes this progress. It provides a more liberal and workable mechanism than currently exists for covered jurisdictions to "bail out" of the preclearance sections of the Act upon a demonstration that they have abided by the Act. We believe that these provisions substantially undercut any argument that the preclearance provisions of the Act unfairly penalize law abiding jurisdictions for policies that are now part of the remote past. Although some have raised questions about certain aspects of the bailout provisions contained in S. 1992, we believe that those problems are not serious enough to preclude enactment of the bill in its present form.

Still, as the case law and other recent developments show, the millenium has not yet arrived. The preclearance provisions of the Voting Rights Act are not uniformly observed. Study after study demonstrates that many changes subject to the preclearance provisions of § 5 are not, or have never been, submitted to the Attorney General. Those plans which have been submitted are not always acceptable; sometimes they are even blatently unacceptable. As noted above, the Department of Justice has objected, under § 5, to districting plans in several states on the ground that the plans deprive protected groups of their rights. A small number of jurisdictions continue to act as if the Fourteenth and Fifteenth Amendments had never been enacted. Without the protection of preclearance, many voters would be deprived of their constitutional rights.

To be sure, persons affected could bring challenges under either § 2 of the Voting Rights Act, which forbids discrimination in voting, or directly under the Constitution. As discussed more fully below, litigation under these sections currently requires a different, and harder to satisfy, burden of proof, than § 5. Litigation, however, is usually a drawn out process and may not result in a vindication of important rights until years -- and perhaps several elections -- have passed. Most importantly, not all those whose rights are affected have access to counsel with the resources to bring such suits. The preclearance sections properly shift these burdens to the jurisdiction seeking to change the status quo.

Only when it can be said with certainty that the right to the franchise -- the effective use of the franchise -- is

universally respected, and minority groups are confident of their ability to freely exercise it, will there no longer be a need for the preclearance sections of the Voting Rights Act. That hour has not yet arrived. Accordingly, those sections of the Voting Rights Act which are due to expire this coming August should be extended without change.

Likewise we believe that the Senate should, as did the House of Representatives, approve an extension of the minority language provisions of the Act, 42 U.S.C. § 1973aa-1a. In brief, these sections require the provision of bilingual voting materials in jurisdictions with high concentrations of voters whose primary language is not English. S. 1992 (H. 3112) would extend these sections so that they expire at the same time as the other temporary sections of the Act. The bilingual provisions have markedly improved the participation of language minorities, notably Hispanics, without imposing substantial costs, either financial or otherwise, on local and state governments. The bilingual provisions have encouraged and assisted language minorities to take their rightful place in the electoral process, although here, too, the effect of previous exclusionary policies has not yet been fully undone. The bilingual provisions, therefore, should be extended. We note in this regard that the Administration, which was originally undecided about the desirability of extending these provisions now supports extension.

Section 2 of the Bill

While we recognize the need for amendments to § 2, we are reluctant to endorse the amendments to § 2 contained in S. 1992 (H. 3112). We believe that these difficulties, which can be dealt

with without subverting the purposes of this bill, should preferably be eliminated with statutory language or, if that is not possible, clear legislative history. S. 1992 would amend § 2 of the Voting Rights Act of 1965, a permanent section of the U. S. Code, 42 U.S.C. § 1973, in order to overturn the decision of the United States Supreme Court in City of Mobile v. Bolden, 446 U.S. 55, (1980) which held that a violation of that section may be established only by proof of discriminatory intent. S. 1992 would substitute a modified effect test for the Court's intent standard. It would outlaw any practice "which results in a denial or abridgement" of the right to vote, provided that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." In our view this proposal is, standing alone, vague and inherently self-contradictory. However, there is a more fundamental reason for our reluctance to endorse this section as it is currently written. We believe that the proposed § 2 may be applied, by the courts (and legislatures) so that in practice it implements a system of proportional representation -- that is, a system in which effectiveness of the freedom to vote is measured by the skin color of the persons elected.

We understand that these results are not intended by the sponsors of S. 1992. It is our understanding that the supporters of S. 1992 do not intend to equate the standard under § 2 with the non-regression effects standard of § 5, and that, in this view, S. 1992 would not allow a plaintiff to make out a § 2 case merely by a showing that a particular group is not electing representatives

in proportion to its presence in the population. We agree that these principles ought to govern § 2 cases, but we are not satisfied that the House-passed language, or the legislative history, is sufficiently clear to preclude an interpretation which would tend toward a principle of proportionality.

A review of the testimony submitted in support of the legislation in the House indicates that most of the difficulties which we have with S. 1992 were not intended, and could be cured without substantially changing the substance of S. 1992. We understand that the same is true of the Senate testimony,

While we are not satisfied with the language of S. 1992, we believe that the decision in Bolden does pose real difficulties for plaintiffs which we believe should be addressed -- and cured -- legislatively. Among the most significant of these is the possibility that Bolden requires direct evidence of an intent to discriminate -- a requirement that would make it impossible for minorities to establish discrimination since public officials no longer admit to racially discriminatory motives.

It is apparent that the difficulties we perceive in the House bill stem in part from a difference in emphasis. The testimony before the House, as well as the House report, focus on the question of whether particular at-large electoral schemes effectively disenfranchise minority groups. Our focus is primarily on the allocation of seats in single member districting schemes. This difference in focus may explain a good deal of the differences between our view of the Act and those of the sponsors and the House Committee.

We believe it necessary to state and explain our opposition

to proportional representation and to review in detail the state of the law both before and after Bolden.

OUR OPPOSITION TO PROPORTIONAL REPRESENTATION

Ethnic, religious and racial groups frequently have, as a result of various social and cultural factors, unique points of view on matters of public policy which tend, in a broad way, to reflect themselves in the way members of these groups vote. This fact is of vital importance to political parties and candidates. It is not, however, the business of government to encourage or prohibit such voting for the "First Amendment assures every citizen the right to cast his vote for whatever reason he pleases .... Anderson v. Martin, 375 U.S. 399 (1964)." Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981). Voting for or against a candidate on the basis of his or her race or ethnicity is thus constitutionally protected. Recognition of the political facts of life, but unwillingess to impose governmental insurance of their institutionalization is not, in our view, contradictory. Rather, it reflects a theoretically sound, and historically validated, approach to politics and ethnicity.

Ethnicity is a fact of life in this country. It would be naive to expect politicians to ignore it. Moreover, in a democracy it would be wrong for the elected representatives of the people to ignore such an important element in the lives of their constituents. No doubt, racial and ethnic considerations are informally considered during the redistricting process. See Burns v. Richardson, 384 U.S. 73 (1960). On the other hand, ethnicity,

if carried too far, would be destructive of the sense of community essential for the well being of this nation. We believe that government goes too far when it formally institutionalizes, either through rigid quotas or otherwise, racial, ethnic and religious divisions, whether in the context of allocation of welfare benefits, jobs or political power. The difficulty encountered by countries such as Canada and Belgium, which have tried to devise systems of assuring representation along ethnic lines, cautions against attempting to institutionalize group status in the political process. The potential for harm is magnified when only some groups are afforded special protection from the normal operation of the political process.* Cf. City of Mobile v. Bolden, supra, 446 U.S. at n.26.

Allocating political power along racial or ethnic lines also stereotypes individual members of these groups. It is not true, for example, that all Blacks, Hispanics or Jews share common views on every question of public concern. A fortiori, it is not true that various ethnic groups are fungible. The danger of imposed racial or ethnic grouping is not only that individual dissenting views within these groups will be muffled; it is that elected and government officials will have a stereotyped picture of these groups and their individual members.

The proposed revision of § 2 does not purport to mandate a system of proportional representation; indeed, it appears to

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* It is true that in United Jewish Organizations v. Carey, 430 U.S. 144 (1977) the Supreme Court held that states could consider racial factors in redistricting. We urged a different result in that case, but recognize that our view did not become the law. Nevertheless we do not believe Congress should mandate that result on a nationwide basis, nor do we believe that, except in extraordinary circumstances, states should redistrict on a racial basis.

explicitly reject any such notion. We understand that in testimony before this subcommittee, both the sponsors and supporters of this legislation have disavowed any intention to implement such a system. A review of current law and the proposed changes will show, however, that the result may nevertheless be the same. It is difficult to quantify that risk, but even if only minimal, we believe that there is no reason to run that risk at all, particularly since it is possible to eliminate the risk without undermining the protection which should be afforded to the effective exercise of the franchise.

There appears to be a general consensus that the Voting Rights Act should not require proportional representation. There is, however, a good deal of disagreement over whether the present language of S. 1992 is sufficient to insure that the courts do not implement such a requirement. We believe that the present language is not as clear as it could be, and that the legislative history in the House does not clear up these problems. On the other hand, we believe that an intent requirement, particularly in the form of a requirement that a "smoking gun" be shown, is not necessary to insure that the Act does not require proportional representation, and indeed, would unnecessarily permit jurisdictions to escape liability for discriminatory electoral schemes.

Pre-Bolden Law

Ever since its landmark decision in Reynolds v. Sims, 377 U.S. 533 (1964), in which it held that the Fourteenth Amendment embodied a "one-man, one vote" principle, the Supreme Court has wrestled with claims that particular redistricting schemes,

usually involving multi-member districts, while in compliance with that principle, accord different weight to the votes of particular groups of voters. See, e.g., Fortson v. Dorsey, 379 U.S. 433 (1965); Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713 (1964); Burns v. Richardson, 384 U.S. 73 (1966); Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973). The Court has steadfastly rejected the contention that multi-member districts inevitably unconstitutionally dilute the votes of political or racial minorities within such districts, see Whitcomb v. Chavis, supra.* It has, however, held that such districting, and presumably reapportionments in general, are invalid where they operate to "minimize or cancel out the voting strength of racial or political elements of the voting population," Fortson v. Dorsey, supra, 379 U.S. at 439.

In determining whether a particular practice impermissibly "operates to cancel out the voting strength of racial ... elements of the voting population," the Court has been cognizant of the fact that, in our democratic system, the majority rules, and that those groups which cannot muster political majorities, whether by virtue of their own lack of strength, or their inability to form coalitions with other groups, lose. That simple political fact of life is neither a denial of the franchise nor of equal protection to those who support a losing candidate. Whitcomb v. Chavis, supra. Accordingly, the Court has always insisted on a greater evidentiary showing than the bare fact that a group has

* The theory that such districts are inevitably unconstitutional is laid out in Whitcomb v. Chavis, supra, 403 U.S. at 143-45.

not elected its members in proportion to its presence in the population. Rather, it has insisted on the far greater showing that the political process is not "equally open to participation by the group in question." White v. Regester, supra.

In none of its decisions prior to Bolden did the Supreme Court focus on the question of whether plaintiffs' burden in a dilution case, as such claims are called, included a showing that the practice was adopted or maintained intentionally in order to cancel out minority voting strength. At the same time, it is also true that the Court had never held that it was necessary to produce a confession from public officials that a practice was adopted in order to disenfranchise minorities. No such showing was made in White v. Regester, the only case in which the Supreme Court has invalidated multi-member districts. It was, however, clear that proof of intentional discrimination would state a claim for relief, see Gomellion v. Lightfoot; 364 U.S. 339 (1961); Wright v. Rockefeller, 376 U.S. 53 (1964); what was not clear was whether it was a necessary element of a dilution claim.

While the Supreme Court was wrestling with the dilution problem, other courts, notably the then Fifth Circuit, where the bulk of the dilution cases have arisen, were also considering the question. There, too, it was not until fairly recently that the courts' attention was directed to the intent/effect problem. For convenience, we focus on the Fifth Circuit's cases.

The early cases did not explicitly require a showing of intent in order to demonstrate a case of illegal vote dilution. However, as early as Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) aff'd on other grounds sub nom. East Carroll Parish School

Bd. v. Marshall, 424 U.S. 636 (1975), the Fifth Circuit had insisted on more than a showing that a particular group was not electing its own members in proportion to its share of the population. It did so in the course of defining the concept of dilution.

> ... [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [of unconstitutional vote dilution] is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.

Id., 485 F.2d at 1305.

Thus, although there was no discussion in Zimmer of the need to establish a malevolent intent, cf. id. at 1304, n.16, it was clear that effect alone was not sufficient. Two points are particularly worthy of note: included among the elements of proof was 1) a showing of non-responsiveness -- that is, a showing that minorities had no influence on the political process, and that political figures were able to ignore the needs and desires of a large minority group and still secure election, and 2) a showing that the state or locality had no important policy reason justifying a challenged policy. That latter requirement, which is logically irrelevant to the question of whether a particular scheme dilutes the role of minorities, demonstrates

that the impact on minorities is not the only relevant factor* in determining whether a particular scheme should be stricken. In other words, effect alone was not sufficient to carry plaintiffs' burden under the Constitution.

In the wake of Washington v. Davis, 426 U.S. 229 (1976), and Arlington Hts. v. Metropolitan Housing Develop. Corp., 429 U.S. 252 (1977), which held that the equal protection clause was not violated absent a showing of intentional discrimination, the Fifth Circuit undertook, in the course of deciding four consolidated cases, to determine whether an intent to dilute was an element of the plaintiffs' case. The court held, over one partial dissent, that a showing of intent was necessary but that the Zimmer evidentiary factors gave rise to a presumption of intent, which could be rebutted, as a factual matter, by a defendant jurisdiction. Having established this principle, the Fifth Circuit then undertook to review the factual record in each of the cases before it. In one of these cases, Bolden v. City of Mobile, 571 F.2d 238, (5th Cir. 1978), the court concluded that the record demonstrated that the particular districting scheme at issue was maintained for the purpose of diluting the black vote, and accordingly violated plaintiffs' rights under both the Fourteenth and Fifteenth Amendments.

It was the determination that the evidence was sufficient to demonstrate intentional discrimination that the Supreme Court

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* The Fifth Circuit did deal briefly with the question of intent. See id. at 1304 n.16. While the Court may have meant to hold that a showing of intent was irrelevant, what it actually held was that even a showing of malevolent intent was insufficient absent a showing of an adverse impact on minority groups. We suggest that this somewhat cryptic holding, which is probably no longer good law, reflects the fact that the courts had not yet focused on the question of intent and effect.

overturned in Bolden. The holding of the plurality was not that the Fifth Circuit had incorrectly applied an effect standard to the Fourteenth Amendment claim, but that it had erred in determining that the factors enunciated in Zimmer, as applied to Mobile, were sufficient to sustain a finding of purposeful discrimination.

> In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithen, supra. Thus, because the appellees had proved an "aggregate" of the Zimmer factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in Washington v. Davis, supra, and Arlington Heights, supra. Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called Zimmer criteria upon which the District Court and the Court f Appeals relied were must assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

City of Mobile v. Bolden, supra, 446 U.S. at ___.

The plurality, however, did not explain what evidence would be sufficient to prove intent. Justices White and Blackmun disagreed with the Court's evaluation of the evidence and were joined in their disagreement by Justices Brennan and Marshall.

Although the plurality opinion of the Court would have held that dilution claims are not cognizable at all under § 2 of the Voting Rights Act or the Fifteenth Amendment, the remaining five Justices held that § 2 (and the Fifteenth Amendment) in fact applied to such a claim. A different majority, however, agreed

that §2 merely restated the prohibition of the Fifteenth Amendment and that the Fifteenth Amendment also incorporated an intent standard. In sum, a violation of § 2 and the Fourteenth and Fifteenth Amendments exists only if a jurisdiction intends to disenfranchise minorities. However, both provisions prohibit dilution of the right to vote, as well as discrimination in access to the ballot.

By contrast, the law under § 5 is relatively simple. That section applies only to changes related to the electoral process in "covered" jurisdictions. Allen v. Bd. of Education, 393 U.S. 544 (1969); City of Richmond v. U. S., 422 U.S. 358 (1975). Unlike § 2, which, as construed in Bolden, requires a showing of intentional discrimination rather than a showing of effect, § 5 prohibits practices which have a discriminatory effect without regard to intent, City of Rome v. U. S., 446 U.S. (1980).* A discriminatory effect is one which results in a deterioration in the political strength of minorities, Beer v. United States, 425 U.S. 141 (1976). Moreover, the burden of proving a lack of discriminatory intent or effect is on the jurisdiction. City of Rome v. U.S., supra. It is somewhat unclear whether it is open to

* Although we oppose the use of an effect test under § 2, and the sponsors of the bill apparently disavow such an intention, we do not believe that the limited effect test applicable under § 5 should be altered. To begin with, § 5 is applicable only in jurisdictions with prior records of discrimination, and, if the revised bailout sections are enacted, only jurisdictions that have not overcome their past history of discrimination will be subject to its provisions. Second, § 5 is not permanent legislation; it is subject to periodic review. When Congress determines that § 5 is no longer necessary to overcome prior discrimination, the effect test will cease to be operative. Finally, § 5 is applicable only to changes, and not to existing practices which under a particular set of circumstances might work to the disadvantage of one group or another.

a jurisdiction to justify a practice against a charge that it has the effect of discriminating on the basis of race on the ground that that practice serves an important public purpose. The answer appears to be that it is. See City of Richmond v. U. S., supra, 422 U.S. at 369. The Department of Justice seems to believe so as well. See, e.g., Hale County v. U. S., 496 F. Supp. 1206 (D.D.C. 1980). The final difference between the preclearance sections of § 5 and the prohibitions of § 2 is that the latter are permanent and the former are not.

The Case Law Subsequent to Bolden

The Fifth Circuit has, in several cases decided after Bolden, attempted to redefine the plaintiff's burden in § 2 cases, McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981); Lodge v. Buxton, 639 F.2d 1358 (5th Cir.) prob. juris. noted, 50 U.S.L.W. 3244 (1981); cf. U. S. v. Uvaldi Ind. School Dist., 625 F.2d 547 (5th Cir. 1980).

The Lodge case contains the fullest discussion of post-Bolden law. In that case, the court first determined that there is no need for plaintiffs to produce a "smoking gun." That view of Bolden seems plainly correct, given the plurality's references to Arlington Heights v. Metropolitan Housing Dev. Corp., supra, and Washington v. Davis, supra, both of which hold that intent may be proven circumstantially.

Next, the court determined that, after Bolden, the Zimmer criteria could no longer be said to give rise to a presumption of intent to dilute. Finally, in the view of the Fifth Circuit, Bolden also held that a showing of unresponsiveness to the needs of minorities is a sine qua non of a dilution case:

> A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for discriminatory purposes. A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a prima facie case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a prima facie case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The Zimmer criteria may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. 639 F.2d at 1375. (citation omitted).

The Supreme Court heard argument this week in Lodge and its decision, which should be handed down by the end of its current term, may well clarify the Court's holding in Bolden.*

Under Lodge's reading of Bolden, both § 2 and the Fourteenth and Fifteenth Amendments impose a requirement that a plaintiff prove an intent to disenfranchise minorities. While Congress can do nothing to change the substantive elements of a plaintiff's case under the Constitution, it can, of course, amend the Voting Rights Act so that it specifies exactly what plaintiff's burden is in a case claiming dilution.

There is a good deal of confusion, some of it semantic, about what reforms are necessary to respond to Bolden. Some use the term "burden" to refer to the types of evidence that are

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* We say may because Lodge presents several other questions. It may be that, as a result of its determination of those questions, the Court will find it unnecessary to address this question.

admissible in the trial of a dilution case -- direct evidence (the smoking gun theory), circumstantial evidence, hearsay, and the like. Although we read Bolden as holding that circumstantial evidence can be sufficient to carry the plaintiff's burden of proof, it would be perfectly appropriate for the Congress to make that explicit.

A rule prohibiting the use of circumstantial evidence, or requiring some direct evidence would, of course, make it virtually impossible to prove a dilution claim, no matter how valid, since public officials are unlikely to admit to improper racial motives.

> Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me," like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland.

F. W. Woolworth Co. v. N.L.R.B., 121 F.2d 658, 660 (2nd Cir. 1941).

To the extent that the revision of § 2 contained in S. 1995 (H. 3112) is meant, as its supporters frequently claim, to clarify the law in this regard, we endorse it.

It is also possible that proponents of the proposed Amendment to § 2 of the Voting Rights Act simply believe, as did Justices White and Blackmun, that the Supreme Court in Bolden simply insisted on too much proof in order to sustain a finding of racial animus. This appears to be a valid criticism of Bolden, but it is apparent that the proposed amendment to § 2 does not leave the legal standard enunciated in Bolden intact, while lowering plaintiff's quantitative burden of proof.

The third possibility is that proponents of the proposed amendment to § 2 are interested not in changing the type or quantity of proof, but in changing the elements of a dilution case under § 2.

The House Committee explained its revision of §2 as follows:

> Section 2 of H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision. Many of these discriminatory laws have been in effect since the turn of the century. Efforts to find a "smoking gun" to establish racial discriminatory purpose or intent are not only futile, but irrelevant to the consideration whether discrimination has resulted from such election practices.*
>
> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.
>
> This is not a new standard. In determining the relevancy of the evidence the court should look to the context of the challenged standard, practice or procedure. The proposed amendment avoids highly subjective factors such as responsiveness of elected officials to the minority community. Use of this criterion creates inconsistencies among court decisions on the same or similar facts and confusion about the law among govern-

* This portion of the House Report is somewhat misleading. While proof that a given practice was instituted in order to disenfranchise minorities is sufficient to carry plaintiff's burden, City of Richmond v. United States, supra, 422 U.S. at 378-79, the courts have made it clear that a practice maintained for discriminatory purposes, even though not originally intended for this purpose, may likewise be challenged. In such cases, the evidence is likely to be much more current, City of Mobile v. Bolden, 446 U.S. at 1449; McMillan v. Escambia County, supra, 638 F.2d at 1244.

> ment officials and voters. An aggregate of objective factors should be considered such as a history of discrimination affecting the right to vote, racially polarized voting which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, a majority vote requirement, a prohibition on single-shot voting, and numbered posts which enhance the opportunity for discrimination, and discriminatory slating or the failure of minorities to win party nomination. All of these factors need not be proved to establish a Section 2 violation.
>
> The amended section would continue to apply to different types of election problems. It would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interest of a racial or language minority. A districting plan which suffers from these defects or in other ways denies equal access to the political process would also be illegal.
>
> (H.R. Rep. 97-228 at 29-31)

As explained by the House Committee, the proposed revisions of § 2 would accomplish several changes.

First, and most significantly, the bill would overturn that part of Bolden which required a finding of intent to establish a violation of the Voting Rights Act by reverting to the standards enunciated in White v. Regester, supra. which do not include a showing of "intent" in the sense of a smoking gun. On the other hand, these criteria fulfill the same purpose as the Supreme Court intended the intent test to fulfill -- a guarantee against proportional representation.

However, the tests would not include a need for a showing of unresponsiveness, which in the Fifth Circuit, at least, is a sine qua non of a dilution case, and which was one of the factors considered in both White v. Regester, supra, and its predecessor,

Whitcomb v. Chavis, supra. Thus, although the report does not mention it, the proposed amendment would not only overturn Bolden, but significant portions of White v. Regester, Whitcomb v. Chavis and Zimmer v. McKeithen, supra, as well.

Second, it would make absolutely clear that § 2 of the Voting Rights Act reaches practices such as dilution which, while not interfering with the right to vote as such, would make that right less valuable. This, too, is a change we endorse. As noted, the Fifth Circuit has interpreted Bolden to cover such practices, but this holding is not beyond question in view of the plethora of opinions in Bolden. It also makes clear that, contrary to the views of the dissenting judges in City of Rome v. U. S., supra, the prohibition on improper dilution applies to local elections.

We understand that the language of the section "which results in the denial or abridgment" was chosen so that it would be clear that § 2 did not embody the same "effects" test as § 5. While we agree that the § 5 effects test is inappropriate for nationwide application, the linguistic distinction is, in our view, too metaphysical to endure, particularly since it is not explained anywhere else in the legislative history.

The objective criteria by which the House report contemplates the resolution of dilution claims focus on the ability of minority community voters to elect minorities to public office -- not on whether minorities can effectively make their voices heard in the political process through the building of coalitions and the like. This is, as we have shown, a significant change in the law of dilution as it existed before Bolden.

Although cast in technical, almost evidentiary terms, the changes that the proposed § 2 would make are profound and go to the very underpinnings of a democratic society. The House bill would eliminate responsiveness as an element of a dilution case. Responsiveness in a rough way measures political influence. Accordingly the Fifth Circuit in Zimmer regarded it as one of the most important evidentiary facts in establishing dilution. Its omission from the list of factors to be considered in determining whether dilution has occurred -- an omission not emphasized by supporters of this bill in testimony before this Subcommittee -- is a reflection of this fundamental philosophic shift. At the same time, we recognize that proving responsiveness is a difficult matter, and that in some cases a jurisdiction may be numerically responsive, while minority communities remain effectively disenfranchised.

The omission of this element would be less significant if the statute were clear on its face that proof of a violation requires a showing that elements integral to the political process, such as a history of discrimination in voting, anti-single-shot rules, at large election, majority vote requirement, exclusionary slating procedures, one party rule, and the like, and not society at large -- have operated to deny a minority group a fair opportunity to influence the political process. Moreover, as S. 1992 does, the statute should explicitly disavow requirement of proportional representation. The legislative history should make clear that a prima facie case is not made out merely by lack of minority elected officials.

Determining a violation under this standard would require a

sensitive inquiry into all the facts and circumstances of a particular case. A court would not be able to find a violation of the Act unless it were able to conclude that the lack of political success was due not to race neutral political factors -- such as membership in the "wrong" political party -- but to racial factors. It is our expectation that only in truly egregious cases will this standard be satisfied.

To be sure, minority voters have the right to prefer members of their own groups to represent them. The persistent failure of politically cohesive minority groups to elect members of their group is surely a relevant evidentiary factor, and one which is entitled to significant weight. Government should not be permitted intentionally, or without sufficient reason, to frustrate this right. we do not believe it proper, however, for the federal governent to insist that such choices are the sole, or even best, measure of minority political expression. Since as it stands, the revision of § 2, read in light of its legislative history, may mandate that result, we believe it important for the Senate to make clear, either through legislative history or statutory language, that dilution is a measure of political power, not an official's skin color.

It is true that the legislative history in the House emphasizes that proportional representation is neither the proper measure of, nor the remedy for, a violation of the Act. Similar testimony has been presented to this Subcommittee. We in no way cast doubt on the sincerity of these statements. Nevertheless, because we believe the substantive sections of the Act may point in a different direction, particularly in the context of single

member districts, we believe that further clarification of the statutory language is necessary.

AJCongress Proposal

There is a good deal of common ground between S. 1992 (H. 3112) as envisioned by its sponsors and the position we are asserting. We believe that the following principles, all of which are said to be embodied in S. 1992 (H. 3112), should govern the revision of § 2:

(1) There is no need to prove malevolent intent by direct evidence ("a smoking gun").

(2) The qualitative burden of proof imposed by the Supreme Court in Bolden was too high, and in any event is of uncertain meaning.

(3) Section 2 should not embody the "effect" standard applicable under § 5 -- that is, a guarantee against a retrogression in minority political power.

(4) The Voting Rights Act should not be construed to impose a system of proportional representation, nor should the primary focus in determining a violation of the Act be on the basis of race or ethnic background of the persons elected. Nevertheless, the failure of a minority group to elect its members is a relevant evidentiary fact.

(5) Section 2 should apply to all types of voting discrimination by all jurisdictions.

(6) A violation of § 2 occurs when, after a detailed analysis of the operation of the political system in the jurisdiction in question, the record discloses that minority groups are excluded from an opportunity to influence the political system on racial or ethnic grounds.

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March 1, 1982

Express Mail

Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Honorable Edward Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Hatch and Senator Kennedy:

On behalf of the American Jewish Congress I wish to thank you for affording us an opportunity to present our views on S. 1992, a Bill to Amend the Voting Rights Act. As Senator Hatch said in opening the hearing at which I testified, the issues being considered by the Subcommittee are important and fully merit the careful consideration they are being given.

As I said in my testimony the other day, it appears to us that the actual differences between the two sides of this debate are small, while the semantic difference is large. Both of you appear to have in mind a § 2 which would incorporate the standards laid down in the line of cases culminating in White v. Regester. Indeed, at one point in the hearings, Senator Hatch referred to the intent test of White v. Regester, while Senator Kennedy referred to the effect test of White v. Regester.

It seems to us relatively unimportant whether one calls this test an "intent" test or an "effect" test if the substantive elements needed to prove a violation are the same. What is important, then, is to agree on the elements contained in White v. Regester and that the statutory language clearly and unambiguously reflect this agreement. Senator Kennedy requested that we submit such language.

We believe adding a new second sentence and clarifying the existing so-called proviso sentence would accomplish this objective.

Section 2 would read in toto as follows;

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen on account of race or color, in contravention of the guarantees set forth in § 1973b(f)(2) of this title. A practice results in the denial of the right to vote only upon a showing that elements integral to the political process have operated to deny a fair opportunity to influence the political process. Nothing in this Act shall be construed to require a system of proportional representation; provided further, that the absence of elected officials of a particular race may be evidence of a practice illegal under this section.

This language, we believe, would serve to incorporate all the elements, including responsiveness and the importance of the state policy articulated in the dilution cases culminating in White v. Regester.

Sincerely,

Nathan Z. Dershowitz

Tampering with the Voting Rights Act

Nathan Z. Dershowitz and Marc D. Stern

CONGRESS has begun to consider an extension of the Voting Rights Act of 1965, perhaps the single most successful piece of federal civil rights legislation ever enacted.

Opposition to the extension is widely portrayed as a racist effort to undo these gains. To some extent, this is no doubt true. But not all opposition can be explained as a racist attempt to turn back the clock. Some is motivated by a concern about democratic ideals.

Particularly vexing are the implications of two key sections of the Act. As construed by the United States Supreme Court in 1980 in *City of Mobile v. Bolden*, Section 2, which is applicable nationwide, prohibits election procedures which are *intended* to discriminate against minority groups either by disenfranchising them altogether or by dispersing them in districts so that the effectiveness of their vote is diluted.

Section 5 of the Act, which applies only to certain "covered jurisdictions" (districts—chiefly in the South, but including Brooklyn, Manhattan and the Bronx—with histories of electoral discrimination), outlaws all election procedures which, regardless of intent, have the *effect* of diluting the minority group vote. In these jurisdictions, changes in electoral procedures must be approved by the U.S. Department of Justice.

Senator Charles Mathias (R.-Md.) and Representative Peter Rodino (D.-N.J.), sponsors of the leading bill to extend the Voting Rights Act, claim that they seek only continuation of the current law. Yet, their bill contains a provision which is designed to overrule the effect-intent distinction drawn by the Supreme Court and thereby to make the effect test applicable nationwide.

Imposition of an effect standard in all jurisdictions has serious implications. Certainly, in many places, redistricting and other changes in the electoral process are used to prevent minority groups from obtaining political power. Passage of the effect test nationwide will strike at these reprehensible practices. But the effect test goes much further. As it has developed, it presumes that not only do minorities have the right to select representatives from their own group (as indeed they do), but that minorities *should* be represented by members of their own group. The Williamsburg section of Brooklyn, New York, for example, has been tortuously gerrymandered in an attempt to assure the election of minority group members.

Thus, an act designed to assure full minority participation in the democratic process can also subvert a major tenet of that process—majority rule. What is worse, it does so by insisting that racial considerations be used to dictate election results.

The effect test also means that redistricting changes may not be undertaken, no matter how necessary for some other important societal purpose—such as school integration—unless minority representation is guaranteed.

A predominantly black school district, for instance, could be prevented from integrating by annexing an adjoining white district unless the electoral strength of black voters was maintained. Similarly, regional consolidation of services and expansion of tax bases could be hindered if the incorporation of a predominantly black area into a predominantly white jurisdiction would result in fewer black representatives.

A more difficult problem is posed by redistricting that is mandated by population changes. If an area loses a legislative seat because of a new census, it may not be mathematically possible to retain proportional representation. The application of the Voting Rights Act in such a case is unclear.

A majority of the Justices in *Bolden* expressed concern that the nationwide adoption of the effect test would amount to nothing less than a requirement of proportional ethnic representation. Indeed, materials published recently in support of the Mathias-Rodino bill by some minority group organizations suggest that proportional ethnic representation would not be an undesirable result. We believe, on the contrary, that, as Justice Stevens put it in *Bolden*, "there is no national interest in creating an incentive to define political groups by racial characteristics."

CLEARLY, gerrymandering which disenfranchises minority group voters must be outlawed. But just as clearly, the institutionalization of ethnic representation cannot be tolerated. We propose two approaches to address these concerns.

First, Congress could simply renew the Voting Rights Act as currently interpreted by the Supreme Court. The effect test would remain in force for another ten years in those jurisdictions with a history of discrimination. Elsewhere, it would be necessary to show an intent to disenfranchise minority groups or to dilute their vote to prove a violation of the Act. Proving intent to discriminate is admittedly difficult, but it is by no means impossible, as cases decided subsequent to *Bolden* establish.

Alternatively, Congress could amend the Act so that evidence of a diluting effect would be sufficient to prove a violation unless the defendants justify the practice. Such a scheme is quite common in civil rights statutes and was endorsed by Justice Marshall in his dissent in *Bolden*.

Other solutions could probably be devised. Eliminating racial or ethnic discrimination in the voting process is essential. But mandating and institutionalizing representation of minority groups by their own members substitutes one form of discrimination for another. More importantly, it undermines a fundamental premise of our governmental system—that the body politic is composed of individuals, not of racial, ethnic or religious groups. □

NATHAN Z. DERSHOWITZ *is director of AJCongress' Commission on Law and Social Action.* MARC D. STERN *is a staff counsel.*

Senator KENNEDY. If you could just come down the table just a little bit, we would ask Mr. Brink, who is our final witness, president of the ABA, to come on up and make his presentation, and then we will try to get some exchange going.

STATEMENT OF DAVID R. BRINK, PRESIDENT, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY ABELARDO I. PEREZ AND WILLIAM ROBINSON

Mr. BRINK. Senator Kennedy and members of the subcommittee, I am David R. Brink and president of the American Bar Association. Accompanying me today are Mr. Abelardo Perez, who is a member of the ABA Special Committee on Election Law and Voter Participation, and Mr. William Robinson, a member of the governing council of our association's section of individual rights and responsibilities.

I wish to thank the subcommittee for permitting me to appear and also to note the fine services given us by Mr. Markman and Mr. Wides, and for their assistance in scheduling us today.

In the interest of time, I request that the full text of my prepared statement be included in the hearing record and, instead, will make a brief oral summary with your permission.

The American Bar Association's policy is made by its house of delegates. The house of delegates, last August at our annual meeting, adopted a strong resolution supporting effective extension of the Voting Rights Act. The resulting policy is one of our current principal legislative priorities.

In brief, we do support S. 1992 and its equivalent as passed by the House of Representatives. We have our own wrinkle; we would also support an amendment to the act which is not included in pending legislation to permit the U.S. Attorney General to exempt annually jurisdictions covered by the preclearance provisions of section 5 where the minority population in that jurisdiction is less than 5 percent. I will not address that further today.

We do very strongly support the amended language of original section 2 that is contained in the bill, and that was fully debated and fully considered in our committee and fully debated in our house of delegates, which voted overwhelmingly for this legislation.

Because of what I take to be general agreement on most of S. 1992, I would like to confine these oral remarks to our support for a "results" test in section 2 and our opposition to an "intent" test.

I believe that we are all basically in agreement that the Voting Rights Act should be extended. I think that we all recognize that the 14th and 15th amendments were not, in themselves, sufficient to eliminate local discriminatory practices that denied minorities an equal opportunity to vote. The Congress, as the legislative policymaking branch of Government, saw the need for a law that would eliminate those local discriminatory practices. The result, of course, was the Voting Rights Act of 1965.

Section 2 of the act contains the test of the statute for determining invalid governmental practices affecting voting rights. For all the years between the enactment of the act and *Mobile* v. *Bolden*, the constitutional rule governing discrimination under the 14th and 15th amendments was uniformly interpreted by the courts in

accordance with what turned out to be the 1973 case of *White* v. *Regester*. That case declared what has been called a "results" or occasionally an "effects" test, and that interpretation was evidently in accordance with the intention of Congress in the Voting Rights Act, since Congress extended the Voting Rights act without changing the test of section 2 in 1970 and again in 1975, 2 years after the decision in *White* v. *Regester*. In fact, I understand that statements were made in Congress in 1970 and, I believe, in 1975 when the act was being extended that a "results or effects" test was incorporated in section 2 as a reading of that line of cases ending in *White* v. *Regester*.

Then in 1980 a plurality of a very much divided Supreme Court held in *Mobile* v. *Bolden* that because section 2 incorporated the words and meaning of the 15th amendment, an "intent" test had to be met. This therefore changed the Voting Rights Act as previously interpreted and reenacted by Congress. The purpose of the proposed amendment to section 2 that is now before us is therefore simply to restore the original meaning of the section, which did incorporate a "results" test.

The reason for the elaborate legal arguments now being made, I think, that the "intent" test brought back by the *Mobile* case should stay there seems to me to be that it is much harder for the plaintiffs to show discrimination under an "intent" case. It is also much easier for defendants who in fact want to discriminate to camouflage their real purpose behind all kinds of other possible motives.

But I believe that the argument over intent misses the real point. What Congress originally set out to do in the Voting Rights Act was to prevent actual discrimination. This was not a criminal statute by which a person is adjudged innocent or guilty by reason of his intent, his state of mind; this is simply a statute designed to prevent the result of voter discrimination. It is only by putting the "results" test back in the law that the purpose of the law can now be carried out in light of the *Mobile* case.

Another area of confusion appears to be over whether the amended language of section 2 would create a test requiring proportional representation among persons actually elected—a quota system. So-called disclaimer language of the amendment specifically says that a disproportionate election result "shall not, in and of itself, constitute a violation of this section." Those who find a problem with the amendment seem to read that statement as though the word "not" were omitted. If all the words are read, the statement seems perfectly clear. The *White* v. *Regester* test sought to be incorporated by the change in section 2 to reenact a "results" rule clearly would require consideration of multiple factors, many of which were mentioned by the chairman in his opening statement.

Senator KENNEDY. Just before we go on, though, Mr. Brink, how do you respond to the suggestion that, basically, if we go with an "effects" test or "results" test, we may be labeling individuals as racists without their intention of being racists? We hear that talked about; we will hear a lot more of it talked about.

Mr. BRINK. Well, my own feeling, Senator, would be that almost the contrary is so, that when we find that they had an intent to do this, we are in fact labeling them as people with a bad intent . If

we merely say that what they did happened to work out this way, and that is unfortunate, but it is illegal, I don't think that we brand them as badly as we do under the "intent" test.

Senator KENNEDY. Well, if they will say that either a statute or an ordinance or other forms of action taken by political subdivisions still have the effect of discrimination, there will be those that will say, when that is struck down, that those that were responsible, since the effect was discriminatory, are the racists within the community.

Mr. BRINK. Well, as I tried to indicate earlier, my reaction would be that it is when you find that they have had the intent of doing something discriminatory that you brand them as worse people than when you merely say that, for whatever reason, they ended up with something that in fact discriminated. You have not said anything bad about them except, perhaps, lack of judgment.

I think, Senator, that a final area of confusion has been created by some who have suggested that somehow this amendment, if passed, will be unconstitutional if it does not follow the *Mobile* test. As I noted earlier, I believe, and I think the legislative record shows, that the purpose of the act was to effect results that gave persons discriminated against in the election process more protection rather than less actual protection than the Constitution standing alone. Since it is generally agreed, I believe, that the "effects" test tends to make it easier for plaintiffs to win cases than the "intent" test and since, in all events, the statute would be read in the light of the Constitution and the record being made here, there can be no doubt, I believe, that putting back what Congress originally intended—namely, the "effects" or "results" test—would be constitutional.

The American Bar Association strongly agrees with the original purpose of Congress that an effective and workable law is needed to eradicate discrimination and opportunities to vote. We therefore urge that this committee and the Senate preserve that purpose by extending the act with the necessary amendment of section 2 to restore its original meaning.

Thank you, Senator, and members of the subcommittee.

[The prepared statement of Mr. Brink follows:]

PREPARED STATEMENT OF DAVID R. BRINK

Mr. Chairman and Members of the Subcommittee:

My name is David R. Brink and I have the honor of serving as president of the 290,000 member American Bar Association. Accompanying me today are Mr. Abelardo I. Perez, who is a member of the Association's Special Committee on Election Law and Voter Participation, and Mr. William Robinson, a member of the governing Council of the Association's Section of Individual Rights and Responsibilities. I appreciate your courtesy, Mr. Chairman, in providing me this opportunity to offer the views of the Association on various provisions of pending legislation to continue statutory protections of a fundamental constitutional right afforded by the Voting Rights Act of 1965, to strengthen that law to assure its continued effectiveness, and to make the application of the law more fair.

The first stated purpose in the American Bar Association's Constitution is to, "uphold and defend the Constitution of the United States and maintain representative government". Among the numerous activities of the Association to accomplish this purpose are those of the Special Committee on Election Law and Voter Participation, which has undertaken in-depth studies and proposed policy positions geared toward maintaining representative government--to help assure the broadest exercise of the franchise and to improve and make more equitable registration and voting procedures.

The Special Committee has proposed and the Association has adopted various policies, such as supporting the need to remove artificial barriers to registration and voting by our citizens, to overcome some of the unrepresentative effects of gerrymandering, to remove the inhibiting effects on political free speech by supporting amendment to or repeal of the equal time provision of the Communications Act of 1935. Following ratification of the 25th Amendment to the Constitution on July 5, 1971, which extended the franchise to 18-year olds, the ABA stated that "encouragement of resort to the ballot box as a prime instrument of social justice is in the public interest" and that the Association committed itself "to the promotion and support of voter registration drives and reform of voter registration procedures, to the end that the

letter and spirit of the 26th Amendment be observed". Only a few years after enactment of the landmark Voting Rights Act which we are here to discuss today, the ABA's policymaking House of Delegates declared "it to be the responsibility of individual lawyers and of the organized profession to be forceful advocates for full legal recognition of equality before the law and equality of opportunity".

The last quoted resolution was adopted during a time of great national turmoil and racial conflict among our citizens and stands for the proposition, as does the Voting Rights Act of 1965, that, "other rights, even the most basic, are illusory if the right to vote is undermined", Wesberry v. Sanders, 376 U.S. 1, 17 (1964). The factual foundation of this statement is well-known: during the nearly 100 years from ratification of the Civil War amendments to the Constitution until enactment of the Voting Rights Act in 1965, large segments of our citizenry were subjected to official acts by states and localities governing registration and voting, the result of which was the widespread denial of access to the ballot box solely because a person was black or did not speak the English language. To those persons the sacred rights of freedom of speech, of religion, of association, held scant meaning because they were denied the most basic association in a democracy--the right to associate with their fellow citizens in casting ballots to decide how this great country is governed.

The success of the Voting Rights Act of 1965 in accomplishing its stated objectives already is a matter of record, and it is fair to say that none of us here today could or would deny that as a direct result of the Act more minority citizens register to vote, more minority citizens vote, and increasing numbers of minority citizens serve as elected representatives. However, we also must know that officially-sanctioned voting discrimination is still an unhappy fact of our national life. The fact that the Act has been so successful is not a good or sufficient reason why its reach should be curbed; to the contrary, the success of the Voting Rights Act is full testament to its continued need. As de Tocqueville noted, "the further electoral rights are extended, the greater is the need for extending them; for after each concession the strength of democracy increases, and its demands increase with its

strength." The ABA concurs in this observation and is on record in support of strengthening and extending the electoral rights of all citizens.

At its Annual Meeting in New Orleans last August, the House of Delegates of the American Bar Association, by a vote of 223 to 35, adopted the following resolution:

> BE IT RESOLVED, That the American Bar Association (1) supports the extension of the Voting Rights Act of 1965 as amended; (2) supports an amendment to the Act to permit states and political subdivisions covered by the pre-clearance provisions of the Act to bail out when there has been a history of compliance with the Act, and discriminatory voting procedures and methods of election have been eliminated; (3) supports an amendment to the Act allowing the U.S. Attorney General to exempt annually certain limited Section 5 jurisdictions where the minority population is so minimal that no potential for discrimination exists; and (4) supports an amendment to the Act to prohibit any election practice which results in a denial or abridgment of the right to vote on account of race or language minority status.

This resolution was proposed jointly by the ABA's Special Committee on Election Law and Voter Participation and the Section of Individual Rights and Responsibilities. Steven J. Uhlfelder, Chairman of the Special Committee on Election Law and Voter Participation, explained in presenting this resolution that, except for the provision allowing administrative exemption of covered jurisdictions by the Attorney General, the resolution essentially followed the amended version of the Voting Rights Act extension bill approved by the House Judiciary Committee in July. This is the same bill which subsequently was passed overwhelmingly by the House of Representatives and which is before you now as S. 1992.

The only amendment offered to this resolution was a proposal to extend the pre-clearance requirement of the Voting Rights Act nationwide, and this was defeated by voice vote.

The American Bar Association's position was reached only after an extensive study of the Voting Rights Act's provisions and the need to amend certain portions of the Act. In April, 1981, our Special Committee on Election Law and Voter Participation conducted a two-day symposium on the Voting Rights Act at which a number of experts, state officials, and congressional staff on both sides of these issues made presentations and commented on the history and objectives of the Act, the bilingual voter assistance provisions added to the Act in 1975, the Section 5 pre-clearance provision, the bail-out provision, and the

purpose or intent requirement enunciated in the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). As a result of this symposium and subsequent study of proposals for amending the Act, the Special Committee issued a report which led to the passage of this resolution.

The Section 2 Amendment

The American Bar Association supports the amendment to Section 2 of the Act which is contained in S. 1992 to prohibit any election practice which results in a denial or abridgment of the right to vote on account of race or language minority status.

In City of Mobile v. Bolden, 446 U.S. 55 (1980), black plaintiffs asserted that the City of Mobile, Alabama's at-large election system for the City Commission diluted their voting strength in violation of Section 2 of the Act and the Fourteenth and Fifteenth Amendments. A plurality of the Supreme Court found Section 2 to be basically a restatement of the Fifteenth Amendment, which required the showing of purposeful discrimination. Plaintiffs had failed to carry the burden of showing, the plurality held, that the at-large election system had been established for the purpose of diluting the voting power of black voters. The Court also rejected the Fourteenth Amendment challenge to the at-large system, deciding that a cause of action under the "equal protection" clause of that Amendment required a showing of intent or purpose to discriminate.

After extensive study, the ABA Special Committee on Election Law and Voter Participation concluded that the burden of proving "intent to discriminate" in actions brought pursuant to Section 2 of the Voting Rights Act is almost impossible to carry and is significantly different from the legal standard governing voting rights cases previously expressed by the Supreme Court in White v. Regester, 412 U.S. 755 (1973). In White, the Special Committee noted, the Supreme Court ruled that plaintiffs' burden should be to show that

> the political process . . . was not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

The Special Committee therefore supported an amendment to the Voting Rights

Act that would add a test to Section 2 similar to that set forth in White v. Regester.

The House Judiciary Committee Report issued in support of the House-passed bill indicates that the "results" standard of the Section 2 amendment is intended to incorporate this White v. Regester standard. Its purpose is to restore the legal standard in effect prior to the Supreme Court's Bolden decision which focused on the results and consequences of a discriminatory voting law, rather than on the intent or motivation behind it.

Under this amendment, the Supreme Court's interpretation of the proper constitutional standard would be left intact. Only the Section 2 statutory standard would be changed to reinstate the prior legal standard.

Some Administration officials have contended that the Bolden decision signaled no change in the law, and that proof of specific discriminatory intent has always been required to establish a constitutional voting rights violation. This interpretation is simply incorrect.

In White v. Regester, the Supreme Court held unconstitutional a Texas legislative reapportionment plan which employed at-large voting in multi-member legislative districts in two counties in Texas. The Court found that under the "totality of the circumstances" black and Mexican-American voters had less opportunity than did other residents to "participate in the political processes and to elect legislators of their choice." The focus of the Court's inquiry was on the actual impact and results of the challenged election scheme, rather than on the intent or motivation behind it.

The Court in Bolden held that a voting law which is racially neutral on its face violates Federal voting rights guarantees "only if motivated by a discriminatory purpose" (446 U-S. at 62) and specifically rejected the evidentiary factors accepted by the Court in White v. Regester to prove a constitutional violation (446 U.S. at 72-74). The Court in Bolden, then, in effect overruled White v. Regester and placed on minority voters a much heavier burden of proof than previously was required.

Others have claimed that this Bolden intent standard requires no more proof than is routinely accepted by courts and juries as proof of intent in tort and criminal cases. In my opinion, this voting rights intent requirement is much more difficult than that normally applied in tort or criminal cases in which intent is an issue. In these types of cases, where there is no direct evidence of intent, intent normally may be inferred by looking at the objective facts and circumstances of the alleged tort or criminal act, including the results of the defendant's actions, past patterns of conduct, and whether the wrongful act is the inevitable and foreseeable consequence of the defendant's actions.

In Bolden, although the Supreme Court held that these factors may be considered, the Court held that such objective proof "fell far short of showing" intent (446 U.S. at 70), is "relevant only as the most tenuous and circumstantial evidence" (446 U.S. at 74), is "of limited help" (id.), and is "far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters" (id.). The plurality decision in Bolden has been criticized by the law reviews on this very point:

> The plurality's treatment is disappointing because it refused to draw inferences that are reasonable in light of the Court's intent decisions since Washington v. Davis.1/

This intent standard requires the courts to undertake the difficult task of looking to see whether a voting law was passed with an intent or purpose to discriminate, rather than whether it in fact is discriminatory against minorities. In its application, this intent test would enable localities to continue to cling to discriminatory voting laws which deny black and Hispanic voters equal access to the political process simply because the proof of discriminatory intent or motivation behind these laws may be insufficient to satisfy this stringent test.

Some have expressed the concern that this legislation might create a right to proportional representation by race or a racial quota system. But the plain words of the proposed Section 2 amendment state:

> The fact that members of a minority group have

1/ Note, The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 147 (1980).

> not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

I am convinced that this statutory language is sufficient to dispel any implication that the "results" standard could be interpreted to create a right to proportional representation by race or racial quotas.

As the Supreme Court has said: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). To ensure that the basic right to vote is protected from invidious discrimination, the American Bar Association supports the amendment to Section 2 to prohibit election procedures which result in discrimination.

Extension of the Pre-clearance Requirement and Bailout

The American Bar Association supports the extension of the present enforcement provisions of the Act, including the Section 5 pre-clearance requirement, and the liberalized bailout provisions of S. 1992.

The continued need for the protections of the pre-clearance requirement of the Voting Rights Act has been clearly established. Since 1965, the Attorney General has objected pursuant to the Section 5 pre-clearance requirement to more than 800 discriminatory voting law changes, and more than half of those changes have been objected to since the Act was last extended in 1975. These figures show that racial and language minority discrimination affecting the right to vote persists in jurisdictions covered by the Section 5 pre-clearance requirement, and even seems to have intensified in the past seven years.

The bailout provisions of S. 1992 would permit covered jurisdictions, for the first time, to exempt themselves from this pre-clearance requirement by showing the District Court for the District of Columbia that there has been a history of compliance with the Act, and that all discriminatory voting procedures and methods of election have been eliminated. This provides an important and needed incentive to covered jurisdictions to comply with all the requirements of the Voting Rights act and to open up their registration and election processes to equal participation by all citizens. For the most part, these bailout

standards simply require covered jurisdictions to do no more than obey the law and to provide equal opportunities for electoral participation to minorities.

Administrative Exemption

The American Bar Association supports an amendment to the Voting Righs Act which is not in S. 1992. This proposed amendment would permit the Attorney General administratively to exempt certain limited covered jurisdictions where the minority population is so minimal that no potential for discrimination exists.

This amendment would permit political entities within covered jurisdictions which cannot bail out by themselves to be exempted from the pre-clearance requirement by the Attorney General. Under the bailout amendment proposed in S. 1992, only states and counties are eligible to bail out, yet there may be political entities within these states and counties which must continue to pre-clear all voting law changes even though the potential for discrimination is slight because there are very few or no minority voters within their political boundaries.

For example, all of Texas is covered by the pre-clearance requirement, and thus, all political entities in Texas must submit their voting law changes for Federal review. However, in some Texas political entities there are no minorities, and consequently no present danger of discrimination. Pre-clearance is merely pro forma and the Attorney General routinely issues "no objection" letters to these jurisdictions.

The ABA Special Committee concluded that this practice does not further the cause of justice and results in unnecessary submissions and review by the Department of Justice. The Attorney General should be allowed to exempt these political entities from the pre-clearance requirement by administrative action. Upon application by the covered entity to the Attorney General, such exemption would be issued only when the Attorney General concludes, based upon Census Bureau certification, that the number of minority residents in that entity is so minimal that no potential for discrimination exists, i.e., that the minority population is less than five percent. The exemption could be for a set number of years or for the duration of the coverage of the Act. The Attorney General

should be authorized to rescind this exemption if he determines that the facts supporting the original exemption have changed materially.

The Special Committee recognized that these administrative exemption proceedings will add to the administrative burden of the Justice Department in enforcing the Act, and therefore Congress would be required to make additional appropriations to the Justice Department so that the Administration of this exemption process would not interfere with the Attorney General's other enforcement responsibilities under the Act.

Conclusion

For almost a century, our jurisprudence has recognized that "the political franchise of voting is . . . a fundamental political right, because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). The Voting Rights Act has played a critical role in preventing discrimination and nullification of the minority vote in covered states and throughout the nation. The need for the law remains. The Voting Rights Act must be renewed and strengthened to ensure that minority citizens may register and vote without discrimination and to guarantee that every American will have a fair and equal opportunity to participate in the democratic process.

Senator KENNEDY. Could I just ask you, Mr. Brink, to address the point that has been made by Mr. Dershowitz in his earlier presentation about his concern whether this provision in section 2 adequately follows the *White* v. *Regester* case or whether it has to be further clarified along the lines that were mentioned by Mr. Dershowitz. Do you think that is necessary? Generally, what is your reaction to it?

Mr. BRINK. My own reaction, Senator, is that since the *White* v. *Regester* test is a test that takes into account multiple factors, it would be almost impossible to codify those in a way that would be fair. It is customary for courts to take a general standard and to interpret it. I think we have a body of interpretational law in the various cases which culminated in *White* v. *Regester*, and I think this committee and, I assume, the Senate as a whole, will make a record that will show that they intended to incorporate that same kind of an approach in the word used in the amendment. I suspect that task of codifying everything under that word would be an impossible one.

Senator KENNEDY. As I understand it, both the witnesses support the *White* v. *Regester*. Do you think that can be clarified sufficiently in the report language or legislative history?

Mr. BRINK. I think that the report and legislative history will be most helpful. The two are tied together, yes.

Senator KENNEDY. One can, I think, easily get mired down in obscure law review debates about past cases. Of course, there is an

overwhelming track record under the *White* v. *Regester* standard which our bill adopts. It is a reassuring one because it shows there is no quota or proportional requirement, but it seems that the real question before us is what policy choice Congress will make now and for the future.

I would like to just pursue that for a moment because, to me, it is what this hearing really is ultimately about. I made a brief reference to at least what I consider to be the issue before this committee, and it will be before the Senate.

Mr. Flemming, in the Civil Rights Commission, pointed this out, I think, quite clearly when he said the Senate is at a crossroads on voting rights; the Congress has the power and the duty to eliminate current confusion about the standards for judging the fairness of election systems. If Congress travels the "intent" path, it would lead to fruitless inquiries into the minds of State and local legislators and continuing judicial confusion over how to prove intent. This path will leave minorities in a position where they would find it virtually impossible to obtain judicial relief from indefensible situations.

On the other hand, if Congress travels the results path, it will contribute to the promulgation of realistic standards that can assure minorities the opportunity for equal participation in our Nation's political process and help, finally, to fulfill the long-delayed promise of the 13th, 14th and 15th amendments.

Your reaction?

Mr. BRINK. Well, I agree with the comment that the standard is one that can be applied, that there are precedents to apply it. My view, as I have stated, is that the test has always been an effects or results test and was so understood by Congress at the time of the extensions in the past, and that remained so until 1980 when the *Mobile* case really changed that.

It seems to me that this is not the time, and it should not be the action of the Senate or of the Congress, to back away now from the commitment over a number of years to apply what was an effects or results test.

Senator KENNEDY. Just finally, Mr. Brink, just on the process of the decisionmaking by the Bar Association, you had several committees, as I understand it, look at this in depth, and there was a report to the House of Delegates and then, after some floor debate, the resolution was adopted by the delegates. Is that correct?

Mr. BRINK. That is correct. The committee primarily charged is the, so that I give it the correct name, is the Special Committee on Election Law and Voter Participation. Many other groups had that report, the careful work done in the study by that committee that resulted in the report that they made and which was adopted without change.

Many other groups within our Association—for example, the Section of Individual Rights and Responsibilities—concurred in that. There was floor debate. The result, however, was overwhelmingly in favor of the resolution as I have stated it.

Senator KENNEDY. We have heard from the administration some questioning about this process that was followed by the Bar Association. I think, when the Department testifies again on Monday, they will probably raise this, so it is important that the position

that has been expressed today is the considered position of the ABA.

Mr. BRINK. Perhaps I should call on my colleagues here who represent the two groups that, over a period of months, did the spadework on that, but I do not believe that we could have possibly had a more thorough and in-depth analysis by experts before we took that position.

Senator KENNEDY. Just very briefly, do either one of you want to just comment on that?

Mr. PEREZ. No, sir.

Mr. ROBINSON. No.

Senator KENNEDY. No? Fine.

Mr. Brink, the Attorney General has said that the results test of *White* v. *Regester,* which our bill and the House bill adopt, is a radical change in the law, and that the intent test has always been the legal standard, even before the Mobile, Ala., case, the *Mobile* case. I take it you do not agree with that reading of the legal history.

Mr. BRINK. I do not follow that argument. It seems to me that the *White* v. *Regester* line was that specifically noted by the Congress in connection with reenactment of this act, and they thereby expressed their approval of that line of cases and that standard.

Senator KENNEDY. Mr. Dershowitz, on the section 5 and the bilingual provisions, do you support those provisions?

Mr. DERSHOWITZ. Yes, we do.

Senator KENNEDY. Extension of those provisions?

Mr. DERSHOWITZ. Extension of those provisions.

Senator KENNEDY. I want to thank you very much. We will make sure your statements in their entirety are included in the record, and I am grateful for your appearance.

Mr. BRINK. Thank you very much, Senator.

Senator KENNEDY. We will ask Mr. Torres, Arnoldo Torres, League of United Latin American Citizens, and I think Mr. Coleman as well if he would come up at the same time, Charles Coleman, the county attorney for Edgefield County, South Carolina.

Mr. Torres, we are glad to have you back here before the committee. Would you please proceed.

STATEMENT OF ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Mr. TORRES. I do not intend to read the whole testimony that we have submitted. It is obviously in for the record.

I am here today representing Mr. Tony Bonilla who, unfortunately, was unable to attend this session. Mr. Bonilla is the national president of the League of United Latin American Citizens, the country's oldest and largest Hispanic organization, and I am the national executive director.

We are honored for the opportunity to come before you to discuss, as many have referred to it, perhaps the most important vehicle which can assure the Hispanic community's full participation into mainstream American society.

We feel that perhaps the ability and the guarantee to be involved in the electoral process of this country does not only secure

meaningful political access for Hispanics but all that is derived from such access.

Before we get into wanting to respond to some of the more pertinent issues that are being discussed today, and have throughout the debate in this subcommittee, we would like to simply clarify for the record a statement that was made by the Governor of Texas on February 4 in this subcommittee, in which he indicated that he had met with an unprecedented coalition of civil rights groups in Texas, and we quote, "for the purpose of collectively and unequivocally endorsing extension of the Voting Rights Act as it currently is constituted and applied to Texas."

Mr. Clements indicated that the State Director of LULAC in Texas was wholeheartedly in support. We would like to bring to the attention and to clarify for the record the fact that, unfortunately, Mr. Clements made another error in his long line of errors as the Governor of Texas by misrepresenting the position of our organization.

We have submitted for the record a resolution that was passed on June 20, 1981, in Albuquerque, N. Mex. The National Assembly of our organization passed it. The National Assembly of LULAC is the policymaking body of the organization, and the decisions that it reaches are binding.

We indicate for the record that the resolution reads as follows:

> Therefore be it resolved that the members of LULAC do hereby urge the U. S. Congress to reauthorize the special provisions of the Voting Rights Act for 10 years, the minority language provisions for 7 years, and to amend section 2 to clarify standards of evidence in voting discrimination challenges by incorporating a discriminatory results test.

The implication was made by the Governor that we were supporting the existing law without that qualifying amendment.

Today we would like to begin to respond to a couple of the issues with regard to proportional representation. The Voting Rights Act, as has been stated over and over again, generally prohibits practices which deny or abridge the right to vote. S. 1992 provides clarifying language so as to explicitly state that any practice which results in such denial or abridgment is prohibited.

Contrary to the contention of the administration and a handful of Members of Congress, this language, under no circumstances, would create, nor intend there to be, proportional representation by race or racial quotas. These contentions have been refuted quite thoroughly and consistently through reviews and legal analysis of vote dilution litigation.

During these hearings, you have heard testimony presented which summarizes 23 vote dilution cases decided by Federal courts prior to 1978. The testimony indicated that, after an examination of these cases:

One, the legal standard for virtually all vote dilution decisions prior to 1978 was focused on results of the challenged voting law.

Two, under this standard, proportional representation was never required and was rejected when raised.

Three, under this results standard, at-large elections were not considered an automatic violation, thus invalidating them.

Four, the result standard did not automatically ensure minority voters' satisfactory changes, for of the 23 cases analyzed, defendants prevailed in more than half.

And, five, the results test applied by the courts did not merely examine a narrow perspective of constitutionality but rather was fairly comprehensive in considering various factors which did not always result in finding at-large voting systems unconstitutional.

To deviate somewhat from the written text, we have found the discussion today very interesting because there appears to be a very strong obsession with perhaps reading more into the proposed legislation—specifically, this amendment—than there really is. We have not read any proportional representation into the proposed amendments to section 2.

Furthermore, we would not be in support of a proportional representation type of set up because we feel that it goes against the integrity of the law and the basis of the Voting Rights Act as previously passed in 1965 and 1975.

The most important thing of the Voting Rights Act is that it is attempting to do, as Mr. Archibald Cox indicated today earlier, and we quote, "that the Act is an essential part of opening up governmental institutions to all citizens and actively involving more citizens in self-government."

For the Hispanic community, we are very concerned about this because, on one hand, we get confusing direction. They want us to speak English, to become Americans, yet there is this concern and reluctance to grant us the full right to vote.

We have experienced many elections in which at-large elections have been challenged. We have not had the ward districts set up the way we would like but, more importantly, the results of the challenge have brought about more sensitivity through the at-large system which has not resulted in proportional representation.

Regardless of what the results are, the intent and the purpose is to try to sensitize and open up the electoral process much more than it was prior to the challenge being made.

We would, very briefly, like to deal at this time with the liberalized bail-out provisions which include the 10-year eligibility test. We feel very strongly that these eligibility tests, if they were not established, would create some significant problems of allowing certain jurisdictions to bail out from coverage of section 5.

The positive action requirements—supposedly, the good-faith efforts—we feel can measure in a better sense the commitment and efforts to institutionalize change in the electoral process of said jurisdictions. We wholeheartedly support this section and recognize, as has been testified, that of approximately 800 counties in the covered States, one-fourth would be eligible to bailout by 1984; the remaining three-quarters, by 1992.

To the criticism that this mechanism would encourage frivolous lawsuits, we would respond that that is a very ridiculous contention. Filing objections is an extremely serious undertaking which requires some significant time and resources. At the present time, both are in scarcity.

Furthermore, it is not our intention whatsoever to abuse the law in such a way which would damage its integrity.

In closing, we underscore our support for passage of S. 1992. While we understand that there is a very strong concern to work out the kinks and the details of whether we have language that is effects standards or intent, maybe we ought to play with "effective intent" or "intentional effect."

Regardless of the language that is used, I know that it is very important, but I think that perhaps today we have missed the fact that the results are the things that we are the most concerned with. Our community perhaps has the greatest investment here; 47.7 percent of our population is below the age of 21 years old. We want to participate in this American society, and unless we have that vote and unless we have an open electoral process, we are going to be further left out, and the serious problems in the society will only worsen as opposed to being resolved.

We would be more than happy to respond to any comments or questions, and we again appreciate the opportunity to come before you on this very, very important issue.

Senator KENNEDY. Thank you, Mr. Torres.

As I understand, you are concerned not only about the extension of the bilingual provisions but also about the clarification of section 2 and the bailout provision. I gather that from your testimony. I think it is of importance because there have been some representations that you addressed in the earlier part of your testimony that you were not as concerned about those other provisions. I just wanted to hear you on that.

Mr. TORRES. The bilingual provisions are very important, but without section 2 and section 5, the very substantive changes and progress that we have been able to make would obviously not have been made.

So we look at the legislation as an overall package. It is all intertwined. Without one, the other is not going to be able to provide the benefits that we are used to getting now.

Senator KENNEDY. In your review of the cases, have you found any cases which require proportional representation under the *White* v. *Regester* standard?

Mr. TORRES. Reviewing the summary of the cases that were submitted in previous testimony here, as we indicate in point 2, proportional representation was never required and was rejected. Specifically, it was repudiated when the issue was raised to seek proportional representation. It was struck down by the court.

Senator KENNEDY. Thank you very much.

Mr. TORRES. Thank you.

[The prepared statement of Mr. Torres follows:]

PREPARED STATEMENT OF ARNOLDO S. TORRES

GOOD MORNING, MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE ON THE CONSTITUTION. I AM ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECT OF THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), THIS COUNTRY'S OLDEST AND LARGEST HISPANIC ORGANIZATION FOUNDED IN 1929 WITH OVER 100,000 MEMBERS ORGANIZED IN 44 STATES OF THE UNION. MR. TONY BONILLA, NATIONAL PRESIDENT OF LULAC WAS UNABLE TO PRESENT THIS TESTIMONY DUE TO HIS LEGAL PRACTICE CASE LOAD.

WE ARE HONORED AND APPRECIATIVE OF THE OPPORTUNITY PROVIDED US BY THIS SUBCOMMITTEE AND SPECIFICALLY SENATOR DECONCINI FOR MAKING IT POSSIBLE TO COME BEFORE YOU TO DISCUSS OUR VIEWS ON THE EXTENSION OF THE VOTING RIGHTS ACT (VRA). LULAC CONSIDERS THE VRA PERHAPS THE MOST IMPORTANT VEHICLE WHICH CAN ASSURE OUR FULL PARTICIPATION INTO MAINSTREAM AMERICAN SOCIETY. THE ABILITY AND GUARANTEE TO BE INVOLVED IN THE ELECTORAL PROCESS OF THIS COUNTRY DOES NOT ONLY SECURE MEANINGFUL POLITICAL ACCESS FOR HISPANICS, BUT ALL THAT IS DERIVED FROM SUCH ACCESS.

BEFORE WE BEGIN TO RESPOND TO SPECIFIC ISSUES REGARDING S. 1992, WE WOULD LIKE TO CLARIFY PREVIOUS TESTIMONY PRESENTED WHICH HAS MISREPRESENTED THE LULAC POSITION ON THE EXTENSION OF THE VOTING RIGHTS ACT. ON FEBRUARY 4, 1982, TEXAS GOVERNOR WILLIAM CLEMENTS TESTIFIED THAT HE HAD MET WITH AN "UNPRECEDENTED COALITION" OF CIVIL RIGHTS GROUPS IN TEXAS "FOR THE PURPOSE OF COLLECTIVELY AND UNEQUIVOCALLY ENDORSING EXTENSION OF THE VOTING RIGHTS ACT AS IT IS CURRENTLY CONSTITUTED AND APPLIED TO TEXAS." IN ADDITION, GOVERNOR CLEMENTS SPECIFICALLY QUOTED A LULAC STATE DIRECTOR AS SUPPORTING THIS POSITION. SUBSEQUENTLY, MANY OF THE ORGANIZATIONS ORIGINALLY INVOLVED IN THIS MEETING

ANNOUNCED THAT THEIR COMMENTS AND SUPPORT HAD BEEN MISREPRESENTED BY GOVERNOR CLEMENTS AND THAT THEY WERE SUPPORTING S. 1992 AS THE CORRECT VERSION TO EXTEND THE VOTING RIGHTS ACT.

TODAY WE WOULD LIKE TO PROVIDE FOR THE MEMBERS OF THIS SUBCOMMITTEE AND THE RECORD, A CLEAR UNDERSTANDING OF THE POSITION OF THE TOTAL LULAC ORGANIZATION. FIRST, WE REFER TO THE LULAC RESOLUTION (SEE ATTACHMENT A) ADOPTED JUNE 20, 1981 AT THE LULAC NATIONAL CONVENTION IN ALBUQUERQUE, NEW MEXICO. THE LULAC GENERAL ASSEMBLY WHICH IS COMPRISED OF THE VOTING DELEGATES AT THE CONVENTION ADOPTED THIS RESOLUTION WHICH RESOLVES THAT..."THE MEMBERS OF LULAC, DO HEREBY URGE THE UNITED STATES CONGRESS TO REAUTHORIZE THE SPECIAL PROVISIONS OF THE VOTING RIGHTS ACT FOR TEN (10) YEARS, THE MINORITY LANGUAGE PROVISIONS FOR SEVEN (7) YEARS, AND TO AMEND SECTION 2 TO CLARIFY STANDARDS OF EVIDENCE IN VOTING DISCRIMINATION CHALLENGES BY INCORPORATING A DISCRIMINATORY RESULTS TEST." UNDER THE CONSTITUTION OF THE LULAC ORGANIZATION THE GENERAL ASSEMBLY IS THE MAJOR POLICY MAKING BODY WHOSE ACTIONS ESTABLISH THE POSITION OF THE TOTAL MEMBERSHIP. IN ESSENCE, NO STATE DIRECTOR OR NATIONAL OFFICER OF THE ORGANIZATION CAN ALTER POSITIONS TAKEN BY THE NATIONAL ASSEMBLY. THEREFORE, THE OFFICIAL LULAC POSITION CONCERNING THE VOTING RIGHTS ACT DOES NOT COINCIDE WITH THAT OF GOVERNOR CLEMENTS' POSITION OF AN "EXTENSION...AS PRESENTLY CONSTITUTED AND APPLIED TO TEXAS." OUR POSITION CLEARLY IS CONSISTENT WITH THE CIVIL RIGHTS COMMUNITY IN SUPPORT OF S. 1992. FURTHERMORE, ON OCTOBER 9, 1982 IN WASHINGTON, D.C. AT THE LULAC EXECUTIVE BOARD MEETING WE UNANIMOUSLY APPROVED SUPPORT OF H.R. 3112 AS PASSED ON THE HOUSE FLOOR OCTOBER 5, 1982 WHICH WAS INTRODUCED BY SENATORS EDWARD KENNEDY AND CHARLES McMATHIAS AS S. 1992.

WE WOULD EMPHASIZE THAT LULAC AND IT'S TOTAL MEMBERSHIP

IS FIRMLY COMMITTED TO S. 1992 AND HAS NEVER WAVERED IN IT'S SUPPORT AND BROTHERHOOD WITH OTHER CIVIL RIGHTS GROUPS CALLING FOR THE SAME.

RECOGNIZING THAT THE HISPANIC COMMUNITY IS THE FASTEST GROWING POPULATION IN THE COUNTRY AS WELL AS THE YOUNGEST, CLEARLY INDICATES THAT THE FUTURE OF THE VOTING RIGHTS ACT IS OF PARAMOUNT CONCERN TO US. WE HAVE A TREMENDOUS INVESTMENT IN VIEW OF THE FACT THAT 47.7% OF OUR POPULATION IS UNDER 21 YEARS OF AGE. IT IS THEREFORE IMPERATIVE THAT THE MOST OPEN SYSTEM FOR VOTING BE MADE AVAILABLE TO OUR YOUNG COMMUNITY TO ENCOURAGE AND INSURE THEIR PARTICIPATION IN THE ELECTORAL PROCESS. WE FIRMLY BELIEVE THAT THE MOST EFFECTIVE MECHANISM AVAILABLE IS THAT WHICH S. 1992 IS PROPOSING.

PERHAPS AN ASPECT OF THIS DEBATE WHICH HAS NOT SURFACED ENOUGH FROM OUR COMMUNITY IS OUR FRUSTRATION AND AT TIMES, OUR CONFUSTION FOR THE ATTACKS MADE AGAINST S. 1992 AS SUPPOSEDLY GOING TOO FAR AND BEING UNCONSTITUTIONAL. WE IN THE HISPANIC COMMUNITY ARE CONFRONTED BY CONFLICTING MESSAGES BY CERTAIN MEMBERS OF CONGRESS WHO, ON ONE HAND DEMAND OF US AS AMERICANS THAT WE SPEAK ENGLISH ONLY, YET ON THE OTHER HAND ARE RELUCTANT TO GRANT US THE FULL RIGHTS OF AMERICAN CITIZENSHIP CONCERNING VOTING RIGHTS. THIS CONFLICT RAISES QUESTIONS AS TO THE MOTIVES OF THOSE WHO ARE ADAMANT AND CONSISTENT IN THEIR CRITICISM OF S. 1992. IF THOSE WHO CRITICIZE THIS LEGISLATION ARE TO BE BELIEVED IN THEIR CONCERN FOR GUARANTEEING THE RIGHT TO VOTE, THEY SHOULD SERIOUSLY REEXAMINE THEIR CONVICTIONS. IF WE RECOGNIZE THAT PROBLEMS CONTINUE TO EXIST WITH THE VOTING RIGHTS OF MINORITIES WE SHOULD BE RESOLVED IN OUR COMMITMENT TO OVERCOMING THOSE BARRIERS AND OBSTACLES. HOWEVER WE FIND A RELUCTANCE, BY THOSE VERY

SAME PUBLIC SUPPORTERS OF THE CONCEPT OF VOTING RIGHTS, TO ENDORSE S. 1992 AND WORK FOR ITS PASSAGE. THIS IS WHERE THE CONFUSION EXISTS WHICH AGAIN HAS MANY OF US ASKING OURSELVES ABOUT THE MOTIVES BEHIND SUCH OPPOSITION AND RELUCTANCE.

WE WOULD LIKE TO TURN OUR ATTENTION TO SECTION 2 OF THE VOTING RIGHTS ACT WHICH GENERALLY PROHIBITS PRACTICES WHICH DENY OR ABRIDGE THE RIGHT TO VOTE. S.1992 PROVIDES CLARIFYING LANGUAGE TO SECTION 2 SO TO EXPLICITY STATE THAT ANY PRACTICE WHICH RESULTS IN SUCH DENIAL OR ABRIDGEMENT IS PROHIBITED. CONTRARY TO THE CONTENTION OF THE ADMINISTRATION AND A HANDFUL OF MEMBERS OF CONGRESS, THIS LANGUAGE UNDER NO CIRCUMSTANCES WOULD CREATE NOR INTEND THERE TO BE PROPORTIONAL REPRESENTATION BY RACE OR RACIAL QUOTAS. THESE CONTENTIONS HAVE BEEN REFUTED QUITE THOROUGHLY AND CONSISTENTLY THROUGH REVIEWS AND LEGAL ANALYSIS OF VOTE DILUTION LITIGATION. DURING THESE HEARINGS THIS SUBCOMMITTEE WAS PRESENTED WITH SUMMARIES OF 23 VOTE DILUTION CASES DECIDED BY FEDERAL COURTS PRIOR TO 1978. THE TESTIMONY INDICATED THAT AFTER AN EXAMINATION OF THESE CASES:

1. THE LEGAL STANDARD FOR VIRTUALLY ALL VOTE DILUTION DECISIONS PRIOR TO 1978 WAS FOCUSED ON THE RESULTS OF THE CHALLENGED VOTING LAW;
2. UNDER THIS STANDARD, PROPORTIONAL REPRESENTATION WAS NEVER REQUIRED AND WAS REJECTED WHEN RAISED;
3. UNDER THIS RESULTS STANDARD, AT-LARGE ELECTIONS WERE NOT CONSIDERED AN AUTOMATIC VIOLATION, THUS INVALIDATING THEM;
4. RESULT STANDARD DID NOT AUTOMATICALLY ENSURE MINORITY VOTERS' SATISFACTORY CHANGES, FOR OF THE 23 CASES ANALYZED, DEFENDANTS PREVAILED IN MORE THAN HALF; AND

5. THE RESULTS TEST APPLIED BY THE COURTS DID NOT MERELY EXAMINE A NARROW PERSPECTIVE OF CONSTITUTIONALITY BUT RATHER WAS FAIRLY COMPREHENSIVE IN CONSIDERING VARIOUS FACTORS WHICH DID NOT ALWAYS RESULT IN FINDING AT-LARGE VOTING SYSTEMS UNCONSTITUTIONAL.

THIS REVIEW OF THE FACTS WOULD APPEAR TO CLEARLY ADDRESS AND REMOVE ANY DOUBTS OR CONTENTIONS THAT A RESULTS STANDARD WOULD REQUIRE PROPORTIONAL REPRESENTATION. WE ARE DISMAYED WHEN WE HEAR OPPONENTS OF SECTION 2-S. 1992 SUPPORT THE VOTING RIGHTS ACT THEN TURN AROUND AND PLEDGE WITH SPECIFIC DATA OR ANALYSIS THAT A RESULTS STANDARD WOULD REQUIRE PROPORTIONAL REPRESENTATION. TESTIMONY SUCH AS THE ONE WE ILLUSTRATE REFLECT A THOROUGH ANALYSIS OF SUCH CONTENTIONS AND CONCLUDE THE CONTRARY.

WITH REGARDS TO THE LIBERALIZED BAIL-OUT PROVISIONS (SECTION 5), WHICH INCLUDE THE TEN-YEAR ELIGIBILITY TESTS AND REQUIREMENT OF POSITIVE ACTIONS TO ELIMINATE DISCRIMINATION, WE FIRMLY BELIEVE THAT THIS MIX IS COMPREHENSIVE AND PROVIDES FLEXIBILITY WHICH WILL ENTICE COVERED JURISDICTIONS TO BAIL-OUT. THE ELIGIBILITY TESTS REQUIRE NO LITERACY TESTS; NO COURT JUDGEMENTS OF VOTING DISCRIMINATION; NO FEDERAL EXAMINERS ASSIGNED; AND NO OBJECTIONS TO SUBMISSIONS CLEARLY ESTABLISH THE TYPE OF STANDARD WHICH SHOULD APPLY TO JURISDICTIONS WISHING TO BAIL-OUT. IF THEY ARE UNABLE TO MEET THIS CRITERIA AND ARE IN VIOLATION OF ANY OF THOSE STATED, SURELY IT WOULD NOT BE IN THE BEST INTERESTS OF THE AFFECTED GROUP TO HAVE JURISDICTIONS REMOVED FROM SECTION 5 COVERAGE. THE POSITIVE ACTION REQUIREMENTS ARE POSITIVE GOOD-FAITH

EFFORTS WHICH CAN BEETER MEASURE THE COMMITMENT AND EFFORTS TO INSTITUTIONALIZE CHANGE IN THE ELECTORAL PROCESS OF JURISDICTIONS. WE WHOLEHEARTEDLY SUPPORT THIS SECTION AND RECOGNIZE, AS HAS BEEN TESTIFIED, THAT OF APPROXIMATELY 800 COUNTIES IN THE COVERED STATES, ONE-FOURTH WOULD BE ELIGIBLE TO BAIL OUT BY 1984 WITH THE REMAINING THREE-QUARTERS BY 1992.

WE WOULD HASTEN TO ADD THAT WE DO NOT ENVISION, NOR WOULD WE RECOMMEND THAT FRIVOLOUS LAWSUITS BE FILED IN ORDER TO PREVENT BAIL-OUT. FILING OF OBJECTION IS A SERIOUS UNDERTAKING WHICH REQUIRES TIME AND RESOURCES, BOTH IN SCARCITY AT THIS TIME. FURTHERMORE, IT IS NOT OUR INTENTION WHATSOEVER TO ABUSE THE LAW IN SUCH A WAY WHICH WOULD DAMAGE ITS INTEGRITY.

IN CLOSING, WE WISH TO UNDERSCORE OUR SUPPORT FOR S. 1992 AND THANK THE SUBCOMMITTEE FOR ALLOWING US TO TESTIFY. WE LEAVE YOU WITH THE INTRODUCTION OF THE LULAC CODE WRITTEN IN 1929 WHICH ILLUSTRATES OUR DESIRE THEN AND NOW TO BE RESPECTED AND TREATED AS FIRST CLASS CITIZENS WITH VOTING RIGHTS.

> "RESPECT YOU CITIZENSHIP AND PRESERVE IT;
> HONOR YOUR COUNTRY, MAINTAIN ITS TRADITION IN
> THE SPIRIT OF ITS CITIZENS AND EMBODY YOURSELF
> INTO ITS CULTURE AND CIVILIZATION."

League of United Latin American Citizens

Office of National President
TONY BONILLA

RESOLUTION

WHEREAS, THE LEAGUE OF UNITED LATIN AMERICAN CIZITNS (LULAC) supports the purpose of fosterin and enlarging the opportunities for training, education, civil rights, job opportunities, housing, economic development, and welfare of all Hispanic citizens of the United States; and

WHEREAS, reauthorization of the Voting Rights Act of 1965 as amended is presently pending before Congress; ; and

WHEREAS, the Voting Rights Act is among the most effective civil rights legislation ever enacted in the United States, bringing a dramatic increase in the participation of Blacks and Hispanics in state, local and federal elections; ; and

WHEREAS, the Voting Rights act has afforded minorities protection from manipulation of local voting laws that unfairly dilute their voting strength; ; and

WHEREAS, bilingual elections (i.e. bilingual printed matter and oral assistance) mandated by the Voting Rights Act have in effect extended the franchise to many non-English speaking U.S. Citizens who would otherwise be denied their constitutionally guaranteed right to vote ; and

WHEREAS, invalidation or dilution of the Voting Rights Act would eliminate the important yet frapile progress that has been made by minorities in exercising their rights and would deter much needed continued progress: ; and,

WHEREAS, LULAC is committed to the belief that the foundation of a representative democracy is broad participation by all its citizens - including minorities - at each and every level of government; ; and,

THEREFORE, BE IT RESOLVED THAT WE, the members of LULAC, do hereby urge the United States Congress to reauthorize the special provisions of the Voting Rights Act for ten years, the minority language provisions for seven years, and to amend Section 2 to clarify standards of evidence in voting discrimination challenges by incorporating a discriminatory results test.

SUBMITTED BY: LULAC Council 272 - Leonard Chaires, Delegate

SIGNED BY Leonard Chaires

Unanimously approved by vot of the Delegates present at the 52nd Annual LULAC National Convention held in Albuquerque, New Mexico on the 20th day of June, 1981.

IN WITNESS WHEREOF, I have hereunto set my hand for the LEAGUE OF UNITED LATIN AMERICAN CITIZENS this 27th day of June, 1981.

TONY BONILLA, LULAC NATIONAL PRESIDENT

ATTESTED TO:

HENRY R. RIOS,
LULAC NATIONAL SECRETARY

Senator KENNEDY. Mr. Coleman?
Mr. COLEMAN. Thank you.

STATEMENT OF CHARLES W. COLEMAN, COUNTY ATTORNEY, EDGEFIELD COUNTY, S.C.

Mr. COLEMAN. Mr. Chairman, members of the subcommittee, I appreciate the opportunity of being here today and of testifying on the Voting Rights Act.

As noted, I am the county attorney, and I think it is an honor to appear here.

I would like to call the committee's attention to the fact that there was one misspelled word in my prepared text, and I hope that will be corrected.

But it seems that Edgefield County has been chosen as a whipping boy or an example why the Voting Rights Act should be extended, and I would like to take this opportunity to give this subcommittee a little information about the county. Of course, we are small. We have approximately the same number of whites and blacks. The whites outnumber the blacks by fewer than 100.

I will say that in the past we have probably committed sins that are no worse or no better than surrounding counties of the States that are around us.

But as in the case of *McCain* v. *Lybrand*, it was testified to by a black that since 1950 there has certainly been no problem of poor participation in the electoral process by them. In my time, certainly the schools have been completely integrated, the blacks completely in charge of the electoral process, as far as the Democrats are concerned, and the juries themselves are at least 50 percent black in all terms of court which we have in our county.

Since 1976, Mr. Thomas McCain has been the chairman of the Democratic Party and is in charge of the Democratic elections. The winner of the Democratic primary on a local level is tantamount to an election. There has been one election where there was opposition to a Democratic candidate, and that was for the county council seat by a Republican in 1974. This Republican was white.

All the positions of importance in the Democratic Party are held by blacks, and certainly the blacks have the choice of picking all the poll workers at the various polls.

Now, to give you an example, in the primary for 1980, 67 percent of the registered voters for Edgefield County participated in the election. In the general election, 74.5 percent of the registered voters of the county participated in this election.

It was also an interesting note that in the primary election in June, there was a black candidate running for the office of sheriff. The county NAACP circulated a sample ballot a few days prior to the election, and in this sample ballot they endorsed a white candidate.

In June of last year, Rev. Jesse Jackson made his famous march in Edgefield from Strom Thurmond High School to the square in the town of Edgefield. This march was well covered by the media, highly advertised in all the newspapers. The board of registration for the county of Edgefield had two registrars placed there on the

square for the purpose of registering black voters. They were there from approximately 1 o'clock until 5:30 in the afternoon.

As a result of this, there were admitted 36 registered voters. It was conservatively estimated that this cost us approximately $500 per registered voter that day.

Now, Jerry Wilson, who is a prominent black that lives in the town of Edgefield and is formerly the president of the NAACP of Edgefield, was quoted in an Augusta, Ga., paper in direct opposition——

Senator KENNEDY. It cost $18,000 for the county to have two registrars out there?

Mr. COLEMAN. It cost the State and the county approximately that, yes, sir, because of protection that they gave the parade. They had to have about 30 or 40 protective agents and helicopter service, this type of thing, yes, sir. That was the figure that was given to me.

Senator KENNEDY. That is not to register voters.

Mr. COLEMAN. Oh, in this particular case, on this march, I am saying.

Senator KENNEDY. I was just trying to get what it cost to register the voters. At a cost of $500 to register 36 voters, I get $18,000 to register the 36 voters.

Mr. COLEMAN. Yes, sir, to register 36 voters that day.

Senator KENNEDY. Well, I do not——

Mr. COLEMAN. The purpose of the march was to register black voters.

Senator KENNEDY. Oh, so you are including all of the other kind of public service protections included in that figure.

Mr. COLEMAN. Yes, sir. That is right.

Mr. Wilson stated that there is no problem in registering or voting, and that the problem is apathy on their part.

This is also borne out by Willie Bright, who was quoted in the papers as saying he had worn out three or four automobiles at the same time.

Now, there are some statements that blacks cannot be elected at large in Edgefield County, but two blacks now are holding office. Willie Lewis, who is serving on the school board, and T. C. Owens, who serves on the town council of the town of Johnston are both elected at large.

So, in conclusion, I would like to correct a few inaccuracies that have been testified to here by Mr. McCain. First, he has testified that their church was burned in 1970 after they had had a meeting. I checked with the sheriff's department. They determined that the fire was caused by a faulty flue.

Mr. McCain further testified that he had offered for election in 1972 and had been removed by the county attorney, but Mr. McCain was a registered voter in the State of Georgia 2 weeks prior to his declaring himself as a candidate for the county council and had participated in the electoral process in the State of Georgia. He also owned property there, he taught school there, and he paid his taxes there.

He was not removed by the county attorney, but he was removed by the State election commission. He also referred to the positions that could not be filled by at-large elections, but as I have stated to

you, the two blacks that are now elected officials have been elected by at-large elections.

He also stated that the county council denied petitions, but he failed to state that these petitions were filed within 30 days prior to an election, which did not give the county sufficient time to call an election, and this matter was litigated and was so found by the Supreme Court of the State of South Carolina.

In conclusion, I would like to say that I appreciate being here, and if there are any questions, I would be glad to respond.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF CHARLES W. COLEMAN

Mr. Chairman and members of the sub-committee, I appreciate the opportunity to appear before you to testify on the Voting Rights Act. It is a privilege and an honor to make such appearance.

It seems that Edgefield County, the home county of Senator Thurmond, has been chosen as the whipping boy or example of why the Voting Rights Act should be extended, and I would like to take this opportunity to give to this sub-committee a little information concerning our great county. Edgefield County is small in area, consisting of 480 square miles or 308,000 acres, with a population of 17,528. There are 8,753 whites, 8,725 blacks, 50 orientals and Indians. The county is rural, with a few industries, and is the largest peach-producing county in the world. The majority of the population are fiercely independent, God-fearing and patriotic. The county has produced such greats as Travis and Bonham who died at the Alamo, 10 governors, a number of U. S. Senators, judges and several Congressmen.

Its past has not been any better or worse than any of the surrounding counties or states. It is true that up until 1950, the blacks were denied full participation in the electoral process, did not serve on juries and attended segregated schools. This situation has now, however, been completely reversed and now blacks fully participate in the election process; they attend completely integrated schools, and the juries of this county certainly are at least 50% black.

Since 1976, Thomas C. McCain, a black, has served as Chairman of the Democratic Party for Edgefield County. In such a position, he is in charge of the Primary Elections of the Democratic Party. The winner in the Democratic Party Primary, on a local level, is tantamount to an election. There has been only one election in which there was opposition to the Democratic candidate, and that was to the County Council seat by a Republican, white against white, in 1974. All of the positions of importance in the Democratic

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A conservative estimate is that these 36 voters cost the taxpayers $500.00 per registered voter.

Jerry Wilson, a prominent black and former President of the NAACP for Edgefield County, was quoted in an Augusta paper in direct opposition to Jesse Jackson's claim that there were problems of registering and voting in Edgefield County. Mr. Wilson stated that there was no problem in registering and voting. The problem was with the blacks' apathy. Another black, Willie Bright, who has been active in voter registration among the blacks, stated that he had worn out four automobiles trying to get the blacks to register and then to vote; that he has found no problem in registering and voting. His only problem is apathy among the blacks.

At the present time there are two black office holders in Edgefield County, Willie Lewis who serves on the School Board, and his successor in office was Mark Adams, also a black, both of whom have run without opposition in the primary election and have done an excellent job in their position. The other black now serving is T. C. Owens, who serves on the Town Council of the Town of Johnston. It is to be noted that in each of the three races in which T. C. Owens has been involved, he has had white opposition, and has on two occasions received the most votes of any candidate seeking a seat on the Town Council, and in one race was the No. 2 man.

There has been much said about the fact that Edgefield County did not pre-clear with the Justice Department in 1965 in establishing the present form of government, which is a County Council, consisting of three members at that time with voting at large with residency requirements. I cannot say of my own knowledge whether the pre-clearance was asked for or not because at that time I was not County Attorney, but it does seem strange that two counties, which established identical forms of county government, the Act passed on the same day and being signed by the governor of the State of South Carolina on the same date, one of which definitely was cleared and the other, Edgefield County, is uncertain. The

Party are held by blacks, and as such, since 1976 the black leadership has picked all of the poll workers at the various polls. The total number of registered voters on June 10, 1980, for the Primary Elections in Edgefield County was 7,626. Of this number there was 1 Indian, 3 orientals, 3,340 blacks and 4,282 whites. Of the 7,626 registered voters for the June 10 Primary Election, 5,112 voted. Of this number 3,001 whites,2,096 blacks and 15 unknown. In other words, 67% of the registered voters participated in this election. The national average is less than 50% of the registered voters that participate in any election, and certainly from these figures, it would indicate that there is a good percentage of participation. For the General Election on November 4, 1980, there were 8,011 registered voters, of which 5,972 voted; or a percent of 74.5% of the registered voters participated in this election, of which 3,539 were white, 2,419 black and 14 unknown.

It is interesting to note that during the primary elections in June of 1980, there was a black running for the office of Sheriff of Edgefield County. The County NAACP circulated a sample ballot on Sunday prior to the election on Tuesday, and this sample ballot supported a white candidate in preference to a black candidate. On June 27, 1981, Jesse Jackson had his much famous march from Strom Thurmond High School to the square in the Town of Edgefield. This march was well covered by the news media, highly advertised and the primary purpose was to register the blacks in Edgefield County. The Board of Registration for Edgefield County had two registrars placed at strategic points on the square for the purpose of registering black voters. During the period from 1:00 o'clock P. M. to approximately 5:30 o'clock P. M. by the loud speaker all persons not registered were urged to register to vote, and the registrars were pointed out to the crowd. As a result of Jackson's march there were 54 applications. Of this, 4 registered who were under the age of 18; 8 applications were signed by someone other than a member or a deputy member of the Board of Registration, and 6 were reinstated, for a net total of 36 new registered voters.

preclearance for Lee County, which established its government the same day as Edgefield, was forwarded to the Justice Department by the Attorney General's Office. The fact that Edgefield County had not precleared was not brought to my attention until 1979 or 1980.

In 1972, the County Council was increased from three members to five members, and the county was redistricted unto five districts. This change was sent to the Justice Department and was cleared by it. The question now is before the court, consisting of a 3-judge panel, whether or not the county is operating illegally under failing to receive clearance in 1965 or is operating legally under the clearance granted in 1972. The matter was heard on August 20, 1981, and at the writing of this statement, there has been no decision by the court.

I would like to correct a few of the inaccuracies which have been testified to by Thomas C. McCain. First of all, he mentions Carey Hill Baptist Church which was burned in 1970. The records indicate that this was a frame church, and they had a service in this church on Sunday night, and that they had a stove for heat and there was a faulty flue which caused the church to burn. On the other hand, on the night previous to Jesse Jackson's march to Edgefield, the United Methodist Church of Edgefield was burned, and it was a definite case of arson. A black was seen running from the church just minutes before the fire was discovered. Mr. McCain further testified that in 1972, he qualified to run for the County Council for the County of Edgefield, and he stated that the County Attorney had the Registration Board remove his name from the Registration Books to prevent him from running as a candidate in the Democratic Primary. Mr. McCain failed to note that, within two weeks prior to his registering to vote, he had participated in the election process for the State of Georgia, and had voted in the municipal elections in the City of Augusta, and at that time was renting a home there, paying utility bills, had an automobile registered in the State of Georgia, and had been in the State of

Georgia some two to three years prior to 1972. It was not the County Attorney but the State Election Commission that removed Mr. Thomas C. McCain's name from the registration records that prevented him from running in the 1972 election. He also referred to the fact that he had filed certain petitions to allow a change from at-large elections to single member districts. The County Council denied the petitions, one on the basis there were insufficient number of signatures required on the petitions that reflected the person's signature, his precinct and voter registration number which are required by state law. Further, that the petitions were filed less than thirty days prior to the primary, which did not give sufficient time to verify the petitions and to call a special election. This matter was litigated and the Supreme Court for the State of South Carolina so found.

I make this statement I'm sure for the vast majority of the County of Edgefield that I believe every person should be entitled to vote and to participate fully in the election process. I do not believe that any person or any race of people should be guaranteed to be elected to an elective office. There has been much said about the diluting of the voting strength of the blacks, and I do not believe that the blacks' voting strength should be diluted nor should the white voting strength be diluted. If it is as contended that there should be single member districts, the districts would be so gerrymandered as to have predominantly black population in certain districts and the others would be predominantly white, and the candidates would run from their district and the individuals living therein would vote for the various candidates. This system would not only dilute the voting strength of the black as well as the white, but would also be gerrimandering, both of which would be improper. In a county such as Edgefield where the population is small and most people know one another, I feel that the at large election, with residency requirement, is the only fair and just form of election. This gives each section of the county representation and makes each county member responsible not for his district but

for the entire county as he must seek his vote from all of the electorate.

I have no qualms with the extension of the Voting Rights Act provided the same will include all states of the United States because all persons, regardless of black or white, should be treated equally. We are rapidly becoming a two-standard nation, one for black and one for white. If I were to say today, please contribute to the Black College Fund, I would be hailed as an activist. However, if I said contribute to the White College Fund, I would be called a racist, a bigot and a person furthering segregation. This not only applies to colleges, but to private clubs and in all walks of life. It was written in 1976 when we were celebrating our two hundredth anniversary as a nation, and I quote: "The average age of the world's great civilization has been two hundred years. These nations progressed through this sequence."

From bondage to spiritual faith - from spiritual faith to great courage - from courage to liberty - from liberty to abundance - from abundance to selfishness - from selfishness to complacency - from complacency to apathy - from apathy to dependence - from dependence back again to bondage. This nation is rapidly becoming too dependent upon the government in Washington to cure all of its ills.

If we continue on the road that we are now heading, it will soon be a quota system to elections, and what are we going to quota, black-white, male-female, Catholic-Protestant-Jew and on into ad infinitum. We have a good system under which the person receiving the majority of votes is elected to the office which he seeks, and until a better system is devised by man, I think that we should stick with what we have.

Mr. MARKMAN. I do not have any questions. Thank you.

Mr. COLEMAN. Thank you, sir.

Mr. WIDES. Excuse me. I have some questions that Senator Kennedy wanted me to ask Mr. Coleman.

You mentioned in your testimony on page 2 that it was true until 1950 that blacks were denied full participation in the political process. Is the implication of that sentence that you think, subsequent to that, they were permitted full participation in the political process?

Mr. COLEMAN. This was a statement made by a gentleman by the name of Frank Jenkins in the case of *McCain* v. *Lybrand*. I was quoting him in that. I am sorry, sir.

Mr. WIDES. I see. Well, it does not indicate it was a quote, but what is your opinion? Do you think that, subsequent to 1950, blacks in Edgefield County have had equal opportunity to participate, not guaranteed results, but to participate?

Mr. COLEMAN. Now, I have lived in Edgefield County since 1965, and I say, since that time, I would say yes, definitely.

Mr. WIDES. You are familiar, I assume, with the opinion of Judge Chapman in the Edgefield County case of *McCain* v. *Lybrand*?

Mr. COLEMAN. Yes, sir.

Mr. WIDES. You are the attorney in the case?

Mr. COLEMAN. Yes, sir.

Mr. WIDES. He was appointed by President Nixon to the District Court and then recently appointed with the support of, I believe, Senator Thurmond to the Fourth Circuit Court of Appeals by President Reagan. Is that correct?

Mr. COLEMAN. That is correct.

Mr. WIDES. In his opinion, he indicated, and I do not have the exact quote, although it has been read into the record before, I think by Mr. Durfner and Mr. McCain, that until 1970, blacks were completely frozen out of the political process and that, in the decade since then—that is, from then until the time of his decision—that there has been, to use his words, barest token or token progress.

Do you think that—his exact words were, and I am reading from his decision, "The Court's overall finding is that blacks were virtually totally excluded up until 1970,"—from the political process, he is talking about—"and that, since that time, they have progressed to minimal tokenism." That is Judge Chapman, whom the President just put on the Fourth Circuit Court of Appeals.

Do you think he is a fair man who would give an accurate appraisal from his perspective of the facts as presented to him in the case?

Mr. COLEMAN. I think Judge Chapman in that instance, sir, was referring to the blacks that had been appointed poll workers. I think that was the reference he was making at that time, and after that time, there were a number of more blacks appointed to positions at the polls. But that was my interpretation of what he was saying.

Mr. WIDES. OK. Well, actually, just to put it in context, then, I will go on to my other question. He says that elections conducted in 1970 to 1974 are as follows, and he lists data of the voting and the election results in Edgefield County, and he then says, quote:

"By analyzing these elections,"—he is not talking about poll workers or officials in the process—"it was possible to get a clear picture of how elections take place in Edgefield County. The Court's overall finding is that blacks were virtually totally excluded up to 1970 and that, since that time, they have progressed to minimal tokenism."

Let me ask you just one other question. The decision in the case came down in April, was it, of 1980?

Mr. COLEMAN. I believe that is right.

Mr. WIDES. And under the previously controlling law applying *White* v. *Regester* and *Zimmer*, although I understand you disagreed, Judge Chapman concluded that the minority voters were sufficiently shut out of the process, that their rights were being denied, and ruled in favor of the plaintiffs. Is that correct?

Mr. COLEMAN. That is correct.

Mr. WIDES. And then, subsequently, when the *Bolden* case came down, which we have been told by a number of witnesses, and there have been other comments to the effect that the *Bolden* case does not really present a problem and plaintiffs should be able to win under that, too, Judge Chapman then granted your request that he vacate or abrogate his order because, under *Bolden*, the case could not be established. Isn't that correct?

Mr. COLEMAN. That is, yes, in substance.

Mr. WIDES. Thank you very much.

I have no further questions.

Excuse me. Senator DeConcini had questions that he wanted to submit in writing to Arnoldo Torres, and we would ask that that be done and Mr. Torres' responses be included in the record at this point.

[Material supplied follows:]

QUESTIONS FROM SENATOR DENNIS DECONCINI TO ARNOLDO TORRES

Question 1. Is it LULAC's view that S. 1992 would require proportional representation as a result of its amendment to Section 2 of the Voting Rights Act? Would LULAC support legislation which required such proportional representation under Section 2?

Answer. We would re-iterate the comments we presented during our oral presentation on February 25, 1982 before your Subcommittee that that League would not support nor was it advocating any amendments which would legally require proportional representation or make the absence of it a violation of the law. Frankly, the contention being made by the Administration has no basis for it is not our intent or interest to have a provision of the law mandating proportional representation. We would find such an effort an affront to the integrity of the Voting Rights Act which simply wants to insure the full participation of all citizens of this country. Those that charge that Section 2 as amended in S. 1992 would result in proportional representation, are committing a grave injustice to the debate process by misrepresenting or concerns and causing unnecessary panic. If the Voting Rights Act is designed to benefit minorities, it is us then who are in a position to best state how the law has been used and how it will be used; under no circumstances have we ever advocated amending Section 2 for the purposes of having it resulting proportional representation in elected offices. The Hispanic community regards the passage of Section 2 as amended as vital to our successful participation in the electoral process as bilingual voting material.

Question 2. Does LULAC believe that the bilingual election provisions of the Voting Rights Act have made a significant improvement in the opportunity of Spanish speaking citizens to participate fully in the political process?

What suggestions do you have for ways in which the implementation of the bilingual provisions might be made more effective?

Answer. There is no doubt in our the minds of Hispanics throughout this country that along with other provisions of the Voting Rights Act, the minority language provisions of the Act have been instrumental in increasing our participation in the electoral process. The fact that voting materials are published in Spanish allows for a better orientation and knowledge of the issues having to be decided. The utilization of the bilingual ballot also has proven to be immensely helpful to our community by removing the comprehension barrier of the English language which many of our senior citizens do not speak.

Insofar as improving the effectiveness of this provision of the law, we would strongly advocate the clarifying of the different approaches which can and have been utilized of minority language materials, through regulations issued by the Department of Justice. Also, we would encourage the use of technical assistance to local and state jurisdictions of the various approaches which can be used in complying with the law. For example, you needn't have to publish bilingual ballots to all Spanish-speaking people in a given area, you can publish a facsimile ballot to be posted in each voting booth for individuals to use. This is one example of where knowledge of this approach would probably be of interest to many county registrars and would be utilized. Again, there must be a process which allows for such information to be made available to everyone concerned with this issue.

Mr. MARKMAN. Thank you, Mr. Coleman.

Mr. COLEMAN. Thank you, sir.

Mr. MARKMAN. We have been requested to include in the record at this point a statement by Senator Dennis DeConcini as well as testimony by the Honorable Alfredo Gutierrez, a member of the Arizona State Senate, who was scheduled to be a witness here today but who could not attend.

This concludes today's hearing.

[Whereupon, at 1:05 p.m., the subcommittee recessed, to reconvene on Monday, March 1, 1982.]

[The prepared statements of Senator DeConcini and Hon. Alfredo Gutierrez, member, Arizona State Senate, follow:]

Prepared Statement of Hon. Dennis DeConcini, a U.S. Senator from the State of Arizona

Thank you, Mr. Chairman. I am especially pleased to be at today's hearing, because among the testimony submitted today are statements by persons with specialized knowledge about the southwestern United States and my own state of Arizona. Unfortunately, two of our scheduled witnesses have been unable to attend today's hearing. My good friend Bruce Babbitt, Governor of Arizona, was forced to cancel his scheduled appearance here today due to pressing developments in Arizona. The Governor has asked me, however, to submit his written statement to the Chairman for insertion into the record. I will be sending several written questions to his office in Phoenix, and I request the chairman to leave the record open until responses are received.

Another of our scheduled witnesses, state senator Alfredo Gutierrez of Arizona, has unfortunately found it necessary to cancel his appearance due to the consideration of an important matter in the Arizona state senate. I had looked forward to Senator Gutierrez' testimony because I have known him for a number of years, and I know him to be a man of extensive knowledge and experience in state government. Indeed, it was those qualities which led his colleagues to select him as minority leader in the Arizona state senate. I ask that the chairman leave the record open until we can submit Senator Gutierrez' statement for the written record.

Fortunately, we do have Mr. Arnold Torres of the League of United Latin American Citizens, or LULAC, with us to give us the benefit of their extensive experience in the field of voting rights. LULAC is an organization which has proven invaluable in identifying the needs and goals of the Hispanic community. I am certain that Mr. Torres, and indeed all of today's distinguished witnesses will provide constructive insights regarding the Voting Rights Act.

Today's hearing will, no doubt, reach a wide range of subjects under the Voting Rights Act. Certainly the topics of Section 2 and the "results" vs. the "intent" tests will be discussed, as is proper. However, I feel that our attention must focus as well on the important

topics of bail out and the bilingual provisions. A minimum amount of discussion has been afforded these topics, and I believe that we should make an effort to focus on these issues so that we assure that the Voting Rights Act continues to be a fair and effective element of civil rights law.

We must assure, for instance, that the bilingual provisions of the Act provide the maximum access possible to our language minority citizens, while simultaneously assuring that the Federal government does not unnecessarily burden state and local governments with needless, costly regulations which do not further the goals of the Act. We must be sensitive to the need to provide a reasonable bail out provision which assures that every jurisdiction that seeks to bail out from the strictures of the Voting Rights Act has complied with both the letter and spirit of the Act, while at the same time assuring that the bail out procedure is not, as some have claimed, so difficult to meet as to be virtually impossible. These issue areas must be analyzed in the light of state and local experience, and the experience of actual voters. I look forward to today's distinguished witnesses' testimony, and I am confident that it will shed light on these difficult questions.

PREPARED STATEMENT OF HON. ALFREDO GUTIERREZ, MEMBER, ARIZONA STATE SENATE

Mr. Chairman, members of the Subcommittee, My name is Alfredo Guitierrez. I'm very pleased to be here today to convey my support of S.1992, the Voting Rights Act of 1982. I would also like to thank Senator DeConcini personally for his support of this bill and his leadership on the issue. Substantively and symbolically this bill means a great deal to Arizona's Hispanics, Indians and Blacks, who make up 28 percent of the State's population. Our minority citizens feel confident that Senator DeConcini will represent our concern for a strong voting rights bill in the face of intense opposition to many of the bill's key provisions, which are necessary to protect what President Reagan has called, "the crowned jewel of our democracy," the right to vote.

I am, quite frankly, surprised by the controversy surrounding S.1992. The provisions I support and wish to discuss today seem to me the very minimal that Congress can enact and still uphold the 14th and 15th Amendments of our Constitution. Under S.1992, jurisdictions that have been "good" will be able to be released from pre-clearance; victims of voting discrimination will once again have meaningful access to the courts, virtually denied them since the 1980 Supreme Court decision, City of of Mobile v. Bolden; and Hispanic, Asian, Indian and Eskimo voters will be guaranteed bilingual voting assistance until 1992.

Arizona is no stranger to the Voting Rights Act. Parts of our state have been covered under Section 5 preclearance since 1965 because, at that time, we used a literacy test and less than 50 percent of our voting age population was registered or turned out in the 1964 presidential election. We were covered again in 1975, as a result of the language minority provisions, which also required us to provide bilingual voting assistance for Hispanics and, in seven counties, for American Indians.

Arizona does not have a state bilingual election law, and without the federal mandate for bilingual elections, our non-English speaking citizens would be denied their right to vote. I am very pleased President Reagan supports this provision of S.1992.

Testimony submitted during these hearings and during House hearings last year reveals that bilingual elections are an appropriate legal and legislative remedy to guarantee that non-English speaking U.S. citizens be permitted to cast meaningful votes. The testimony showed further that in most areas of the country, the additional cost for providing bilingual election assistance was insignificant. Alternative methods for providing cost effective bilingual assistance are available and have been used successfully in Los Angeles, San Diego and other districts whose normal election costs run high.

Hispanics make up 16.2 percent of Arizona's population and 13.2 percent of our elected officials. Between 1973 and 1980, Hispanic representation at the city and county levels increased significantly.

In 1973, there were 57 Hispanic elected officials at these government levels. In 1980, there were 77. Among state elected officials (Governor, Lt. Governor, Senators, Representatives, judges and district attorneys), between 1973 and 1980, Hispanics representation declined from 13 to 12 representatives. During those years, we did not have any Hispanic representation in the U.S. Congress.

Between the 1976 and 1980 presidential elections, Hispanic representation and voter turnout increased impressively. Hispanics increased their registration by 14 percent, or 12,700 voters, between these two elections. They increased their turnout by 25 percent, by 14,288 voters. Yet, only 55 percent of Arizona's eligible Hispanics are registered to vote, compared with New Mexico's 65 percent and Colorado's 60 percent.

Since 1975, the Department of Justice has issued objections to eight voting changes contained in four letters of objection. The Congressional and state legislative redistricting proposals are currently under review by the Department of Justice. The first sixty day period ends on March 7. I understand that a number of Hispanic individuals and organizations have submitted comments to DOJ charging that the plan will have a discriminatory impact on Hispanic voters.

It may be suggested that Arizona's relatively small number of objections is evidence that the state's voting problems are minor and do not require the imposition of federal scrutiny. I reject that conclusion and urge the Senate to reject it. The fact that Arizona has had a small number of objections suggests other circumstances to me: the State has fewer subdivisions than any other fully covered state except Alaska; and the state and its subdivisions pass fewer discriminatory laws than other states because we lawmakers know the laws will be reviewed for their possible discriminatory impact. In other words, the Act has sensitized our lawmakers and discouraged them somewhat from enacting discriminatory voting laws. The Act's deterrant effect at halting discriminatory voting laws may be as significant as the actual Section 5 review mechanism. In this

regard, I wholeheartedly agree with Attorney General William French Smith, who praised the Act's deterrant effect in his report to the President on the Voting Rights Act.

I support the continuation of pre-clearance contained in S.1992 with its new bailout provision. The proposed bailout will both protect minority voters and permit jurisdictions with genuinely good records to be released. Detractors have referred to the bailout in S.1992 as "impossible", while some on the other end of the spectrum consider it too loose. I believe the truth is somewhere in between. The bailout is stringent--and it should be. The purpose of Section 5 is to protect minority voting rights. Those who propose to weaken the bailout seem more interested in protecting local election officials from what they consider the "burden" and "stigma" of pre-clearance. The Constitution, the Congress and the Courts have spoken on this issue many times and have concluded that it is the proper role of the federal government to protect citizens from denials or abridgments of their right to vote. Local election officials who consider this a "burden" do not have my sympathy. I urge this Subcommittee and the Senate to focus it attention on the problems of minority voters rather than the cries from local election officials.

I understand that during a recent hearing Senator DeConcini raised the issue of state responsibility for its subdivisions and questioned the need for one of the bailout criteria. The proposed bailout would permit a fully covered state to bailout only when all of its subdivisions could meet the bailout criteria--though, it should be noted, not all of the smaller units must have actually bailed out. Senator DeConcini brought up an example in which a state would be kept under Section 5 solely because of the recalcitrance of one of its smaller political subdivisions and suggested, from what I understand, that the requirement might be too stringent.

As a state legislator, I believe that standard is not only reasonable but necessary to insure that minority voting rights are protected. To a very great degree, states determine the

electoral practices and proceudres of their counties, cities, school districts, water districts, sanitary and hospital districts.

The Arizona Revised Statute Title 16 is the state election code. It is developed by the State Legislature; it is amended frequently for both administrative and substantive reasons. It specifies how and when elections are to be conducted for virtually every governmental unit in the state. It specifies, for example, that the state's more than 200 school boards must be composed of 3 or 5 members whose terms alternate and that they must be elected on a non-partisan basis from the entire school district. The election code specifies when elections must be held for fire, sanitary and road improvement districts, as well as for the Central Arizona Water District Board.

It is exclusively within the power of the state government to specify standards and guide the electoral practices of even the smallest of governmental units. To suggest, therefore, that the state should be permitted to bailout when its subdivisions are not clean is to absolve the state of its exclusive responsibility and to nullify the relationship between the state and its political subdivisions. As a state legislator, I urge the Senate to acknowledge the reality of this unique relationship, and to retain this important bailout standard.

I would like to turn now to Section 2 of the Voting Rights Act. I fully support the amendment to this section which would prohibit electoral practices and procedures which would "result in the denial or abridgment" of the right to vote on account of race, color or membership in a language minority group." Again, I am pleased that Senator DeConcini has endorsed this vitally important provision. I am confident that his support of this amendment will help to insure its passage by the Senate.

I would like to limit my discussion of this complex issue to three parts: 1) The pre-Mobile standard; 2) Congressional authority to amend Section 2, and 3) My experiences as a state legislator which lead me to conclude that any 'intent' standard for voting lawsuits is unreasonable and will not safeguard the voting rights of minorities.

The Subcommittee has heard a great deal of testimony on the "results" standard which S.1992 would codify into law and thus restore the standard that was used in voting litigation prior to the 1980 Supreme Court decision, City of Mobile v. Bolden. I reject the assertions that this is a new untested standard and refer the Subcommittee to the testimony of Frank Parker on February 11 and his analysis of 23 lawsuits decided between 1972 and 1978. The conclusions of Mr. Parker's testimony deserve reiteration. They forcefully and unequivocally rebut charges made by detractors of S.1992, including the Attorney General of the United States.

1) The results standard will not lead to a finding of a Section 2 violation because of lack of "proportional representation" and one other "scintilla of evidence."

2) the results standard will not lead to court-ordered "proportional representation"; under the results standard proportional representation or racial quotas were repudiated in every case.

3) The results standard will not open "floodgates" to litigation. Under the results standard between 1965 and 1980, few lawsuits were brought nationwide and still fewer won by minority voters. In other words, the results standard does not mean automatic victory for minority voters.

I am not a lawyer and I am not a Constitutional scholar; I leave the fine points of legal analysis to attorneys at the Mexican American Legal Defense and Educational Fund, the Southwest Voter Registration Education Project, and others who have worked vigilantly to represent minority citizens whose right to vote has been denied or abridged.

Though I am not a lawyer, I am quite familiar with the 14th and 15th Amendments of the U.S. Constitution which empower Congress to enact appropriate legislation to ensure full enjoyment of the rights protected by those amendments. I believe that the Section 2 amendment in S. 1992 is such an appropriate use of Congressional power.

To those opponents of this amendment who will respond that Congress does not have the authority to mandate "racial quotas in

elections" or "proportional representation" I can only refer you again to the findings of the experts: there is no basis in fact, and in the 15 year history of vote dilution cases decided prior to 1980, to support this allegation. I would not presume to ascribe a motivation or "purpose" to those who oppose this amendment. I will limit myself to the tangible, objective results or effect of their opposition: an intent test will deprive minority citizens of meaningful access to the courts that is promised them under the Voting Rights Act.

The motivation of lawmakers in passing laws is not only irrelevant but highly imprecise. In my almost ten years in the Arizona Senate, I have witnessed legislators publicly and privately express their reasons for taking certain actions. Their motivations are most often quite honorable but there may nonetheless be a wide divergence between what they say in private and what they say in public. All of us in public life know that and live by it. How then is a court supposed to determine the "motivation" behind the enactment of a particular law? And whose motivation is to be judged? My own? my colleague's? How can the motivations of a diverse group of people be determined with any accuracy? Indeed, how can the motivation of one person be determined with any accuracy? My life holding public office forces me to conclude that any standard requiring proof of motivation in voting lawsuits is seriously flawed and should be roundly rejected.

Voting practices should be examined based on objective criteria, such as a history of discrimination, racially polarized voting, the existence of discriminatory methods of election, and exclusion of minorities from the political process. To protect a right as fundamental to our democracy as the right to vote, Congress should adopt a standard--in existence between 1965 and 1980--which will provide equitable and fair relief for minority voters. To do less would be for Congress to shirk its responsibility to uphold the Constitution.

Thank you.

VOTING RIGHTS ACT

MONDAY, MARCH 1, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Mathias, Specter, and Leahy.

Staff present: Stephen Markman, chief counsel; William Lucius, counsel; Prof. Laurens Walker; Kim Ervin, professional staff; and Claire Greif, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the final day of 9 days of hearings by the Subcommittee on the Constitution on the Voting Rights Act. Today we will hear the views of the Assistant Attorney General for Civil Rights, Mr. William Bradford Reynolds. And we have eminent members of the Congressional Black Caucus here with us whom we are very interested in hearing.

As we near the close of our hearings, I would again like to address a question to my colleagues on this committee who are leading the charge for the House-approved legislation.

It is a question that I addressed to them on the first day of hearings and one with respect to which I have not yet heard an answer. My question relates to the workability of the proposed new standard for identifying discrimination in section 2 of the act. The House legislation would propose to change this from the traditional intent standard to a never before utilized results standard. In the process, this change would overturn the ruling by the U.S. Supreme Court in *Mobile* v. *Bolden,* a 1980 ruling.

I would like to ask my colleagues again how a State or a county or a city or a school board will have any idea whatsoever as to what is necessary on their part in order to avoid being in violation of the results test, short of proportional representation by race.

What will these communities have to do in order to insure themselves that they will not be sued by the Justice Department or by the NAACP Legal Defense Fund or by MALDEF or by the ACLU or by the Lawyers Committee for Civil Rights or by any other of the innumerable public interest groups that litigate for a living?

In particular, I would like to know what assurances they could give to the mayor of Boston or to the mayor of Cincinnati or to the Mayor of Baltimore that their communities are not going to be subject to litigation under the House bill. What are their assurances that the Federal courts are not going to come in there and seek to restructure their systems of self-government? What are their assurances that the citizens of Boston and Cincinnati and Baltimore are not going to have their own judgment about how they wish to run their own affairs overturned in deference to the judgment of the attorneys for the Lawyers Committee for Civil Rights here in Washington?

In Boston, after all, there is a lack of proportional representation, there is an at-large system of government, there is a history of school segregation, there is a history of racial turmoil, and there has been criticism by the U.S. Commission on Civil Rights.

In Cincinnati, after all, there is a lack of proportional representation, there is an at-large system of government, and there is a history of school segregation.

In Baltimore, after all, there is a lack of proportional representation, there has been a history of lack of proportional representation, there have been civil rights violations within the school system and there are voting procedures and practices that have been found to constitute barriers to minority participation in other communities.

What are the assurances that the sponsors of the House bill can offer that Baltimore and Cincinnati and Boston will be allowed to maintain their own systems of self-government? What are the assurances that these communities will not suddenly be placed in violation of section 2 and the 15th amendment to the Constitution? And perhaps 12,000 other communities in the country because that is how many at-large jurisdictions we have in this country.

Is it perhaps that they are located in the North rather than the South? I don't think so. Not only does section 2 apply throughout the country, but it is clear that the history of the civil rights effort has been that issues originated in the South ultimately become the subjects of fire and controversy in the North, as well.

Is the assurance that the citizens of Boston and Baltimore and Cincinnati have never intended to discriminate? I would remind my colleagues that this is an irrelevant factor under the results test.

Is the assurance that there are legitimate, nondiscriminatory objectives to at-large systems and the other voting practices and procedures within these communities? Again, I would remind them that the plaintiffs in the *Mobile* case considered this irrelevant.

Is the assurance that my colleagues would offer that there have occasionally been minorities elected to office in their communities? This is simply not good enough. I would remind them that the House report on the results test states expressly that the lack of proportional representation is "highly relevant" in evidencing a section 2 violation. It is simply not enough that some minorities have been elected.

As one of the distinguished proponents for the House bill has eloquently testified, such minorities may often be nothing more than

tokens or window dressing or elected at the sufferance of the white power structure.

Is the assurance that the court must look to the totality of circumstances? Well, that is a fine response but it begs the question. How do the people of Boston or Balitmore or Cincinnati have any idea whether or not these add up to a violation?

How, indeed, does a court know whether or not these add up to a violation? As Prof. James Blumstein eloquently pointed out in an exchange with the distinguished senior Senator from Maryland, "What does a court do with this evidence? How does it evaluate it? What is the standard?"

That is the issue. The most honest description of the standard that I have heard thus far is the description of Mr. Benjamin Hooks. "You know discrimination when you see it," observed Mr. Hooks.

If I am wrong about Boston or Baltimore or Cincinnati, I would like to hear an explanation of why I am wrong. I have been assured by several witnesses that I do not appreciate the limitations upon the resources of the civil rights community and that such limitations will stand in the way of multiplied litigation.

Well, that is fine but somehow that is not a very comforting assurance. What these witnesses are saying is that in the place of a limitation in the nature of a rule of law, the "results" test would substitute a new limitation in the form of the resources of the civil rights movement. I hope that this comforts Bostonians and Baltimorans and Cincinnatians who value their structures of self-rule.

Ladies and gentlemen, as I have said from the start, the section 2 controversy is one of the most important constitutional issues that has been considered by this body in many, many years. But, to emphasize once more, it is not solely that. It is equally a controversy that threatens to have a substantial day-to-day impact upon communities throughout the country.

In the place of a settled rule of discrimination, one that ultimately looks to the purpose of an action, we are now proposing to substitute a test that is predicated upon the idea that You know discrimination when you see it. It is a test ultimately that depends upon little more than which side of the bed the judge got up on that morning. It is a test that substitutes for the historical rule of nondiscrimination a new, and I believe, dangerous rule of proportional racial balance.

The results test is antithetical to everything that is important in our Constitution—equal treatment of all citizens, colorblind public policies, the rule of law, local self-government, and the notion that representation in this Nation is predicated upon the individual, not special bloc interests.

However such opponents of the "results" test attempt to deny it, there is no other logical stopping point to the test short of proportional representation.

As the Supreme Court correctly observed in the *Mobile* case, "The theory of the dissent . . . appears to be that every political group or at least every such group that is in the minority has a Federal constitutional right to elect candidates in proportion to its numbers."

It is this dissent which is at issue in the present Voting Rights Act debate, however much proponents of the "results" test understandably would like to obscure it. The resolution of this issue will speak a great deal about what direction our Nation chooses to go with respect to domestic social policy—in the direction that the equal protection clause of the 14th amendment has traditionally been pointed, towards colorblind public policies, or in the direction of policies that establish quotas and entitlements in every sphere of society on the basis of calculations of race and ethnicity.

While, from my perspective, the tide today does not look particularly favorable, each and every person in this room can be assured that we will not give up this battle without the strongest fight possible because the issue is an extremely important issue.

In that regard, we are happy to have with us this morning representing the Congressional Black Caucus, Congressman John Conyers from Michigan, Congressman Harold Washington from Illinois, and Congressman Walter Fauntroy from the District of Columbia.

I have had lots of opportunities of being close to you gentlemen and have enjoyed our relationship through the years and I admire all three of you. We are very happy to have you with us and we look forward to taking your testimony at this time.

STATEMENTS OF A PANEL CONSISTING OF HON. WALTER FAUNTROY, THE DELEGATE FROM THE DISTRICT OF COLUMBIA; HON. JOHN CONYERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; AND HON. HAROLD WASHINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. FAUNTROY. It is indeed a pleasure for us as a panel of members to appear before your committee. We are Members of the House of Representatives, of course, and members of the Congressional Black Caucus, 18 black Members of the Congress who seek to move this Nation to the high ground of principle that we enunciate, but so often fail to live up to, in respect to our rights as citizens.

Accompanying me on the panel are Congressman John Conyers, who is the fifth-ranking member of the House Judiciary Committee which, like your committee, was the committee of original jurisdiction on this matter, and Congressman Harold Washington, who served on the House Judiciary Subcommittee on Civil and Constitutional Rights and who has, from the very beginning, studied and worked assiduously on this issue through the final passage of H.R. 3112.

At this point, Mr. Washington will make a statement followed by Mr. Conyers and myself, and then we will be pleased to respond to queries that you may have of us.

Senator HATCH. That will be fine.

Mr. WASHINGTON. Thank you. We appear before your subcommittee today not only on behalf of the caucus, but also on behalf of millions of black and brown citizens who are vitally interested in the immediate passage of S. 1992.

We regard this legislation as the single most important test of America's commitment to racial justice, and to the integration of

minority populations, including language minorities, into the mainstream of American political life.

There is no American right more fundamental, as you know and have stated, than the right to participate freely in the electoral process. If America were now to renege on the protections afforded by the Voting Rights Act, the most serious doubts would be raised in the minds of a great many people, both at home and abroad, about the commitment and future course of this society.

The companion legislation, H.R. 3112, obtained broad-based bipartisan support in the House, where it was passed by a vote of 389-24. This included unanimous votes from the South Carolina, Louisiana, and Florida delegations, and majority votes from the delegations of Alabama, Georgia, Mississippi, North Carolina, and Texas. Ironically, because there is such broad, bipartisan support for the legislation, weakening of the bill by the Senate would represent a moral defeat for the Republican Party. This is because it is widely perceived that, but for the opposition of a few key figures within the current administration, who already have sacrificed much of the President's credibility on issues of this kind, S. 1992 would already have been enacted without rancor or controversy.

The Congressional Black Caucus is pleased that S. 1992 is now cosponsored by nearly two-thirds of the Senate. We are also aware that the President has publicly stated that he will sign the final bill as passed. Our hope is that the remaining Senators will endorse the bill, without weakening amendments, so that we may present this legislation to the American people as an example of unity, morality and political decency, at a time when this example is sorely needed.

We have followed your hearings with great interest, Mr. Chairman. We do not intend to use the little time that we have to restate the substantive arguments which have been made in support of S. 1992. The evidence and rationale for this legislation are there, in the House record, and in the testimony you have already received. We ask only that a good faith effort be made to objectively explore that testimony.

We would just make several points.

First, some witnesses—including the Attorney General of the United States—and some Senators are laboring under the misconception that section 2 of S. 1992 somehow mandates proportional representation or racial quotas. As was said by the President of the American Bar Association and other prominent legal scholars such as Archibald Cox appearing before this subcommittee, this simply is not true.

By the plain language of the concluding sentence in this section, the House expressly disavows the concept of proportionality. The sentence states:

"The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

I might also note that Representative Hyde signed off on the results test because that caveat was inserted partly at his behest and presumably it mollified him at that time.

Moreover, this issue repeatedly has been addressed by both the Congress and the Courts. The legislation does not mandate propor-

tional representation and there is no court which we feel would hold that it does.

The press has correctly characterized the situation by noting that "The drafters of the House bill went to some trouble to avoid this misapprehension. [New York Times, January 29, 1982.] In view of the statute's plain words, raising the specter of proportional representation and racial quotas amounts to nothing more than "obfuscation and dithering," a quote from the Washington Post, December 20, 1981.

Our point is not to question the sincerity of people who keep raising this issue. Our point is that both the wording and the intent of S. 1992 are abundantly clear. The direction of the courts is clear. In short, the law on this subject is clear. Why, therefore, does proportionality recur as a diversionary issue?

A second recurrent issue concerns the result standard embodied in section 2. The issue arose because a plurality of the Supreme Court, in its ruling in *City of Mobile* v. *Bolden,* chose to clarify previous court rulings by requiring that plaintiffs must prove that the intent, purpose or conscious motivation of those adopting or maintaining voting laws was racial discrimination.

The Court traditionally held that the Voting Rights Act paralleled the 15th amendment: that is, it prohibits all acts which deny or abridge the right to vote on account of race or color. Sixteen years of experience under the existing act has made it clear that this language also reaches State and local laws which relate to voting, districting and representation.

What we as legislators also thought was clear, when the act was passed and through two subsequent reauthorizations, was that the discriminatory results flowing from these practices gave rise to a cause of action under the act. Before *Mobile,* the results standard had consistently been applied by the courts.

Since the Supreme Court argued that the congressional intent was ambiguous, we have accepted its invitation to clarify congressional intent once and for all by developing the language you now have before you. This clarification is consistent with recent cases holding that the Congress appropriately may establish a different standard in remedial legislation, but that in the absence of such legislative guidance, the Court will infer the standards which controls claims arising under the Constitution.

Thus, the purpose of section 2 of S. 1992 is to make it clear that a showing of intent is not required to establish a violation of section 2 of the Voting Rights Act. As has already been stated, this is not a novel interpretation.

In fact, it is patently obvious to the average, fair-minded American, as it is equally obvious to legal scholars and litigating attorneys—and I understand litigating attorneys who have testified here—that there is something inherently unfair about requiring citizens to prove the subjective intent of political officials.

Anyone with any understanding of the political process, especially as it operates at the local level, understands that decisions are often reached at dinner parties, in closed meetings, at private clubs, in back rooms, in places where the press and the public are not present, where no record is required of the meeting and no reasons are stated for the decision.

To require that citizens attempting to uphold their right to vote prove the subjective intent—indeed almost the psychological state—of officials who draw these plans strikes the average layman, as it strikes most lawyers, as unreasonable and unfair.

It also introduces an extremely negative element into state and local politics. I have heard you, Mr. Chairman, in public state on several occasions that it is unfair to be labeled a racist. Yet this is precisely what the intent proposal encourages.

It should not be necessary for me to prove that someone is a racist in order to vindicate my rights, particularly my voting rights. And Congress should not encourage such ad hominem attacks on government officials as the intent test would obviously, clearly and patently do.

Indeed, requiring proof of intent would ensure that these sorts of personal attacks would become a necessary part of all voting rights litigation which involved any local political official, because racism is precisely what some would have us prove, in any way we could, by dredging up old statements, past conduct and associations, and using such other corroborating evidence as we could find, since few officials would be so ill-advised as to say that the reason for a particular voting change is that they intended to discriminate. Indeed, as the Birmingham Post Herald noted, in support of the House passed bill, it would often mean subpenaing people from their graves for testimony about their racial motivations.

In fact, there is a strong indication by lower courts that the legislative privilege rule would prevent litigants from cross-examining legislators concerning their racial motivations in a given case. See for example, the case of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*

Requiring that intent be proven in voting rights cases, as has been suggested, could undermine this concept, since the testimony of elected officials often would be essential to the case.

In summary, there is simply no way to prove voting rights violations unless the Senate adopts the standard in S. 1992. To change it would indeed weaken the act, and make a mockery of the faith that millions of Americans have placed in its protections.

Aside from our desire to correct distorted perceptions about specific sections of S. 1992, as Congressmen we also believe it important to refute—and refute forthrightly—. suggestions that intimidation or insufficient evidence played any part in the House's passage of this vital legislation. False and spurious allegations serve no useful purpose; they are an attempt to inject acrimony and rancor into this important debate, and to obfuscate the unity and purpose which characterized the House's action.

For example, the suggestion has been made by one witness before your committee that 389 Members of the House of Representatives did not understand what they were voting for. The same witness stated that these Members, elected from districts throughout the country, and from every state in the nation, voted to support the right to vote because they were intimidated by civil rights groups.

This is incredible and it is also untrue. Worse than sour grapes, it is a gross and dishonorable distortion which impugns the integri-

ty of the House, as well as the concept of representative government.

We are certain that you would question the motives of anyone who said this about the Senate, and that you will therefore appreciate the deep offense this has caused many of our colleagues in the House. I am proud to state that position for them.

The weight of the evidence demonstrated continuing need for a strong Voting Rights Act and also played a major role in converting doubters into strong supporters.

For example, we were told that people in covered jurisdictions suffered psychologically because of section 5. This was not true, and we heard no evidence to suggest it. Indeed, what we did learn is that the preclearance provisions of section 5 have removed pressures from decent, local politicians, who would otherwise have to risk their political careers by personally opposing backroom political schemes which have traditionally denied blacks equal access to the polls.

We were told that the Act was too expensive to administer. Again, these allegations were repeatedly disproved by quantitative data, in state after state, until, happily, these arguments subsided.

We were told that the review process within the Justice Department caused delays. The suggestion was made that the Department of Justice was hopelessly backlogged with preclearance requests. Nothing is further from the truth, even given the small staff that the Department has devoted to this function.

We are confident that the same process of reviewing the facts will recur in the Senate; indeed, it already is taking place. And, as in the House, we are confident that your colleagues will be persuaded to pass S. 1992 as written. The issues addressed by this bill, and the need for it, are compelling. They speak eloquently for themselves.

The straw men which were disposed of by the House should not be permitted to reemerge, Mr. Chairman. They have been put to rest both by the eloquent testimony before the House and the Senate; by the almost unanimous action of the House; and by majority public opinion.

It is incumbent on this subcommittee, I respectfully submit, and on the Senate to join in the swell of unanimity which has after so many discordant years, finally culminated in the legislation you now consider.

We urge you and your Senate colleagues, in the words of the great Black poet Langston Hughes, to "Let America be America again" by passing S. 1992. This action will ensure that the franchise—the premiere and most precious American right—is freely available to all citizens regardless of color, of language and of residence.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Congressman Washington.

Mr. CONYERS. Mr. Chairman, I am happy to be here as a member of the Judiciary Committee in the House who has worked on this matter at least once before and I am pleased to be before, these hearings and I suppose it is important that it is the concluding day and you are hearing from us.

I am not happy that the question of "result" versus "intent" still is unresolved before your Committee because Mr. Katzenbach spoke to this question from the very first time that those words around section 2 were put into the law when he said that section 2 was intended to ban any kind of practice denying or abridging the vote and when its purpose or effect was to deny or abridge the right to vote on account of race or color, that it would then be a violation.

So we see that purpose or effect or result, no matter how it has been garbled or mishandled in one case, was always the test and I think that legal scholars would agree with the conclusion that we have arrived at in the other body that result is not a new introduction of the test that we should use.

I am really literally surprised that we would take this one case, which was settled, as you know, with many different voices and opinions and say that that now is the law. The fact is that the cases are still coming up, as you know, using the same result or purpose test that we have for so long seen.

I do not know. I perhaps see this as a last ditch effort to derail an historic piece of legislation that the overwhelming majority of both sides of the Federal legislatures should determine be continued for a very good reason.

My second point is that the Department of Justice is today under a cloud unlike any that I have ever witnessed in my career in the House of Representatives. From that one body specifically charged with the enforcement of the laws of this land have come an unconscionable series of activities for which there are no parallel in American governmental history, no parallel, and it is being examined very carefully by lawyers and, I might add, Members of Congress in terms of the switches they are making, of the crass political interventions that are clearly denominating some of their changes of opinion and the fact that it is taking the lead with other departments of government to institute incredible changes that diminish racial progress under Federal laws and court decisions of our land.

I am seriously disturbed by the character and the quality of the kinds of acts that flow from that department, that both your committee and mine have a great deal of connection with.

Now, finally, it seems to me that there is somehow still the suggestion that the civil rights community and the legislators that have already passed on this matter are somehow divided as to the result of their work product, that we are in some quandary as to whether we really want this new improved bill that is now before you, or whether we want a simple extension.

If anybody tries to tell you that there is some confusion, I think that it should be rejected out of hand. What we did, and I remember the intense negotiations that all three of the Members of Congress before you were engaged in for many hours with one of our colleagues from Illinois, in an attempt to work out the best kind of bipartisan effort that the extension of this legislation would produce, and I remember very carefully that the initial reservations about bailing out these communities that were locked in almost for the rest of this generation, sir, created some reservations that we

resolved long before that bill came to the floor of the House of Representatives.

It was clear through all of our civil rights leadership, through the black community of America's leadership, through our friends in the legal community, the legal scholars, and our practicing attorneys. We come here on this final day with the very strong convictions that what most of your colleagues want is what has been done I think to the credit of the House of Representatives.

I had no way of knowing, nor would I have ever predicted, that only 24 members of the housing would withhold their support from a matter that had been so acrimonious in years past. But we have reached that point, and if you see fit to give us your assistance in this matter, if you see fit to move with what I think is the clear stream of the majority views of thoughtful lawmakers and civil rights advocates of America, we will come to a very, very happy conclusion in these hearings.

But if we have to fight out these spurious allegations, if they have to be debated out amendment by amendment on the floor of the Senate, I can tell you, Mr. Chairman, that the collective forces of America are totally prepared to join in with that drawn out and I think perhaps useless legislative exercise.

I urge, with all the skill and brilliance that you have brought to this great body, that you consider as carefully as I know you will the questions that have, we think, been so forthrightly addressed in the House measure, whose companion is before you today.

Senator HATCH. Thank you, Congressman Conyers.

Walter?

Mr. FAUNTROY. Thank you, Mr. Chairman.

As you know, I bring to this panel not only my considerable work over the past year with the members of the committee listening to hearings on the House side, watching the change in the attitude and concern registered on the part of persons who at first felt that the measure should not be extended, but I also come as a minister who is veteran of a number of hearings over the past 15 to 20 years on this subject.

I was the coordinator of the Selma to Montgomery march. I was in Alabama when Jimmie Lee Jackson was gunned down in Marion, Alabama, when the Rev. James Reeb, a Unitarian Minister from this city, was beaten to death on the streets of Selma, and when Viola Liuzzo, a civil rights person from Detroit, Michigan, was gunned down on Highway 80 at the close of that march. And I have been throughout the South in the past few weeks listening to the kind of testimony that ultimately moved the House to pass by so overwhelming a margin the measure which is before you. I want to impress upon you the fact that in the decade of the sixties, as today, we in this Nation are committed to a worldwide struggle to promote and protect the rights of all who wish to be free. If there is anyone in this country who believes in the dream of America, it is those of us who are black, who have worked so hard to make that dream a reality, not only for ourselves, but for all Americans.

I would just say in closing that I hope that every member of the committee will examine his conscience on this matter. This Nation was founded upon the firm belief of government of the people, by the people, and for the people. And I know that you recognize that,

even as the President has indicated, the right to vote is the most precious that we in a democracy have. There is ground swell, as evidenced by the House vote, that this measure be extended in the form that it passed the House. It is a ground swell that cannot be met with mere statements about the importance of voting rights for all Americans. It cannot be left to the courts to ponder the intent of the Congress in 1965 in passing this law. It must be resolved in the measure that has been passed by the House, and that has obviously substantial support in the Senate, even at this moment.

It is a desire that cannot be quieted by generating vague fears about quotas and required representation of all segments of American society. It is a time for action now. A time for action in the committee, in the Senate, and among the American people, to begin sincerely and seriously to move this Nation to the high grounds of principles that we enunciate, but so often fail to live.

It is very difficult for me to say to citizens in Montgomery, Ala., where there are 44 percent black citizens, but where only 20 percent are registered, because there is a requirement that persons in order to register have social security numbers, and a great many people who are citizens and who pay their taxes do not work in covered employment. It is very difficult for me to explain the necessities and complexities to people in Marengo County, Ala., where they are 60 percent of the population, and where if they do not have a social security number they are required to purchase a school record in order to qualify to vote—it is hard to say to them how that in fact is not a poll tax.

In short, Mr. Chairman, I would hope that as we are prepared to respond to any queries you may have on the legal questions which you have raised about S. 1992, that you will keep in mind the compelling moral reasons for extending this measure as it has been passed by the House.

Senator HATCH. Thank you, Congressman Fauntroy.

We appreciate the eloquent statements all three of you have made. They have been compelling and very enlightening and I do appreciate both your remarks and your feelings on this matter.

Senator Mathias, do you have any questions?

Senator MATHIAS. No. Just to welcome, as always, our distinguished colleagues from the other side of the Capitol. I understand their feelings, and I think they understand mine, so I will not embellish the record any further at this point.

Senator HATCH. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

A question that I have relates to your sense of the burden of proof which would be present if the intent standard is adopted, contrasted with the results standard. Do you believe it would be significantly more difficult to establish a violation of the Act with the intent test as opposed to the results test?

Mr. WASHINGTON. Yes. We feel it would be excessive—extremely more difficult to abide by the standard of intent than by result. It has been stated that you almost have to have a smoking gun, or to have overheard conversations relative to that in order to prove it, and I embellish that point in my submission to this committee.

We all know how difficult it is to establish intent, for example, in a body as large as, say, the Congress, or one of the State legislative bodies. What do you base it on, the intent of the chief sponsor, or spoken words he stated? Do you expand it out to the cosponsors and try to determine what their intent was in supporting or amending a bill, or do you look at the entire body and try to gage from that what the intent of that body was relative to a piece of legislation?

It could go on and on, and in my testimony I address this. What disturbs me is what I touched upon earlier, when I indicated that this is a standard of proof in the area of discrimination that I do not think this country wants to bog itself down in. It would be a really, really debilitating and disturbing experience to go through to have to prove that a person is a racist. Rather than do that, why not deal with the result situation, and say that the result of what you gentlemen have done, or ladies, is that you have discriminated against contrary to the standards of the Voting Rights Act. You have discriminated against a significant body of voters.

Senator SPECTER. Do you have a body of cases that would be indicative of a situation where an act was determined to be a violation under the results test, and not a violation under the intent test?

Mr. WASHINGTON. I am hard pressed to elicit one from memory. I think the record has been made by Mr. Cox and other litigators. I do not have one at my particular beck and call.

Senator SPECTER. There has been a fair amount of controversy on the issue whether the House-passed version changes or does not change the existing law. What is your view on that subject?

Mr. WASHINGTON. Our position is that the correct standard is the test cited in White versus Register. It states it clearly. The worst that can be said is it might be ambiguous. We think you ought not to overrule that, but to go back to the standard in that case.

Senator SPECTER. So you think that if you have a simply stated extension of the Voting Rights Act that that purpose would not be accomplished?

Mr. WASHINGTON. We definitely think so.

Senator HATCH. Thank you very much for coming. We certainly appreciate your having shared your views on this matter with us today. We will keep the record open so that if you have any other statements for the record, we will incorporate them, and the full statement.

Our next witness will be the Assistant Attorney General of the United States for Civil Rights, Mr. William Bradford Reynolds. Mr. Reynolds is the chief spokesman for the administration on civil rights matters, so we will be happy to have him as our witness at this time.

Mr. Reynolds, we are happy to have you here to take your statement. After your statement we will have some questions for you.

STATEMENT OF HON. WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Thank you, Mr. Chairman, members of the committee.

If I could make an opening statement, I then would be pleased to answer questions.

In America, the sovereign power belongs not to the Government, but rather, as established in the first sentence of the Constitution, "we the people" govern. In a nation founded on this democratic principle, the right to vote is the most cherished of all individual rights. The American people underscored their recognition of this fundamental truth through adoption of the 15th, 19th, and 26th amendments to the Constitution and enactment of legislation by their chosen representatives. As a consequence, the laws of this country now insure that no American eligible to vote can be deprived of an equal opportunity to participate in the affairs of Government.

The Voting Rights Act stands as the centerpiece of the protections that guard against the denial or abridgement of the right of every qualified citizen to participate equally in the electoral process. This treasured piece of legislation was enacted by Congress in 1965 in response to the use by some State and local governments of literacy tests, poll taxes, and similar devices designed to prevent blacks from exercising their right to vote.

Section 2 of the 1965 act codified the 15th amendment's ban on voting qualifications and procedures calculated to deny or abridge the franchise on the basis of race or color. Additionally, section 5 of the act placed certain State and local governments, primarily in the South, under a 5-year obligation to submit for "preclearance" by the U.S. Attorney General or the U.S. District Court for the District of Columbia any proposed change in voting practices or procedures enacted after the date used to determine coverage. Preclearance is to be granted only if the submitting jurisdiction satisfies the Attorney General or the District Court that the proposed voting practice or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or since 1975, membership in a language minority group.

In 1970, Congress reviewed the progress in minority registration and voting made in jurisdictions covered by the Federal preclearance provision of section 5, and found sufficient evidence of continued racial discrimination in voting to warrant extending section 5 preclearance requirement for an additional 5 years. In 1975, Congress revisited the issue, extending section 5 for another 7 years, and bringing within its coverage additional jurisdictions having sizable language minorities.

Today, the question whether to extend again the protections of section 5 is before Congress, and, as in the past, the answer lies essentially in a careful assessment of the results achieved since the act's passage 17 years ago. By any standard, the achievements have been dramatic. Minorities in the covered jurisdictions have made extraordinary gains in voter registration and election to public

office. For example, black voter registration in Mississippi has increased tenfold, from 6.4 percent to 67.4 percent, which exceeds the national average. The number of black elected officials in the South has increased from less than 100 in 1965 to well over 2,000 today. In Arizona, Hispanics constitute 16.2 percent of the population and 13.2 percent of all elected officials.

Progress in the covered jurisdictions can be measured attitudinally as well as statistically. The political environment in the covered jurisdictions has changed markedly over the last decade and a half. Rarely can a serious candidate for elective office afford to ignore minority voters, and incumbent public officials cannot neglect the concerns of minority citizens without jeopardizing their prospects for election.

Despite these strides, the sad truth is that racial discrimination in the electoral process still plagues blacks and language minorities in some parts of the country. As Attorney General William French Smith earlier testified before this subcommittee, the Justice Department's experience in enforcing the Voting Rights Act demonstrates that Federal oversight of electoral changes continues to be necessary for some political jurisdictions.

It is for this reason that the President favors extending the present act without change for another 10 years. The protections provided in the 1965 act, and carried forward by Congress in 1970 and 1975, have worked extraordinarily well. This is the piece of legislation that a wide spectrum of Americans consider the "crown jewel" of the civil rights laws. When the Attorney General and I and others in the Justice Department met last summer with the civil rights leadership—shortly before any action had been taken in the House—the unanimous plea was for the administration to support a straight extension of section 5. "If it is not broken, don't fix it," was the message we were given over and over again. The administration is in full agreement with that position. The logic of that position applies to the act as a whole. While we will certainly work with this subcommittee and the Senate on a meaningful and fair bailout provision, there has been absolutely no showing for amending the other basic provisions of the act. A 10-year extension without change is therefore recommended.

The purpose of my testimony today is twofold. First, I will in summary fashion attempt to review our recent experience in enforcing the provisions of the Voting Rights Act. Second, I will address the proposal, passed by the House, to replace the existing "intent" test in section 2 of the act with an "effects" test.

First is the Justice Department's enforcement of the Voting Rights Act. Jurisdictions covered under section 4(b) of the act are subject to the so-called special provisions: section 5 preclearance of voting changes, Federal examiners, Federal observers, and—for jurisdictions which became covered in 1975—bilingual elections. Section 4(a) contains a complex formula of possible bailout dates, under which States initially covered in 1965 may be able to escape further coverage of the special provisions after August 1982. Some jurisdictions can bail out no earlier than 1991.

Today the most important of the special provisions is section 5, which requires preclearance of any change in the voting laws of a jurisdiction covered by section 4(b). A jurisdiction covered by sec-

tion 5 is required to submit a proposed change to the Attorney General or the U. S. District Court for the District of Columbia and to demonstrate that the change does not have the purpose and will not have the effect of denying voting rights on account of race, color, or membership in a language minority group. In the event that a jurisdiction subject to section 5 attempts to implement a new voting law without obtaining preclearance, the Attorney General or a private person may sue to enjoin implementation of the law.

In 1969, the Supreme Court held that section 5 reaches not only laws relating to the process of registering or voting, but also to practices such as redistricting and annexation that could involve dilution of a minority group's voting power. In the years just after 1965, the Department of Justice gave low priority to section 5, concentrating instead on registration of minorities.

In amending the act in 1970, Congress endorsed the Supreme Court's interpretation of section 5 and stressed the need for effective enforcement. In 1971, the Department of Justice issued guidelines for the administration of section 5. Administrative and judicial enforcement of section 5 became a major priority of the Department's implementation of the act.

The Department has gained insight into the operation of section 5 during the course of reviewing over 39,000 changes, defending 25 preclearance suits and successfully litigating a similar number of suits to enforce section 5. Most of the activity has occurred since the 1975 extension of the act. Thus, three-fourths of the changes submitted and three-fourths of the preclearance suits filed since 1965 have occurred since the 1975 extension of the act. This dramatic increase in the submission of changes cannot be explained as reflecting a corresponding increase in the adoption of new voting practices by covered jurisdictions.

Instead, we believe that the explanation lies in part in the increased number of jurisdictions brought under section 5 coverage in 1975.

In addition, our stepped-up enforcement efforts have led to the submission in recent years of many changes that had been adopted and should have been submitted years ago. Also many jurisdictions covered by section 5 have become better educated regarding the preclearance requirements and are, for the first time since the act was passed, submitting most changes as they are adopted.

In spite of increased compliance with the preclearance requirement of section 5, we continue to find significant failures to submit covered changes—which is but one of the reasons suggesting the need for an extension of the act. For example, over the past 6 years, more than 50 suits have been brought, by this Department and by private persons, to enjoin implementation of voting changes that had not been precleared. Moreover, during the past 2 years, the Department sent 223 letters to covered jurisdictions noting an apparent failure to comply with section 5 and requesting the jurisdiction to seek preclearance of the change in question.

The need to extend section 5's preclearance requirement is also evidenced by an analysis of objections to submitted changes. Such an objection reflects a determination by the Attorney General that the jurisdiction has failed to show that the submitted change has

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neither the effect of denying or abridging the right to vote on account of race, color or language minority status. A change has a discriminatory effect under section 5 when it can be said to be "retrogressive"—that is, when it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." That is stated by the Supreme Court in *Beer* v. *United States.*

Since 1965, the Department has objected to 695 changes. More than 400 of these objections have occurred since the most recent extension of the act in 1975. While Texas, which came under section 5 coverage in 1975, accounts for one-third of the post-1975 objections, almost half of the objections to voting changes in States covered by the act in 1965 have occurred since the 1975 extension of the act.

Thus, while the gains made by minority groups in covered jurisdictions have, for the most part, been dramatic, the record demonstrates that there still remains room for improvement. Our experience in 1980 and 1981 reflects continuing progress over the preceding six years, but we have not yet arrived at the point where it can confidently be stated that section 5 is no longer needed.

Because of the potential for redistricting to affect the voting strength of minority groups, section 5 becomes particularly significant after a decennial census. Reapportionment under the 1980 census is now in progress. We have thus far received 300 redistricting submissions based on the 1980 Census, 13 of which have resulted in objections.

While accounting for no more than half of the changes submitted since 1965, redistrictings, annexations and changes in method of election such as a majority vote requirement for election to a particular office, have resulted in over 80 percent of the objections interposed by the Department.

Thus, in considering the question of duration of an extension of the act, it is particularly important to keep in mind the special need for review of redistricting after the next decennial census. Accordingly, the administration supports a 10 year extension of the act's special provisions.

Section 203 of the act imposes upon counties within its coverage formula a requirement that elections be conducted in the language of pertinent language minority groups, as well as in English. Under its present terms, section 203 will automatically terminate in August 1985.

In 1976, the Department of Justice issued interpretative guidelines on the act's language minority provisions. The guidelines state that the basic standard is one of effectiveness—providing, for example, that a covered jurisdiction may "target" bilingual material or oral assistance. In our dealings with covered jurisdictions, we have emphasized that the bilingual requirements should be interpreted in a reasonable way.

In 1975, Attorney General Levi assigned primary responsibility for enforcing section 203 to the United States Attorneys. The Department of Justice has not accumulated detailed information on the extent to which bilingual assistance or materials have actually been provided by the jurisdictions or used by voters.

Several enforcement actions have been filed under section 5 to obtain compliance with the bilingual election requirements of section 4(f). Additionally, the Department obtained consent decrees designed to protect the rights of Chinese and Spanish speaking voters in a California county, and Navajo voters in a New Mexico county. We have defended nine bailout suits by jurisdictions covered under the language minority provisions of section 4 or section 203.

Our enforcement experience indicates that the language minority protections of sections 203 and 4(f) have, by and large, worked well. Citizens whose first language is not English have been afforded by these provisions the opportunity to participate in the political process. Accordingly, we believe that section 203 ought to be placed on the same coverage schedule as the special provisions and extended until 1982.

In sum, then, Mr. Chairman, the work of section 5 and the language minority provisions is unfortunately not yet completed. The administration, therefore, urges the Congress to extend these protections for an additional 10 years. The administration does not support, however, current proposals to amend the substantive standard of section 2 of the act, and it is on this issue that I will now focus my remarks.

Civil rights concerns naturally and understandably evoke great emotion, and the debate concerning section 2 has been no exception. Thus, although the President strongly supports extension of the act, with the permanent provisions remaining intact, his support has been characterized as an attempt to "weaken" the act, or, as Congressman Washington said, an attempt to renege on the basic protections of the 1965 act.

Such rhetoric does not advance the debate. Precisely because of that fact, it is particularly important that the Senate carefully and dispassionately assess the need for and implications of any amendment to the Voting Rights Act. With this in mind, I wish to address experience under section 2, the language of the proposed amendment to section 2, and the potential impact of that amendment on American political processes. This change has become the most controversial of the amendments in the House bill.

Much of the debate surrounding the amendment to section 2—which has been recommended to the Senate in S. 1992—has centered on the state of the law prior to the Supreme Court's decision in *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980). This, in itself, is difficult to understand in light of the fact that, as the court of appeals for the fifth circuit itself noted in the *Mobile* case, "[T]his court knows of no successful dilution claim expressly founded on [sec. 2]." *Bolden* v. *City of Mobile.*

In any event, I submit that the critical issue before the Congress is not so much what the law was prior to the *City of Mobile* decision, but rather what the law will be, and will do, if the House-passed amendment to section 2 is enacted.

As originally passed in 1965, section 2 banned voting practices or procedures "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen" to vote on account of race or color. In 1975, the section was amended to include within its prohibition discrimination against members of certain language minority groups. Unlike section 5 of the act, section 2 applies na-

tionwide, applies to existing laws and procedures as well as to changes, and is a permanent provision requiring no congressional action to continue its protections.

Noting that the section merely codifies the prohibitions contained in the 15th amendment, the plurality opinion of the Supreme Court in the *City of Mobile* v. *Bolden,* concluded that a challenged voting practice violates section 2, as well as the 15th amendment, only if motivated by a racially discriminatory intent.

As is discussed later in my testimony, the current statutes and case law under the 14th and 15th amendments provide strong protections against racial discrimination in voting practices and procedures. This Administration is firmly committed to vigorous enforcement of the rights protected by section 2.

The bill recently passed by the House amends section 2 to prohibit the use of any voting practice or procedure "which results in a denial or abridgement" of voting rights on the basis of race, color or membership in a language minority group, thus eliminating the requirement of proving discriminatory intent and replacing it with a standard based on an "effects" test. As the House report makes clear, amended section 2 would focus the inquiry "on the results and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it. This focus on election results rather than the right to vote without discrimination drastically alters the focus of the 15th amendment and section 2 as originally enacted.

In addition to our basic concern with changing the existing standard, the amendment to section 2 is loosely worded. What is a voting practice "which results in a denial or abridgement" of voting rights on the basis of race? Because of the ambiguity of the phrase, the interpretation will be left to the courts. We are deeply concerned that this language will be construed, as occurred with title VII of the Civil Rights Act of 1964, to require governmental units to present compelling justification for any voting system which does not lead to proportional representation, notwithstanding the lack of discriminatory intent.

By adopting a statistical test which measures the statutory validity of a voting practice or procedure against election "results," the House amendment would place in doubt the validity of any election system under which candidates backed by the minority community were not elected in numbers equal to the group's proportion of the total population. Amended section 2 would, according to the House report, invalidate longstanding election systems incorporating at-large elections "imposed or applied in a manner which accomplishes a discriminatory result."

Equally vulnerable to attack would be redistricting and reapportionment plans. Would not amended section 2 require manipulation of district lines to insulate racial and language minorities from electoral defeat? At least one prospect, and a very real one at that, is that this amendment could well lead us to the use of quotas in the electoral process.

The second sentence of the proposed amendment is frequently cited to counter the proposition that the change to a "results" standard would create a right in racial and language minorities to proportional governmental representation. That sentence provides:

"The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

The terms of this proviso suggest that amended section 2 would tolerate only those racially disproportionate election results that occur in spite of the challenged election procedure or method. Such a case would be presented where the election system at issue was closely tailored to insure a racial or language minority group a full and fair opportunity to achieve proportional electoral success, but for reasons unrelated to discrimination, the minority group collectively did not avail itself of that opportunity.

For example, regardless of what electoral system is employed, a racial or language minority group will not be as represented on a governmental body in proportion to its numbers in the population if no candidate backed by that minority group undertakes to run for office. Although such a result might well run afoul of the effects test, the second sentence of amended section 2 makes clear that disproportional governmental representation in such circumstances does not require invalidation of the challenged election method.

Likewise, even in governmental systems employing single member districts, it certainly is not unheard of for a candidate not backed by the minority community to win election in a district in which a racial or language minority holds a solid majority of the voting age population.

Were disproportional governmental representation alone sufficient to establish a violation of amended section 2, invalidation of such a single member district form of government might well be required. Thus, in essence, the first sentence of amended section 2 creates in racial and language minorities a right to elect minority backed candidates in numbers equal to the group's proportion of the total population, and the second sentence provides that an election system tailored to protect that right to proportional governmental representation will not violate the Voting Rights Act solely because that right has not been exercised.

But in the archetypal case—where minority backed candidates unsuccessfully seek office under electoral systems, such as at-large systems, that have not been neatly designed to produce proportional representation—disproportionate electoral results would lead to invalidation of the system under section 2, and in turn, to a Federal court order restructuring the challenged governmental system. Such restructuring would by no means be limited to Southern cities.

According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. A 1976 study of 106 cities with at-large systems indicated that, even in the Northeast and Northcentral regions of the country, blacks are significantly underrepresented on city governing bodies. Would the multimember districts in Pittsburgh, Pa. or Hartford, Conn. be vulnerable to a restructuring Federal court suit under section 2?

A brief look at the statistics would lead to the conclusion of minority underrepresentation in those cities, as well as Wilmington, Delaware and Kansas City, Kans. and many others. Yet no evi-

dence has been presented suggesting racial discrimination in the electoral system of those cities.

Nor would amended section 2's prohibition be limited to at-large election systems. Throughout the country, blacks are also underrepresented to a significant extent in cities with single member district systems.

In sum, an "effects" test under amended section 2 would likely lead to the widespread restructuring by Federal courts of electoral procedures and systems at all levels of Government—from the U.S. House of Representatives to local school boards—on no more than a finding that the election system is not designed to avoid disproportionate election results.

Most would agree that racial and other minority groups can be and often are represented effectively by nonminority officeholders. It is commonplace for officeholders with majority white constituencies to seek support from and provide services to minority group constituents. Thus, the premise that proportional representation is necessary in order to protect the rights of minority groups is fallacious.

From the time our Constitution was written, we have rejected proportional representation. Alexander Hamilton, in the Federalist Papers, No. 35, addressed this question in an analogous context in evaluating the proposition that each segment of society should be represented by someone of its choice "in order that their feelings and interests may be the better understood and attended to." But, Hamilton continued, "this will never happen under any arrangement that leaves the votes of the people free." To this sobering fact, he added:

"Is it not natural that a man who is a candidate for the favour of the people and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself and his posterity by the laws to which he gives his assent are the true, and they are the strong chords of sympathy between the representatives and the constituent."

A candidate for public office could afford, of course, to ignore a sizable voting minority when that minority was prohibited, through literacy tests and other devices from registering to vote, as was the case with blacks in the covered jurisdictions when the act was passed in 1965. As I previously noted, however, the Voting Rights Act outlawed such tests and devices, and registration and voting of racial and language minorities in the covered jurisdictions have increased to the point that the political strength of these groups can no longer be ignored by serious candidates.

An "effects" test in section 2 threatens to undermine a basic principle of our democratic system of Government; namely, that no group, whether defined by political interests, party affiliation, racial characteristics, or anything else, has a right to be represented on elected governmental bodies. As the Supreme Court has stated:

"[A]ll who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation,

whatever their income. * * * The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

That fundamental principle of our democratic form of Government should not lightly be tampered with lest we encourage political repolarization along racial lines.

The difficulty of proving discriminatory intent is often cited in support of the discriminatory effects standard proposed by the House. Frequently voiced by witnesses before this subcommittee and by the authors of the House report is the view that the Supreme Court has required evidence of the so-called "smoking gun" to prove purposeful voting discrimination. The Court has done no such thing.

To the contrary, in numerous cases it has made abundantly clear that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." That is from the *Arlington Heights* case in the Supreme Court.

Indeed, the discriminatory effect of official action can alone be sufficient to prove an intent to discriminate when the action is unexplainable on any other basis, as was the case in *Gomillion* v. *Lightfoot.* Other indicia of discriminatory intent recognized by the Court are the historical background of the challenged decision, particularly if it reveals a series of official actions taken for invidious purposes, the degree to which the action departs from either normal procedural sequence or normal substantive criteria, and contemporaneous statements of members of the decisionmaking body, minutes of its meetings, reports, or other direct evidence of intent. The Court has made clear that these indicia of intent by no means exhaust the proper subjects of inquiry in determining the existence of racially discriminatory purpose.

Thus, direct evidence of intent—that is, the so-called "smoking gun"—is simply not essential to prove discriminatory purpose, but rather is one of the many evidentiary avenues to explore. To be sure, proving discriminatory purpose is not easy. But neither is it impossible. Indeed, countless successful civil rights claims have been made under the equal protection clause of the 14th amendment, and each one required proof of discriminatory purpose. Certainly no less should be required to authorize a Federal court to restructure the governments of State and local jurisdictions across the country.

Finally, apart from the question whether to amend section 2, our enforcement history under the act, as the Attorney General previously testified, confirms that States and political subdivisions currently covered by section 5's preclearance requirement should have the opportunity to demonstrate that they have indeed cleansed their electoral processes of racial discrimination and have been in compliance with the law for many years.

As the President has noted, such jurisdictions should be allowed an opportunity to bail out from the special provisions of the act. We must not lose sight of the fact that the preclearance requirement of section 5 represents a profound Federal intrusion into governmental and political questions of State and local concern.

In upholding the constitutionality of section 5, the Supreme Court in *South Carolina* v. *Katzenbach*, emphasized the fact that the bailout provision would allow covered jurisdictions presenting the requisite proof to escape further coverage. Implicit was the notion that Congress could revist the bailout standard.

Accordingly, the administration could support an amended bailout provision that continues section 5 preclearance for those covered jurisdictions which have not cleansed their electoral processes of racial discrimination, but at the same time, provides a realistic and fair bailout mechanism under which a jurisdiction with a proven record of compliance with constitutional and statutory voting safeguards is permitted to remove itself from section 5's coverage.

In this connection, there are now pending before this subcommittee several bills that would amend the current bailout provision in section 4 of the act to release jurisdictions from preclearance requirements upon meeting specified criteria. As I indicated at the outset, the Department stands ready to work with this subcommittee in the weeks ahead to seek to devise from the various alternatives under consideration a workable and fair bailout provision.

Thank you. I would be pleased to answer any questions you may have.

Senator HATCH. Thank you, Mr. Reynolds.

Let us address a few questions now.

Just how significant an issue is the proposed change in section 2? The Attorney General, if I recall correctly, described the proposed change from an intent standard to a results standard a "dramatic" change.

Do you agree or disagree with him?

Mr. REYNOLDS. I agree that it is a dramatic change. I think that it has the potential for terribly dramatic ramifications and consequences, as I spelled out in the statement that I just gave.

We do see it as a marked departure from what the law has been in the past and a fundamental change in the basic right that is guaranteed in the 15th amendment, which is the right to vote, free from discrimination.

The change in section 2 would change that fundamental right to a right to have certain election results rather than simply the right to cast your vote free of racial discrimination.

Senator HATCH. Proponents of the results test argue that the change in section 2 would simply restore the well understood law that existed prior to the *Mobile* decision.

You would disagree with that claim, according to your statement.

How do you account for such widely differing views of what the status quo was prior to the *Mobile* decision?

Mr. REYNOLDS. In the attachments to my statement, Mr. Chairman, I have submitted, I think, in attachment O, a discussion for the benefit of the subcommittee of the state of the law prior to the *Mobile* decision.

I believe that the debate that has been carried on in this area has been largely due to the tendency of the proponents of the House bill to ignore which cases are indeed section 2 cases, and in so doing they have relied heavily on cases in the section 5 area to suggest that there has always been an effects test under section 2.

If you look at the principal cases both by the Supreme Court and the fifth circuit, the constitutional standard as announced in *Whitcomb* v. *Chavis* and *White* v. *Register*, which were the only two Supreme Court cases before *Mobile*—the constitutional standard does indeed embrace an intents test or a showing of a discriminatory purpose as an element of the constitutional violation.

Section 2 is, as was made clear in the legislative history in 1965, a codification of the 15th amendment constitutional protection. The first case to reach the Supreme Court that actually addressed the section 2 standard was the *Mobile* case, and Justice Potter Stewart did, I think, very carefully analyze pre-voting rights law in that decision and demonstrated that there was an intent test, and had always been an intent test in place, under section 2. I guess the other point that should be made with regard to the discussion in this area is that the proponents of the House bill have made their arguments as to what the prior law was in terms of cases like *Zimmer* and the fifth circuit decisions that follow *Zimmer*; they suggest that that line of cases is what the House bill, section 2, requires as a standard. That is simply not the case.

If you read what the House bill says, it talks in terms of election results. There is no decision, whether it is *Zimmer* or any other fifth circuit decision, that has yet spoken to what a "results" standard means, and a lot of the discussion from the proponents of the House bill is nothing more than an effort to define or shape what the "results" test might mean.

Our concern is that if you look at the only body of law that we are aware of that deals with the effects or results test, you really turn to the title VII law, and in that area you do not have a standard such as was announced in *Zimmer* or by the fifth circuit under the Voting Rights Act. Rather, you have a standard that simply talks in terms of underrepresentation and statistically whether or not the employees in the work force are represented in proportion to the representation in the community. That is the body of law under an effects test that one would logically turn to.

Thus, I think part of the reason for the confusion in the debate is that there seems to be an effort on the part of the proponents to define this "results" or "effects" test in terms of prior decisions of the court developed in a constitutional context or under section 5—using those specific standards—and there is nothing to suggest in the legislation or its history that that would be the case.

Indeed, if you read the House report, the House report says in several places that various factors that are included in the *Zimmer* standard would not be relevant to proving effect—"unresponsiveness," for example.

The House report simply casts that aside as being an irrelevant factor.

But when they talk in terms of—or discuss the matter before this subcommittee or elsewhere, the proponents seem to latch onto that body of law in the fifth circuit and suggest that it forms the definition of "effects". Our concern is that we do not see that parallel anywhere in the language or the legislative history of the statute as articulated in the House report.

Senator HATCH. From your experience with regards to the application of the Voting Rights Act, could you give us some indication

of how an amended section 2 would be applied? We have heard claims from many people on that issue, but could you give us an answer based on your understanding and experience with the law, giving us specific examples of how you think the results test would be applied and what the results of that application would be?

Mr. REYNOLDS. Well, of course, we are always a little bit in the dark because we never had the experience under a results test and this is a new creature in the law.

As I have indicated, I think the manner in which it would be applied would look to one of two areas. I think that the courts would look either to the title VII cases, where there has been a body of law under disparate impact, and they would pick up that body of law and put it down in this area. That body of law says if you have underrepresentation in the work force measured by statistics, comparing it to the total population in the community, then you have got a discriminatory effect; if you pick that up and put it down here in this area under the effects test, what you wind up with is looking at election results: If you do not have in the elected body the same proportion of minorities as you have in the community at large, then you will have a problem under the effects test under the title VII analysis.

Another area where one would, I think, logically look would be in section 5, under the "purpose and effect" standard. There you have really two kinds of situations. You have the dilution line of cases which really flow from annexation. Those cases point one in the direction of proportional representation, because an annexation that tends to change the proportional representation of the minority in the area involved is one that runs afoul of an effects test in section 5.

Another line of section 5 cases involves redistrictings and a "retrogression" standard under *Beer*. I think that should probably have limited use to define what we are talking about here in terms of "effect," because in a retrogression analysis you are talking about changes; you have to compare the new system to the directly preceding system.

The only case I am aware of that really gives us a clear indication, or a signal, of what is likely to happen is the *City of Mobile* case, where Judge Pittman did find a discriminatory effect based on the fact that the at-large system in the city of Mobile had not produced a minority candidate for some 70 or more years, notwithstanding that there was a 33 percent minority population in the area. The judge did not find discriminatory purpose, but said that because the statistical result showed a discriminatory effect, there was a violation. He then proceeded to restructure the city government on his own in such a way as to insure proportional minority representation on the city council. That is the decision that the Supreme Court overturned and in the process it said that if it were to adopt an effects test, it would lead to proportional representation.

Senator HATCH. You suggested in your statement that even communities with multimember districts such as Pittsburgh, Pa., and Hartford, Conn., Wilmington, Del., or Kansas City, Kans., would be vulnerable to attack under the proposed section 2 changes.

Could you please elaborate on that?

I think my 10 minutes are up; I will switch after Mr. Reynolds had had an opportunity to answer this question.

Mr. REYNOLDS. We have done a rough survey to see exactly what the impact might be with regard to an effects test, and certainly in the areas that were mentioned in my testimony, Pittsburgh, Pa., you have an at-large system where you have 24 percent of the population in Pittsburgh that is minority and they have only one black out of nine on the city council.

Without trying to suggest that there are any discriminatory motives at all, and I do not suspect there are, with the effects test that would be vulnerable to attack. You can go down——

Senator HATCH. How about Hartford, Conn.?

Mr. REYNOLDS. Hartford, Conn. would have the same problem. Wilmington, Del.; Dover, Del., would have the same problem. Fort Lauderdale——

Senator HATCH. How about Boston?

Mr. REYNOLDS. Boston, Mass., would definitely have underrepresentation. Springfield, Mass.; Baltimore, Md., would have underrepresentation. Kansas City, Kans., South Bend, Ind.——

Senator HATCH. How about Cincinnati?

Mr. REYNOLDS. Cincinnati and Dayton, Ohio, would be vulnerable; so, too, Paterson, N.J., Chester, Pa., Memphis, Tenn.——

Senator HATCH. In other words, what you are saying is that each, despite the absence of at-large systems of election, of these communities generally lack proportional representation?

Mr. REYNOLDS. What I am saying is each of them is not only at-large, each of them has a history of underrepresentation of minorities on the city council or the city commission, and that is just a beginning of a very long list of cities.

Senator HATCH. In the case of Boston and Baltimore and Cincinnati, to isolate three because of the concerns three members of this committee have regarding those particular jurisdictions, each of these areas can be seen as having a history of "under-representation"?

Mr. REYNOLDS. Well, that would be another element in the equation.

Senator HATCH. That is all you need, is it not? The "in and of itself" language does not protect those juridictions from the full force and effect of the effects test?

Mr. REYNOLDS. I think that is right. But I would go further. The "in and of itself" language would not protect them any more than without that language simply because they have at-large systems. If you look at the House report that accompanied the House bill, there was a general condemnation of at-large systems suggesting a direct link between that kind of system of government and the underrepresentation of minorities. I think the way around the "in and of itself" language as to any of those jurisdictions is that they do not have underrepresentation alone, but they have underrepresentation in a system that has not been tailored in a way to cure it.

It is thus not a case of underrepresentation "in and of itself," but a case of underrepresentation in a climate or environment which could be tailored or improved or corrected so as to address that underrepresentation. Any court looking at the "in and of itself" language can walk away from this statutory proviso whether or not

you have another element such as some indicia of segregation, simply by virtue of the fact that the system, as it is drawn, has not been designed to cure or somehow ameliorate the underrepresentation.

So I think any of those jurisdictions, without going into what other activity they might have pointing toward segregation, are clearly vulnerable under a result or effects test, and the consequence would be, if you follow the logic of Judge Pittman's decision in the district court in *City of Mobile,* that a Federal court would then be redrawing for all of these communities the electoral systems that they are going to be living under without any say-so from the electorate.

Senator HATCH. My time is up.

Senator Leahy?

Senator LEAHY. Mr. Chairman, I would like to, with your permission, put a statement in the record that I would have given on behalf of myself. I appear to be the only Democratic member here this morning, and I ask unanimous consent that the full statement be placed in the record at the beginning of this hearing.

If I may have the chairman's attention—Mr. Chairman, I hate to interfere with the staff, but I wonder if I could have my statement put into the record. I will ask unanimous consent to——

Senator HATCH. Without objection, it will be placed in the record.

Senator LEAHY. I will just refer to a few points.

Thank you, Mr. Reynolds, for reading to us your long statement. For each of us it gave us a second chance to go through it. I am sure you did not intend to suggest that none of us did not read the statement by reading through it, but each one of us has read it once.

Many others have spoken eloquently about the effect the Voting Rights Act has had on the actual participation of minorities in our political system. No one would deny that those effects have been dramatic.

I have supported S. 1992, which is a bill that passed the House by a 389 to 24 vote and for good reason.

The House wrestled for a long time over the issue of preclearance under section 5 of the act. Under the present law, all jurisdictions become eligible for bailout at the same time, and a State that is entirely covered is required to bail out as a unit.

Based on actual experience, these provisions seemed unfair to many House Members, and they called for improvements.

But it is one thing to improve the preclearance section of the Voting Rights Act and quite another to even think of eliminating it, either explicitly or through "improvements" that disable it.

Section 5 of the act was the force that made the Voting Rights Act of 1965 work, where earlier laws in 1957 and 1960 seemed to founder. It has not proved to be the bureaucratic nightmare that was sometimes predicted—or hope for—back in 1965.

Another major issue before us in these hearings is the question of intent under section 2 of the act. If section 5 is the engine that drives the act and renders it enforcable as a practical matter, section 2 is still the basic protection against discriminatory practices. Preclearance does not cover all areas and may not resolve every threatened violation where it does apply.

Preclearance is designed to stop voting discrimination before it can start in covered jurisdictions, and section 2 is calculated to end it whenever and wherever it is found.

I might say that many in this country took the President at his word in the state of the Union speech when he said something to the effect that we would have an extension of the Voting Rights Act.

Unfortunately, a lot of people, when they read the small print, found that his idea of the extension is to extend apparently if the Justice Department gets its way, a rather emasculated version of the Voting Rights Act and perhaps one of the reasons for the concern expressed is it does not follow what the President of the United States said we would do at the time of the state of the Union message. I hope we are not falling into what a former Attorney General of the United States claimed was a situation of, watch what we do, not what we say. I am sure you would not want that to happen, either.

I understand from your testimony that you do agree that section 2 is a very important issue, is that correct?

Mr. REYNOLDS. That is correct.

Senator LEAHY. Have you always thought so?

Mr. REYNOLDS. Yes. I thought it was important.

Senator LEAHY. Did you participate in the preparation of the Attorney General's report to President Reagan last October?

Mr. REYNOLDS. I did.

Senator LEAHY. And did you prepare section 2 of the report to the President as it being an important issue at that time?

Mr. REYNOLDS. Certainly.

Senator LEAHY. Did you then, in the report given to the President, did you give a detailed analysis of section 2, of your concern that it is an important section?

Mr. REYNOLDS. I do not believe we gave a detailed analysis of any of the sections. We gave several options that could be considered.

Senator LEAHY. Well, how long a report was given? How large a report was it?

Mr. REYNOLDS. I really do not remember how long it was. Eight or 10 pages.

Senator LEAHY. Would 21 pages seem out of line?

Mr. REYNOLDS. I do not recall. If you have the report, why do you not tell me how many pages?

Senator LEAHY. I have been told 21. I do not have the report.

Mr. REYNOLDS. I do not have it in front of me.

Senator LEAHY. If I had the report here, I would not ask you.

Mr. REYNOLDS. I certainly can provide that information to you. I just do not have it right now.

Senator LEAHY. I am told, however, that the only reference to section 2 was in four sentences of that whole report, and what I had been told was—let me read you what I have been told and you tell me if this jibes with your memory, and I ask it only because section 2 is so important, whether this adequately covers it.

"Another issue before Congress is whether an 'effect' test should be added to section 2, which is a permanent prohibition against denial or abridgment of voting rights under the bill. The House recently approved an amendment to this effect. The objective of this

amendment is to facilitate challenges to elections and other provisions that affect the voting rights of minority groups. We are opposed to including in the administration bill any amendment of section 2 that incorporates an 'effect' test."

Again I do not have the report here so I am asking you is that all that was said about section 2 of the report?

Mr. REYNOLDS. As I say, I do not have it either, but I certainly will stand on what the report says.

Senator LEAHY. Would you send me a copy of the report and let me know whether that was all that was said about section 2?

Mr. REYNOLDS. I am sure we can do that.

[The following was received for the record:]

STATEMENT OF SENATOR PATRICK J. LEAHY BEFORE THE CONSTITUTION SUBCOMMITTEE HEARING ON VOTING RIGHTS -- MARCH 1, 1982

Many others have spoken eloquently about the effect the Voting Rights Act has had on the actual participation of minorities in our political system. No one would deny that those effects have been dramatic. I would like to begin this morning by standing back a little and asking you to join me in a little exercise of the imagination. Suppose you had to summarize the American system of democracy to someone who didn't know what the word meant and you were limited to giving this visitor three one-minute glimpses of American life. What would you choose for your one-minute scenes?

Let me tell you mine. The first scene would be the inauguration of a new President, with the former President standing by as an important guest. Point one would be the peaceful transfer of power. Then I would want our guest to see a newspaper full of comment and criticism of the government being wafted onto a front lawn early in the morning anywhere in America. Point two would be the lesson of absolutely free expression of opinion. The third scene would be a voting booth in which the grandchild of slaves would be casting a ballot without the faintest hint of intimidation or the slightest sound of derision.

Point three would mean two terribly important things to our visitor, first that we take seriously the promises we made to ourselves in the Constitution, and second, that we can rectify injustice in this country without violent revolution, through the application of conscience and dedication to principle.

This morning's proceedings challenge use to renew that dedication. The work of the Voting Rights Act is not complete, and the idea that the franchise is available to all Americans equally has not yet become a reality.

I SUPPORT S. 1992, WHICH IS THE BILL THAT PASSED THE HOUSE BY A 389-24 VOTE AND FOR GOOD REASON. THE HOUSE WRESTLED FOR A LONG TIME OVER THE ISSUE OF PRECLEARANCE UNDER SECTION 5 OF THE ACT. UNDER THE PRESENT LAW, ALL JURISDICTIONS BECOME ELIGIBLE FOR BAILOUT AT THE SAME TIME, AND A STATE THAT IS ENTIRELY COVERED IS REQUIRED TO BAIL OUT AS A UNIT. BASED ON ACTUAL EXPERIENCE, THESE PROVISIONS SEEMED UNFAIR TO MANY HOUSE MEMBERS, AND THEY CALLED FOR IMPROVEMENTS.

BUT IT IS ONE THING TO IMPROVE THE PRECLEARANCE SECTION OF THE VOTING RIGHTS ACT AND QUITE ANOTHER TO EVEN THINK OF ELIMINATING IT, EITHER EXPLICITLY OR THROUGH "IMPROVEMENTS" THAT DISABLE IT.

SECTION 5 OF THE ACT WAS THE FORCE THAT MADE THE VOTING RIGHTS ACT OF 1965 WORK, WHERE EARLIER LAWS IN 1957 AND 1960 SEEMED TO FOUNDER. THE REQUIREMENT TO PRECLEAR VOTING CHANGES WAS THE BEGINNING OF A PROCESS THAT SAW MORE THAN A MILLION BLACK AMERICANS REGISTER TO VOTE BETWEEN 1965 AND 1972. NO LONGER COULD A STATE HOPE TO RETAIN DISCRIMINATORY ELECTION SCHEMES BY FIGHTING IN COURT YEAR AFTER YEAR, ONLY TO SHIFT TO ANOTHER EQUALLY DISCRIMINATORY SCHEME WHEN THE FIRST ONE WAS SHOT DOWN BY A FEDERAL JUDGE. PRECLEARANCE MEANT THAT THE APPARENTLY NEUTRAL CHANGE IN A VOTING LAW THAT ACTUALLY DISCOURAGED OR PREVENTED MINORITY CITIZENS FROM CASTING THEIR BALLOTS WOULD BE SCRUTINIZED BEFORE IT TOOK EFFECT.

SECTION 5 HAS NOT PROVED TO BE THE BUREAUCRATIC NIGHTMARE THAT WAS SOMETIMES PREDICTED -- OR HOPED FOR -- BACK IN 1965. THE PAST RECORD OF THE JUSTICE DEPARTMENT THROUGH SEVERAL ADMINISTRATIONS HAS BEEN EXEMPLARY, WITH PLAINLY NONDISCRIMINATORY CHANGES BEING PROCESSED IN 60 DAYS CR LESS IN MOST CASES.

IT IS UNDERSTANDABLE, NEVERTHELESS, THAT STATES AND COUNTIES THAT HAVE ELIMINATED DISCRIMINATION WANT TO BAIL OUT OF THE SECTION 5 PROCESS, HOWEVER FAIR AND EXPEDITIOUS IT MAY BE. THERE ARE SOME WHO FEAR THAT THE COMPROMISE WORKED OUT IN THE HOUSE ON THE BAILOUT ISSUE IS TOO EASY TO USE AND THAT THE BAILOUT WILL BE TOO BROAD. THERE HAS BEEN CRITICISM OF THE BAILOUT PROPOSAL IN THESE HEARINGS ON GROUNDS THAT THE TESTS ARE TOO STRINGENT. I

BELIEVE THAT A LIBERAL BAILOUT IS A CHANCE WORTH TAKING, BECAUSE IT STRESSES INITIATIVES THAT STATES AND COUNTIES CAN TAKE TO ELIMINATE DISCRIMINATION AND DOES NOT SIMPLY WAIT FOR THE PASSAGE OF TIME. THE BAILOUT COMPROMISE IS A PRODUCT OF EXPERIENCE AND HOPE, AND I SUPPORT IT FULLY.

ANOTHER MAJOR ISSUE BEFORE US IN THESE HEARINGS IS THE QUESTION OF INTENT UNDER SECTION 2 OF THE ACT. IF SECTION 5 IS THE ENGINE THAT DRIVES THE ACT AND RENDERS IT ENFORCEABLE AS A PRACTICAL MATTER, SECTION 2 IS STILL THE BASIC PROTECTION AGAINST DISCRIMINATORY PRACTICE. PRECLEARANCE DOES NOT COVER ALL AREAS AND MAY NOT RESOLVE EVERY THREATENED VIOLATION WHERE IT DOES APPLY. PRECLEARANCE IS DESIGNED TO STOP VOTING DISCRIMINATION BEFORE IT CAN START IN COVERED JURISDICTIONS, AND SECTION 2 IS CALCULATED TO END IT WHENEVER AND WHEREVER IT IS FOUND.

THE CHANGE IS SECTION 2 PROPOSED BY THE HOUSE BILL IS A SENSIBLE ONE IN LIGHT OF THE HISTORY OF THE VOTING RIGHTS ACT. IT SIMPLY STATES THAT A PRACTICE WHICH RESULTS IN A DENIAL OR ABRIDGEMENT OF VOTING RIGHTS IS PROHIBITED. THE REASON FOR THIS AMENDMENT NOW IS NOT AN INHERENT DESIRE TO TIGHTEN THE LAW BUT RATHER TO RESPOND TO THE SUPREME COURT'S BODEN V. MOBILE DECISION, WHICH IS THE FIRST SUPREME COURT CASE TO READ A REQUIREMENT OF INTENT INTO THE APPLICATION OF SECTION 2.

I AM ALL TOO FAMILIAR WITH THE AMBIGUITIES OF THE WORD "INTENT" AS A FORMER PROSECUTOR IN VERMONT OPERATING UNDER TYPICAL CRIMINAL STATUTES, WHERE THE ELEMENT OF INTENT IS USUALLY CRUCIAL TO THE OUTCOME OF A PROSECUTION. I WAS GLAD TO WORK UNDER A SYSTEM OF LAW WHERE INNOCENCE WAS ARDENTLY PRESUMED AND WHERE PROOF OF INTENT PROTECTED INDIVIDUAL RIGHTS BY BARRING CASUAL PROSECUTIONS. BUT I AM CONVINCED THAT THE BOLDEN INTENT TEST IS NOT NEEDED TO PROTECT THE RIGHTS OF GOVERNMENTS, AND IF APPLIED IN SECTION 2 CASES WILL RENDER SECTION 2 UNENFORCEABLE.

INTENT IS HARD ENOUGH TO PROVE AS APPLIED TO A NATURAL PERSON, BECAUSE THE PATTERN OF INDIVIDUAL CONDUCT IS OFTEN AN AMBIGUOUS GUIDE TO THE INDIVIDUAL'S INTENT. EVEN THE OFTEN CITED "SMOKING PISTOL" FAILS TO CLARIFY INTENT IN SOME CASES. AND

DERIVING INTENT FROM A PERSON'S SPOKEN WORDS IS DIFFICULT BECAUSE THE WORDS ARE USUALLY INDIRECT AND RARELY TELL US, "I MEANT TO DO IT BECAUSE..."

PROVING INTENT IN A GOVERNMENT BODY, A LEGISLATIVE OR A CITY COUNCIL, WHERE THERE IS A STRONG MOTIVATION TO LEAVE THE PUBLIC RECORD SILENT, IS NEARLY IMPOSSIBLE. THE TRIAL OF THE BOLDEN V. MOBILE CASE BY ALL ACCOUNTS IS AN EXERCISE IN FRUSTRATION.

NOT ONLY THE BEST BUT PERHAPS THE ONLY PROOF OF DISCRIMINATORY PURPOSE IS DISCRIMINATORY RESULT. NOT DISPROPORTIONATE RESULT, AS SOME HAVE SAID IS THE SECRET AGENDA OF THE NEW SECTION 2, BUT DISCRIMINATORY RESULT. IT HAS BEEN HARD FOR PLAINTIFFS TO SHOW THAT AT-LARGE ELECTIONS WERE DISCRIMINATORY WHERE DILUTION OF VOTING STRENGTH HAS BEEN THE BASIS FOR A SECTION 2 ACTION. IN THE DECADE BEFORE BOLDEN, THE COURTS HAD FASHIONED TOUGH STANDARDS OF PROOF, AND THE SMALL NUMBER OF CASES ACTUALLY BROUGHT TO TRIAL SINCE 1965 ATTESTS TO THE FACT THAT THE FLOODGATES WOULD NOT BE OPENED BY A RETURN TO THE JURISPRUDENCE THAT APPLIED BEFORE BOLDEN.

THE AMENDMENT TO SECTION 2 WILL CONTINUE TO ASK, AS BEFORE, WHETHER A PARTICULAR ELECTION SCHEME, AS A PRODUCT OF ITS NORMAL OPERATION, ISOLATES RACIAL OR LANGUAGE MINORITIES WITHIN THE POLITICAL SYSTEM AND DENIES THEM ACCESS TO POLITICAL POWER IN A PRACTICAL SENSE.

IT IS THE OPPORTUNITY TO PARTICIPATE, NOT THE ACTUAL USE OF THAT RIGHT, WHICH IS CRUCIAL. BUT IF MINORITIES ARE DENIED THE OPPORTUNITY TO GET TO THE BALLOT BOX, IT IS NO ANSWER TO AN ATTEMPT AT CORRECTION THAT THE DENIAL IS ADVERTENT OR WEDDED TO EVENTS IN THE DIM PAST. ONCE A DENIAL IS ESTABLISHED -- AND NOT SIMPLY A DISPROPORTIONATE RESULT -- IT MAKES NO SENSE TO SAY WE WILL NOT RIGHT THE INJUSTICE BECAUSE THERE IS NO EVIDENCE THAT ANYONE PLANNED IT THAT WAY.

THE VOTING RIGHTS ACT MUST, AND I TRUST WILL, SURVIVE THE EXTENTION PROCESS WITH ITS STRENGTH INTACT. I AWAIT YOUR TESTIMONY WITH EVERY EXPECTATION THAT OUR DEBATE WILL BE THE CLEARER FOR IT.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 5, 1982

Honorable Orrin G. Hatch
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

At the March 1 hearing on extending the Voting Rights Act, Senator Leahy and Senator Specter requested that I furnish additional information and material to explain and further clarify certain parts of my testimony. This letter is in response to those requests. In view of the Subcommittee's intention to close the hearing record on Friday, March 5, 1982, I am relying on notes and my recollection in framing this response, since the transcript of the hearings is not yet available to us and I have received no written questions from any member of the Subcommittee or Committee.

1. Senator Leahy requested a copy of the Attorney General's October 2, 1981 Report to the President on amending the Voting Rights Act. As I stated during the hearing, because the Report is one prepared for the President, the decisions as to when to release it publicly, and in what manner, are for the President to make. I have, pursuant to Senator Leahy's request, inquired into the matter, and my advice is that the Report has not yet been officially released. Accordingly, the Department is not at this time in a position to forward copies of the Report to Senator Leahy or other members of the Subcommittee.

With reference to the substance of the Report, I have had an opportunity since the hearing to review the document in its entirety. My recollection had been that my testimony, and that of the Attorney General's before this Subcommittee, were fully consistent with the Report's treatment of Section 2 of the Act. A rereading of the Report confirms my recollection in this regard to be absolutely correct.

2. Both Senator Leahy and Senator Specter asked for additional comment on the Voting Rights Act case involving Edgefield County, South Carolina. Let me start by supplementing my earlier explanation of the status of the case, since I have been advised that my testimony on this particular point was, regrettably, not entirely correct. You will recall that I indicated in a colloquy with Senator Leahy that the dilution case, captioned McCain v. Lybrand, was not, to my knowledge, the same action as the Section 5 case involving Edgefield County, South Carolina, where this Department considered amicus participation but decided not to take part.

On looking into the matter further, it is clear to me that my response to the Subcommittee requires modification. The McCain dilution suit was heard and decided by a single federal district judge. On April 17, 1980, the court issued an order holding that the county's at-large system dilutes the vote of blacks. After issuance of the Supreme Court's

Mobile decision, the district court vacated its April 17, 1980 judgment. This Department was not involved in the dilution suit.

After the initial judgment in McCain had been vacated by Judge Chapman, the plaintiffs filed new allegations, including the allegation that the 1966 state statute establishing the at-large system had never received Section 5 preclearance. Under the Voting Rights Act, the issue of compliance with Section 5 must be heard by a three-judge district court. Accordingly, a three-judge district court was convened to consider as an entirely separate matter the issue whether the 1966 state statute had received preclearance. I mistakenly advised Senator Leahy that the Section 5 action carried a different caption than the original dilution suit. On that point, I stand corrected; both matters, although separate and distinct from one another as I had testified, are styled McCain v. Lybrand.

I hope that the foregoing discussion helps to dispel any confusion that might have been caused by my testimony. Because the Department had taken no part in the earlier McCain dilution case, I had not been aware at the time of my testimony of the tangential relationship described above. I should add to complete the record that, as of March 3, 1982, the Section 5 issue is still pending before the three-judge court. Depending upon the ultimate outcome of that issue, there may be a Section 5 submission of the county's at-large system to this Department or the initiation of a preclearance suit in the federal district court for the District of Columbia.

3. Senator Specter asked me to undertake a review of the record in the McCain dilution suit and advise the Subcommittee whether the vacation of judgment by Judge Chapman was, in my personal judgment, a proper resolution of the case. The McCain record is not at this time available to the Department for review. We are, however, undertaking to obtain a copy of the trial transcript and the briefs filed in that case. After I have had an opportunity to examine the referenced trial materials, I will report back to the Subcommittee in response to this question.

4. Finally, pursuant to Senator Leahy's request, we are enclosing a copy of the brief filed by the Department in the Supreme Court in State of Washington v. Seattle School District No. 1 and also our brief in Crawford v. Board of Education of the City of Los Angeles. As I testified at the hearing, our brief in the Seattle case deals primarily with the issues raised by the decision of the court of appeals--the appropriate legal analysis concerning whether the state initiative classifies persons on the basis of race, whether the state's neighborhood school policy imposes special burdens on racial minorities with regard to the governmental process, and whether the state, rather than local school districts, may properly adopt a policy favoring neighborhood schools. In addition, our brief rejects certain grounds relied on by the district court (but not the court of appeals), including the district court's determination that the state initiative had a racially discriminatory purpose.

On further reflection, it occurs to me that perhaps it was this latter argument in the Government's brief to which Senator Leahy may have had reference in some of his questions. If so, I apologize for any miscommunication that took place and trust that the brief itself will adequately describe our position in the Seattle case. Similarly, our amicus brief in the Los Angeles case states our position that the amendment to the state constitution (Proposition 1) does not violate the Equal Protection Clause of the Fourteenth Amendment. As in Seattle, our principle focus in Los Angeles is on the issues of racial classification and special burdens on minorities. Our brief also maintains that Proposition 1 was not motivated by discriminatory purpose.

The foregoing discussion covers the questions I was asked to address to the best of my recollection. In view of the fact that this letter serves to clarify some of my testimony in the areas indicated, I would appreciate it if the Subcommittee could include the correspondence in the record of the hearings so as to eliminate any possibility of confusion or misunderstanding.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Senator Specter
Senator Leahy

Senator LEAHY. Mr. Reynolds, you have talked about it not being so difficult to prove discriminatory purpose through circumstantial evidence. Let us talk about a couple of cases.

In the *Lodge* case, I guess it is *Lodge* v. *Buckstom* or *Rogers* v. *Lodge,* as I understand, and again I did not see the television interview that you were—you were interviewed and you stated that the election system in that case was not discriminatory. Does that mean that you felt the circumstantial evidence of discriminatory purpose was insufficient, even though the lower court espoused the fact that discrimination was there?

Mr. REYNOLDS. The lower courts in that case both found there was discriminatory purpose.

Senator LEAHY. But did you feel the circumstantial evidence was insufficient?

Mr. REYNOLDS. I do not understand. The case has been decided by two courts and they have said there is discriminatory purpose that was involved in that case. It is before the Supreme Court now on brief, and the Supreme Court will decide whether or not there was sufficient evidence of purpose to sustain the two decisions of the district court and the court of appeals.

Senator LEAHY. Did you say that you thought the election system in that case was not discriminatory?

Mr. REYNOLDS. No, I did not say that.

Senator LEAHY. Has the Department of Justice filed a brief on this?

Mr. REYNOLDS. No, we did not file—not in the Supreme Court.

Senator LEAHY. Why not?

Mr. REYNOLDS. Well, we participated in the case below and when the case came to the Supreme Court, the issue was really one that revolved around whether or not the particular facts of that case demonstrated purpose, and we made the decision not to join in as *amicus* on that issue.

Senator LEAHY. In the *State of Washington* v. *Seattle School District,* that is a case involving a referendum that is now in the Supreme Court, the lower court did find circumstantial evidence and

proof of discriminatory purpose. You signed a brief to the Supreme Court arguing that the circumstantial evidence did not offer proof of discriminatory purpose.

Why did you disagree with the lower court?

Mr. REYNOLDS. We signed a brief in that case on the constitutional issue, Senator. That brief speaks for itself, and since the brief is in the Supreme Court, I cannot elaborate on it.

Senator LEAHY. You signed a brief arguing that the circumstantial evidence did not offer proof of discriminatory purpose. What did you say in that brief? That is obviously not commenting. That is commenting on the brief.

Mr. REYNOLDS. I will provide you with a copy of the brief. My understanding of the issue is one that concerns whether or not the State statute there is constitutional or not constitutional, not one that concerns an issue revolving around the finding of discriminatory purpose. If we are talking about the *Seattle* case.

Senator LEAHY. Have you signed any briefs or taken any position in any cases in which you have taken the position that there was circumstantial evidence which showed discriminatory purpose on the part of the governmental body in taking or not taking any action?

Mr. REYNOLDS. I would have to go back and check the cases.

Senator LEAHY. Are there any that come to mind?

Mr. REYNOLDS. No. But if I think the circumstantial evidence indicates a purpose, I would have no reservation about signing such a brief.

Senator LEAHY. That is the *State of Washington* v. *the Seattle School Board* and the case of *Los Angeles* v. *Crawford*, you felt they did not?

Mr. REYNOLDS. I do not agree with your characterization of either of those cases, Senator. But we can look at the briefs and that should resolve how those cases should be properly characterized.

Senator LEAHY. In the *Los Angeles* v. *Crawford* case, your brief argues, does it not, that the circumstantial evidence did not add up to proof of circumstantial discriminatory purpose?

Mr. REYNOLDS. Could I have that again?

Senator LEAHY. The *Los Angeles School Board* v. *Crawford*, you stated that your brief does not argue that the circumstantial evidence in that case did not add up to proof of discriminatory purpose?

Mr. REYNOLDS. That is not the issue before the court.

Senator LEAHY. But your brief did not make any—your brief does not make any such argument. I want your characterization.

Mr. REYNOLDS. What I am saying——

Senator LEAHY. It is your brief.

Mr. REYNOLDS. The brief may well make reference to whatever the lower court might have held, and certainly if the lower court made a holding, the brief would characterize what that holding is. But the issue in the case is not one that revolved around the point that you are focusing on. So to the extent that there is a statement in the brief to that effect, I would suspect that the statement goes to what the lower court held. The only case I can think of where circumstantial evidence would constitute purpose is in the *City of*

Mobile case, on remand, where the Government has argued that there is a sufficient evidentiary basis for purpose there in order to find a violation of section 2 on remand from the Supreme Court decision.

Senator LEAHY. But your brief in *Los Angeles* v. *Crawford* does not argue that circumstantial evidence in that case did not add up to proof of discriminatory purpose?

Mr. REYNOLDS. Well, if you have the brief and show it to me——

Senator LEAHY. I am asking you. It is your brief. You are suggesting my characterization may have been wrong so I am asking you to give your own characterization. Here is your chance to state just——

Mr. REYNOLDS. The issue in that case again revolved around the constitutionality of a State action. That is what the court is looking at. It is not an issue that relates to whether or not there is sufficient evidentiary basis in the record to ascertain that there is a discriminatory purpose.

Senator HATCH. Senator, your time is up.

Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Mr. Reynolds, on page 12 of your statement, you say, "I submit that the critical issue before the Congress is not so much what the law was prior to the *City of Mobile* decision, but rather what the law will be."

Reflecting on that statement and on the statement this morning, there is a certain amount of wry amusement in the way we lawyers manage to perpetuate our breed by joining in the judgments of each others and, therefore, by requiring the necessity for still more lawyers. If we could apply that principle to other forms of economic activity, maybe the world would be even more productive and prosperous and happier than it is today.

But I really wonder how you can reach that conclusion when, and, of course, I do that as one who voted for the act in 1965, and I do that in the light of the colloquy in this room between your predecessor, Nick Katzenbach and Senator Fong, discussing section 2 and discussing the issues—in terms of an "effect" test.

In response to the chairman, you said that we had no experience as to how the court would react under an "effect" test. But is it not true that we do have a track record on which to rely for the amended section 2? There is, in fact, a track record of a lot of court of appeals' decisions that did adopt the "result" test, that did look at all the circumstances, that did reject proportion of representation, and I would submit that this track record does exist and that the Congress can rely upon it with a great deal of confidence.

Mr. REYNOLDS. Well, with all due respect, Senator, you are absolutely wrong.

Senator MATHIAS. I thought you would say that.

Mr. REYNOLDS. I guess——

Senator MATHIAS. That is why we breed more lawyers.

Mr. REYNOLDS. The cases that I suspect that you have reference to, all are cases that came out of *White* v. *Regester* largely in the fifth circuit. Those cases do incorporate and include as an element of the violation that there has to be a showing of discriminatory intent. What those cases say is that if you apply a certain set of

factors, there is a legitimate inference to be drawn that you will have an intent, and it is precisely because those cases look to that element that the courts at the same time have said, sometimes explicitly, disproportionate representation is not "in and of itself" enough. *White* v. *Regester* used that language, and that is the very point, I think, that needs to be underscored—that when the courts have applied section 2, the courts have done it cognizant of the fact that the constitutional standard requires a showing of intent either inferentially or directly. It is as a result of that that the courts have said they are not going to be content with a showing of disproportionate representation.

The concern we had with the rewrite of the act by Congress, or by the House, is that it will eliminate that particular element of the test. What that leads one to, we believe, is the specter of a holding of disproportionate representation being a violation similar to what the courts have done in the title VII area with an "effect" test.

Senator MATHIAS. I think you are wrong in your interpretation of the *White* case. It seems to me that in the *White* case, the court employed a totality of circumstance test, and I would note that none of the dire expectations that have been talked about and predicted, the proportional representation or per se invalidation of the at-large elections, did come about. But I suppose that we will have to agree to disagree on that.

Mr. REYNOLDS. I think so, Senator. I can only point to the author of that decision, Mr. Justice White, who in *Bolden* v. *the City of Mobile* acknowledged that there was indeed an "intent" test that was present in *White* v. *Regester* and to the *Washington* v. *Davis* case which, in its list of decisions that had gone under an "effects"—prior decisions that had gone under an "effects" test and that were being overruled—did not include *White* v. *Regester.* And I think that those two are clear indications that *White* v. *Regester* was indeed a case that was recognized as having an "intent" test as part of the element of proof.

Senator MATHIAS. I personally think that the court in that case was talking about a fair chance, and I think that is the sense of the law. But let us move on to another case.

Are you familiar with Judge Chapman's opinion in the *Edgefield County* case, in *McCain* v. *Lybrand?*

Mr. REYNOLDS. I have heard it has been discussed up here. I am not familiar with it, no.

Senator MATHIAS. Well, I might suggest to you that in the *McCain* case, it was first ruled that the Edgefield County Council's at-large system of election was discriminatory and invalid, and that was 5 days before the *Bolden* case. That was on April 17, 1980. So this came before *Bolden.*

Judge Chapman vacated his finding of the invalidity of the at-large system of elections in light of *Bolden,* stating that the plaintiff had not "proved that the voting plan for election of members to the county council in Edgefield County was either conceived or operated at a purposeful device to further racial discrimination nor was intended to invidiously discriminate nor was it intended to invidiously discriminate against blacks."

Are you familiar—does this refresh your memory on that case at all?

Mr. REYNOLDS. Well, that certainly squares with the understanding I have of what did occur. As I say, I am not familiar with the case personally. We were not involved in the case.

Senator MATHIAS. The point is that in Judge Chapman's mind, the *Bolden* case changed the rules of the game. Going back to your statement, "if it ain't broke, don't fix it." In Judge Chapman's mind this had broken. I think that is the importance of the *Edgefield* case.

Now, the findings and the conclusions of law in Judge Chapman's initial opinion, and these were considered by him to be sufficient prior to the *Bolden* case but were not, in his judgment, sufficient after the *Bolden* case—let us look at those indicia that he felt to be sufficient under the state of law as he saw it prior to *Bolden.* He found that black voters have no right to elect any particular candidate or number of candidates but that the law requires that black voters and black candidates have a fair chance. And we did get back to this concept of fair chance, have a fair chance of being successful in elections. Judge Chapman concluded that the record in this case definitely supports the proposition and the finding that they do not have this chance in Edgefield County.

Second, he also concluded that under no theory of the law can the court direct a white to vote for a black or a black to vote for a white. However, if there is proof, and there is ample proof in this case, that the black candidates tended to lose not on their merits but solely because of their race, then the court can only find that the black voting strength has been diluted under the system and declare the system unconstitutional.

And, finally, Judge Chapman found that black participation in Edgefield County has been mere tokenism and even this on a very small scale.

So these were the considerations in Judge Chapman's mind. There were also findings that no black has been elected to the county council, the State legislature, or countywide office. Blacks serving on school boards obviously serve as a token and at the pleasure of the white power structure. These were findings in the case.

But with these facts, it would seem to me to be so powerful that the judge felt compelled to reverse himself after the *Bolden* decision and came to the conclusion that there can be no other explanation for the amazing level of racial black voting except that whites absolutely refuse to vote for a black.

Now, do you envision this in this whole kaleidoscope of changing law as a result of court decisions?

Mr. REYNOLDS. Well, as I say, I am not familiar with the record in that case. I would say that Judge Pittman also had a misunderstanding of what the rule was with regard to section 2 and he was overturned by the Supreme Court. Judge Chapman, apparently from your description, agreed with Judge Pittman's view as to what the section 2 standard was. Whether I would agree with Judge Chapman that subsequent to *Mobile* the evidence before him was insufficient to prove a discriminatory purpose, I think is a different question, and I have not had a chance to visit the record to

draw any conclusion as to whether I would agree with that or disagree with it. I might well disagree with the conclusion that the evidence was insufficient to establish a discriminatory purpose to the same extent that I would disagree with him on his prior ruling that effects alone was an improper standard under section 2. Judges are going to look at the compilation of evidence and make their judgment call, and I am not endorsing or subscribing to any particular decision by Judge Chapman or anyone else on what the evidentiary content was of the record.

Senator MATHIAS. Let me ask you this. As a lawyer and as a citizen and as a human being, do you believe that the kind of situation that I have just described, as set forth by Judge Chapman, should be beyond the scope of the Constitution? Do you believe that the Voting Rights Act should not provide any remedy for this kind of a situation?

Mr. REYNOLDS. Well, I would have to look at the full situation and tell you, Senator.

Senator MATHIAS. But that is the practical effect of letting Mobile stand untouched.

Mr. REYNOLDS. You see, I am not sure that your leap to that conclusion is a fair leap. What you are doing now is suggesting that the decision that Judge Chapman made in that particular case as to whether there was a sufficient showing of purpose is going to be the determining factor for all litigation henceforward. I think that is not a fair assumption for one to draw. I do not know from what the record shows how many judges would agree with Judge Chapman as to the discriminatory purpose conclusion. I do not know that it suggests that because Judge Chapman ruled that way that the standard of purpose is impossible for one to meet.

I think there are any number of cases that talk in terms of circumstantial evidence that you can use in proving intent, and that those cases would allow ample room for one to make a showing of discriminatory purpose if indeed there was discriminatory purpose there.

The concern that I have, and I think is warranted under the "result" test, is that you are changing the definition of discrimination not to mean those people who intend to discriminate against others because of their race, but you are changing it to simply a statistical analysis that underrepresentation automatically means discrimination. I think we should be very careful about walking down that road and bringing within that kind of a condemnation all the jurisdictions in this country that have at-large systems, for example, or single member districts or multimember districts that have underrepresentation and for that reason branding them all as racial discriminators. That is the fundamental concern.

Senator MATHIAS. We have now reached a point where it is really not your opinion or mine. It is the point where the operations of the rule enunciated in the *Mobile* case has resulted in the defeat of the petition of the Edgefield County citizens. That is a fact. That is not opinion.

Mr. REYNOLDS. But the operation of the rule has also resulted in the success of *Escambia County and Buxtson* v. *Lodge*. So it just depends, I guess, on what case and what the facts are. I do not have

the record in that case so I am not in a position to suggest that I agree or disagree with Judge Chapman on his ultimate conclusion.

Senator HATCH. Your 10 minutes are up, Senator. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I would like to compliment the chairman for these very excellent hearings. I have noted the extensive number of witnesses, and express an appreciation for your including witnesses at my suggestion. I think that there has been a very extensive inquiry which is good.

Mr. Reynolds, you have said, in response to Senator Leahy's question, that you did not say that the situation in Burke County was not a violation of the Voting Rights Act. I have what purports to be a transcript of the program on Nightline last week which is denominated a rough copy and may be incorrect, but it quotes you as saying, "But at the present time, certainly the at-large system in Burke County and in many, many other jurisdictions through this country are not the kind of a situation that would violate the law."

Mr. REYNOLDS. That is correct, I did say that. That was in response to the question of whether the effect of an at-large system, such as in Burke County, would be a violation of the law, I believe.

My point was that, and I think the response I did make, is that simply the fact that you have underrepresentation in an at-large system would not today be a violation of the law.

Senator SPECTER. Well, is the reason that the Justice Department did not file a brief in the Supreme Court of the United States because you concluded that the underlying facts there did not constitute a violation of the Civil Rights Act?

Mr. REYNOLDS. Well, Senator, we did not because we took a look at what the issue was at the court at that time. A brief had been filed by the Justice Department in that case in the court below which had argued that section 2 had an "effects" test in it, a position I do not agree with and the Fifth Circuit did not agree with. That issue did not go up to the Supreme Court, and the decision was made not to participate in the case at the court in light of the fact that that issue was no longer there.

Senator SPECTER. But the issue was present and still is present as to whether the underlying facts constitute a violation of the Voting Rights Act under the "intent" test and the *Mobile* decision.

Mr. REYNOLDS. That is correct. That is the issue that is there, and we felt that the parties would brief that. It is not every civil rights case that the Justice Department can participate in as amicus, unfortunately, and with the resources we have—we are in a large number this term and that was one because it turned on that kind of an issue, that the decision was made not to file.

Senator SPECTER. So what you are saying is that it was not because you concluded that the facts in Burke County did not constitute a violation but only because of a workload issue?

Mr. REYNOLDS. Well, it was not just a workload issue. There are different kinds of issues that go to the court and different kinds of ones we get involved in. The decision we made in that case was that it was not one that we felt we should become involved in as amicus.

Senator SPECTER. Well, I have heard you say that now a couple of times. You decided not to do it.

The concern I have is that if you take the statement which you make publicly, that you think the situation in Burke County is not a violation of the Voting Rights Act, and if you have a change in position where the Government withdraws as amicus, that then raises a pretty clear-cut implication that the Civil Rights Division does not think that there is a violation of the Voting Rights Act.

Mr. REYNOLDS. That statement was not addressing the case that is before the Supreme Court or the issue there in an evidentiary basis. That statement addresses a question that was made after two prior segments in the show that were talking generally about at-large districts and using Burke County as an example.

Senator SPECTER. Well, I share the concern that Senator Mathias has voiced about the *Edgefield County* case. But since you did not have familiarity with the facts in that case, I understand it. But you have commented about the *Burke County* case and you made a decision not to participate and in light of the facts—let me just recite them as they appear in the court of appeals' opinion at 639 F.2d 1376–77:

> After considering exhaustive evidence on the subject, the court found that the county commissioners demonstrated their unresponsiveness to the particularized needs of the black community by (1) allowing some blacks to continue to be educated in largely segregated and clearly inferior schools; (2) failing to hire more than a token number of blacks for county jobs, and paying those blacks hired lower salaries than their white counterparts; (3) appointing extremely few blacks to the numerous boards and committees that oversee the execution of the county government * * *; (4) failing to appoint any blacks to the judge selection committee * * *; (5) making road paving decisions in a manner so as to ignore the legitimate interests of the county's black residents; (6) forcing black residents to take legal action to protect their right to integrated schools and grand juries, and to register and vote without interference; and (7) participating in the formulation of, and in fact contributing public funds to the operation of, a private school established to circumvent the requirements of integration.

In the light of those findings, is it your opinion that the evidence in Burke County constitutes a violation of the Voting Rights Act under the *Mobile* decision?

Mr. REYNOLDS. I cannot comment on that with the case pending in the Court, Senator.

Senator SPECTER. Why cannot you comment on that with a case pending in the Court?

Mr. REYNOLDS. It would be inappropriate for me to express my personal views as to—whether the evidence in a pending case does or does not make——

Senator SPECTER. I am not asking for personal views. I am asking for legal judgment. You are an attorney in charge of the Civil Rights Division of the Department of Justice. If you did a brief and appeared in the case there would be nothing to prevent you from expressing a professional legal judgment.

Mr. REYNOLDS. If I appeared in the case and we had a brief on file, I would refer you to the brief and give you the same answer, Senator. Two courts below have held on the facts in that case that there was discriminatory purpose. The issue before the Supreme Court is whether that is true or not. I am not at liberty with the case pending in the Court to discuss the case or give a legal judgment on how that case might come out in the Supreme Court.

Senator SPECTER. Are you relying on some canon of professional ethics for that statement? Because I know of no reason why you cannot comment, especially if you are the chief enforcement officer in this field of law and you are appearing before a Senate committee. I think we are entitled to know what your evaluation of this is on matters of this sort.

Here you have a case which is in the Supreme Court. You were not reluctant to express your opinion when you appeared on "Nightline."

Mr. REYNOLDS. My opinion when I appeared on "Nightline" did not go to the merits of that case. It was a question that was asked as to whether there was a discriminatory effect as a result of the at-large system in Burke County, and I answered it in terms of that particular county, and other at-large counties.

Senator SPECTER. Well, Mr. Reynolds, I do not think that is what you said. The language is:

> At the present time, certainly the at-large system in Burke County and in many, many other jurisdictions through this country are not the kind of situation that would violate the law.

Now, when you gave that conclusion, are you saying you did not know the details of what was going on in Burke County?

Mr. REYNOLDS. I am saying that the conclusion that was given there was not in terms of the particular details that might form a finding of purpose in Burke County or any of the other at-large counties that I referenced in my answer. I was saying, in response to the question, that generally speaking I do not think that one should draw the conclusion or can draw the conclusion that the fact that you have an at-large system and underrepresentation would alone be enough to establish a section 2 violation of the act.

Senator SPECTER. I do not understand that.

But let us proceed with it anyway.

When you talk about Burke County, you are talking about a case that was pending before the Supreme Court; is that correct?

Mr. REYNOLDS. That is correct.

Senator SPECTER. And you made a comment about that case when you made your judgment, to whatever extent it might have been limited as you just defined it, did not you?

Mr. REYNOLDS. I made a judgment as to the at-large system and underrepresentation.

Senator SPECTER. Well, isn't this committee as much entitled to know what your judgment is as the "Nightline" audience?

Mr. REYNOLDS. I think I have given my judgment. My judgment is that the at-large system and underrepresentation alone in Burke County are not in my judgment sufficient to show a violation of the Voting Rights Act under section 2 as it is now enacted.

Senator SPECTER. But you are familiar with the record in the *Burke County* case?

Mr. REYNOLDS. I am familiar with the record.

Senator SPECTER. And in conjunction with the other factors which I just summarized from the fifth circuit opinion, is that not sufficient to provide a basis for you to say whether or not it is a violation of the Voting Rights Act?

Mr. REYNOLDS. I have a personal view on that. It would be inappropriate with the case pending for me to make a statement as to what my personal judgment is on the facts of that case.

Senator HATCH. What Senator Specter is saying is that if those allegations are true, and the Supreme Court will make that ultimate determination, then perhaps there would be a credible case under section 2.

But if those five or six factors that Senator Specter read from the lower court decision are true, then perhaps there would be a case under section 2. That is all Senator Specter is saying.

I do not know why we have to continue going over this point. We all agree on the law.

Mr. REYNOLDS. Two lower courts have held there was sufficient purpose there for a violation.

Senator HATCH. If those decisions are sound, then such evidence might be sufficient?

Mr. REYNOLDS. Again, I think that is ultimately for the Supreme Court to say.

Senator HATCH. We agree. If those decisions are true, however, then in the hypothetical case, such evidence might suffice. That is all the Senator is asking.

Mr. REYNOLDS. I have given you my answer.

Senator SPECTER. I do agree to yield considering that is on your time and not mine.

Senator HATCH. We will see that you get adequate time, even though you are not a member of this subcommittee. I believe we have been more than gracious with everybody who has wanted to come to ask questions concerning this important issue. We do not intend to deny anybody that right.

When the red light goes on, I hope you will yield and I will get back to you.

Senator SPECTER. I just have three more questions.

On the issue of intent, I am troubled by the language of Justice Stewart in footnote 17 of his opinion in the *Mobile* case and I would like to know whether or not you think this is a legal standard that has to be proved, where he says—

> "Discriminatory purpose" * * * implies more than intent as volition or intent as awareness of consequences. * * * It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

If you were dealing with intent in the traditional setting, natural and probable causes of a person's act, it may be one thing to draw an inference of intent. But does not that standard, if applied, put a very much higher burden of proof on a plaintiff in a voting rights case?

Mr. REYNOLDS. I do not believe it does in the context that you asked me the question. I think what Justice Stewart was saying is that, in order to show intent, you have to meet the standard of purpose that the Constitution requires and is articulated in the *Feeney* case and also *Washington* v. *David*. But he also makes it clear that you can do that through circumstantial evidence and indirect proof as well as through direct evidence.

Senator SPECTER. With respect to the bailout, is the bottom line for the administration that you prefer to keep the current law in effect?

Mr. REYNOLDS. Well, I think our—certainly our view is that we are for an extension but at the same time we recognize the concept of bailout has some merit and we would be more than happy to work with the subcommittee and the Senate on devising a bailout that is fair and equitable.

Senator SPECTER. I have read that statement on page 21 and your statement on page 3, "It is for this reason that the President favors extending the present act without change for another 10 years."

While you would be willing to work on a modification of a bailout, do I take your position to be, the bottom line, that given your preferences you would favor extending the act for another 10 years, including the current bailout provision?

Mr. REYNOLDS. I think that is right, but I do not want to leave a misunderstanding.

Certainly we think that a 10-year extension is a correct way to go but at the same time, given the different bills before the subcommittee that have variations of bailout, we think there are some very attractive features and worthwhile features in those different bailout variations. There are others that we think are cause for concern, and our view is that a constructive and fair bailout could be devised by taking those different bills and working with them and coming up with the best features of all of those.

Senator SPECTER. Mr. Chairman, I have one more question.

Senator HATCH. If you have only one more question, please go ahead, Senator.

Senator SPECTER. The discussion you had with Senator Mathias relating to the consequences of a results test has had perhaps some evidentiary base given what has happened since the *Register* decision and the opinions in the fifth circuit.

The case of *Toney* v. *White* decided by the fifth circuit in 1973, I think, states the test which the fifth circuit had been operating under prior to *Mobile,* and that was, as it appears on page 207 of 476 F. 2d, "And Section 2 of the Voting Rights act of 1965 * * * prohibits imposition of any practice or procedure which has the effect of denying or abridging the right of any citizen to vote on account of race or color."

Now, I agree with you, Mr. Reynolds, that when you read *Register* you come out on both side of effect versus intent and as you read the plurality opinion in *Mobile,* and the dissent in *Mobile,* that you can make any line of interpretation that you want as to whether it is intent or result and that it is a very complex issue considering that there was no majority opinion in *Mobile.*

But as I have reviewed quite a number of cases post-1973 in the fifth circuit, which is the jurisdiction that contains the States subjected to challenges under the Voting Rights act, that the fifth circuit was looking at a results test in its decisions.

Would you think that to be accurate?

Mr. REYNOLDS. Well, I do not—no, I do not agree with that. It is accurate to say *Toney* v. *White* articulated an effects test under section 2. That is the only court of appeals decision that does that. That was not a dilution case. It is also clear that the fifth circuit

did not follow *Toney* v. *White* and, indeed, if you read *Zimmer,* as further informed by *Nevitt* v. *Sydes,* I think you come away with the standard of the fifth circuit, which was that you would look to a number of criteria, and if they were all present, that the inference could be drawn from that that you would have a requisite intent to satisfy the section 2 and constitutional standard.

So I think you are correct on how you read *Toney* v. *White,* but that is the single case that is out of step with what the fifth circuit was doing.

Senator SPECTER. At any rate, *Toney* v. *White* articulates an effects test and did not result in the very calamitous consequences that you have suggested might occur.

Mr. REYNOLDS. It was not a dilution case and it was not followed, so it did not, you are right.

Senator SPECTER. One final point and this is not a question.

I would personally appreciate it if you have the time, and I know how busy you are, if you would review the opinion in *McCain* v. *Lybrand,* Judge Chapman's decision which I agree with Senator Mathias is very significant because what we are concerned about are situations, aside from what the intent was in 1965—we are trying to come to grips with the factual situations and what is going on out there in the real world as to what kind of policy we ought to adopt.

I would be interested to know either your personal or professional judgment, how you would come down on whether that kind of conduct as eloquently described, whether or not it would constitute a violation of the kind of legislation We are considering.

Mr. REYNOLDS. Yes, sir.

Senator MATHIAS. Mr. Chairman, may I ask unanimous consent that a copy of that opinion be included in the record, the *Edgefield* case?

Senator HATCH. Without objection.

Mr. Reynolds, had the Supreme Court decided that the effects test was a valid test for use in deciding section 2 cases, what would have been the final *Mobile* decision?

Mr. REYNOLDS. It would have—the *Mobile* decision would have been left standing.

Senator HATCH. And the result would have been proportional representation by race. That is what the lower court decision had been even though the majority opinion found there were no facts to justify that particular finding.

Mr. REYNOLDS. I think that is right.

Curiously enough, I notice that Congressman Washington quoted from the Washington Post an editorial of December 20, 1981, that suggests raising the specter of proportional representation in racial quotas amounts to nothing more than "obfuscation and dithering," and yet the Washington Post, when the *Mobile* case came out, ran an editorial which said, and I will read the last—second to last paragraph:

"By opting for intent or something close to it, a majority of the Court has cut down dozens and perhaps hundreds of legal challenges that would have made a case against existing systems of government or multimember legislative districts. It has also avoided the logical terminal point of those challenges that election dis-

trict lines must be drawn to give proportional representation to minorities."

That is the Washington Post's comment on the *Mobile* decision on April 28, 1980, where it indeed recognized that proportional representation, was the logical terminal point of an effects test, and yet now, more recently, it finds such a suggestion to be nothing more than an "obfuscation."

Senator HATCH. We have read both. There may be more truth revealed by recognition of the flagrant inconsistencies which you have pointed out than by anything else. I have afforded every opportunity to members of this committee, as well as other Senators and Congressmen, to point out why Boston, Baltimore, Pittsburgh, Cincinnati, would not be subject to a district court *Mobile* interpretation and I have yet to see anybody point out why that would not be the end result of implementing an effects test in section 2.

I would certainly be interested if someone would be able to do that. The proponents of the effects test however have even differed significantly on whether the effects test would be the same under section 2 and section 5.

What is your view and how do you account for the significant differences between the proponents of the result test as to whether or not the proposed results test of section 2 is identical to the effects test in section 5?

Mr. REYNOLDS. Well, I think that the effects test in section 5, as I tried to indicate earlier, has two prongs. I do not think the effects test of section 5 in the reapportionment area would be similar to the effects test that we are talking about under section 2. That is a test of "retrogression." It talks about reviewing changes, measured by what was in place directly prior to the change; if there is a difference, a retrogression in the minority representation from what was in place before the change to what was there after the change, then you do run afoul of the section 5 test. I think that proposed section 2 is not a "retrogression" test, in that we often will not have a frame of reference against which to compare what is being scrutinized.

We are not just talking about changes under section 2. We are also talking about systems of government that are in place, and have been in place, for a considerable period of time; therefore the measurement is not "retrogression" but a measuring of election "results" in terms of population percentages. I think that involves a different kind of standard than when you look only at a discrete change and see the before and after of that change.

On the other hand, in reviewing annexations under section 5, the courts have very definitely adopted the kind of standard that I think would be closer to what you would find in a section 2 "effects" test. There, they look to see whether an annexation does indeed change the voting strength of the minorities in the particular area involved, and in doing that they look to see whether the proportional representation of the minority group remains the same after annexation as it was before. I think that is the analysis applied in section 5 cases that would be very close to the analysis one would use under a section 2 effect case.

Senator HATCH. There seems to be a fundamental difference in perception among proponents and opponents of the change in sec-

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tion 2 as to whether or not the results test will establish a standard of proportional representation.

Is the difference in your opinion one of semantics or if not what is the fundamental basis for this difference in perception?

Mr. REYNOLDS. Well, I think one of the differences is that the proponents of the effects test seek to define the test as if it is going to be used in terms of the *Zimmer* factors, and that line of cases; they therefore suggest that if you were to look at it under those criteria, the effects test would not lead to proportional representation. The concerns we have about that argument is that, if you look at the House report, it does away with certain of the *Zimmer* factors as being relevant to the inquiry, and the language in section 2, the effects test, does not speak to any particular standard or criteria, but simply talks about election results. I think that, therefore, the standard that we are going to be dealing with is something far removed from the standard that the proponents of the bill are now suggesting would be put in place. Again, I go back to the concern that a result or effects test can be equated much more neatly with the title VII area of law and with review of annexations under the section 5 effects test. I think that is where the discrepancy lies.

The concern is that the courts are not going to look to the *Zimmer* criteria and stop there, but they will look to an effects test as put in place in similar fashion under title VII.

Interestingly enough, under Title VII the legislative history said clearly that it was not intended to permit the use of quotas in terms of employment decisions; yet that is exactly where the law went. I think we have the same concern here with respect to an effects test: That you will wind up with quotas in the electoral process.

Senator HATCH. How would a community know definitely, whether or not it was in compliance with the full requirements of the results test in section 2? What are the kinds of questions that a city or county attorney ought to be asking himself or herself in order to properly advise his or her clients as to how to insure that litigation is avoided under the proposed section 2 change?

Mr. REYNOLDS. I think that is a difficult question. I am not sure how one would advise a client in that situation?

Senator HATCH. Under the results test, about the only advice which could be given is that if the statistics look bad, if you have a lack of proportional representation and an at-large district, you had better reconsider that system.

Mr. REYNOLDS. I guess that would be the safest advice.

One of the difficulties you.face is this kind of standard that is going to be put into the act is going to foster a great deal of complex litigation that is going to keep the question in abeyance for a considerable period of time, and it is going to be terribly difficult for a number of jurisdictions to know what it is that is expected of them in order to pass muster.

Senator HATCH. In other words, there is no standard. This is not a standard——

Mr. REYNCLDS. It is not a standard until you reduce it to a statistical formula, at which point it is that underrepresentation equals discrimination.

Senator HATCH. Why, in identifying discrimination, should we have to look to fault or blameworthiness? Isn't it enough that some voting or electoral action results in a disadvantage to minority persons?

Mr. REYNOLDS. Well, I think you have to take a look at what the consequences are of the finding of a violation. We are talking about jurisdictions being required to restructure their governmental systems, not at the insistence or behest of the electorate but rather at the whim and wish of a Federal judge based not on any finding that it has discriminatory purpose or racial animus but simply on the basis that it has a system and that system has not brought into the electorate numbers of minorities to match the number in the population.

I think what it does, as I said earlier, is it redefines discrimination in a way that faults a large number of the communities that never had any discriminatory purpose. It does that without any determination of a need to do so—developed either in the House hearings or in these hearings that I am aware of. There has not yet been a suggestion for a need for that kind of nationwide change in the law; and I do not think—I think if those are the drastic consequences, one should require some showing of intent rather than do it simply on a numerical analysis.

Senator HATCH. Well, you have indicated that the lack of proportional representation plus an additional factor triggers section 2. The House Report, which states that the lack of proportional representation is "highly" relevant evidence of a violation, identifies just a few such additional factors. Let me add just a few others to their list: registration procedures, a discriminatory culture, money for black education facilities, economic difficulties in registering, candidate costs, history of disproportionate representation, bloc voting, a history of English only, poll taxes, maldistribution of services, city council decision-making procedures, staggered terms, multimember districts, annexations, numbered posts, dual school systems, neighborhood patterns, impediments to third parties, majority vote requirements, off-year elections, residential requirements, reapportionment, redistricting, absentee ballot irregularities, etc., I could continue listing factors almost indefinitely. Cases and preclearance policies have found these to be factors that you would consider; so lack of proportional representation plus any of those factors triggers section 2.

Mr. REYNOLDS. I think that is right and it would mean that the nondiscrimination proviso would not be available to take you outside of section 2.

Senator HATCH. There is hardly a city or county for which the potential of civil rights litigation would not exist under the amended section 2.

Mr. REYNOLDS. I think that is right.

Senator HATCH. It seems to me that this proposed section 2 change is not some insignificant change; this change could turn the electoral system in this country upside down.

Mr. REYNOLDS. It could drastically alter the electoral processes of this country and alter them through judicial decision rather than the electorate having any voice or say in the way they want their system to be structured and do it without any indication at all that

what was in place before was there for the purpose or intent to discriminate against any racial group.

Senator HATCH. It applies to all voting groups.

Mr. REYNOLDS. It would apply to any and all. It could apply.

Senator HATCH. What it means is that cities, counties, school boards, in fact just about every governmental entity throughout the country could be attacked on the grounds of a section 2 violation even when there exists no intent or purpose to discriminate whatsoever.

Mr. REYNOLDS. Section 2, as amended, has that potential.

Senator HATCH. You support the position that those who intend to discriminate ought to be severely reprimanded?

Mr. REYNOLDS. If there is an intent to discriminate, you should certainly crack down hard and the courts should deal with them.

Senator HATCH. My time is just about up. Could you please elaborate upon your understanding of the "intent" test? We have had many witnesses come in here to testify on behalf of the House bill who have said that the problem with the "intent" test is that you must have a "smoking gun" in order to prove the existence of intent. They also say that it is too difficult to establish what long-dead legislators intended when a particular action was taken. They ignore the fact that cases have always held that the totality of circumstances relating to a discriminatory system satisfies the intent standard. How can we avoid under the intent test establishing a requirement of finding a smoking gun as evidence or a requirement of reading the minds of long dead legislators?

Mr. REYNOLDS. I do not think that the courts have anywhere suggested that you need a smoking gun or have to go back and read the minds of legislators that have been long dead. The cases are clear that you can demonstrate intent in any number of ways. In fact intent can be demonstrated with a single factor of official action such as in *Gomillion* v. *Lightfoot* where it was clear on the facts that there was discriminatory purpose because of the redistricting. At the same time intent can be shown by any combination of factors that would lead one to conclude, inferentially, that there is an intent. The notion that you need to go back and get inside the minds of the legislators really does not fit anywhere in the case law I have read or am aware of.

Senator HATCH. That is really obfuscation?

Mr. REYNOLDS. That is obfuscation.

Senator HATCH. Senator Leahy?

Senator LEAHY. I ask unanimous consent that a number of questions that I have for Mr. Reynolds be placed in the record.

Senator HATCH. Without objection, so ordered.

Senator LEAHY. I would like to go back. You said in answer to Senator Specter's last question, I believe it was the decision of *McCain* v. *Lybrand,* you suggested you would like to read it. I understand your testimony to be you are not familiar with that case. Is that right?

Mr. REYNOLDS. I am just generally familiar with it. I am not familiar with the record in the case.

Senator LEAHY. Yet you did feel you were familiar enough to call back the Government's brief which was already in the U.S. Attorney's office in South Carolina?

Is that correct?

Mr. REYNOLDS. No.

Senator LEAHY. You did not call, in *McCain* v. *Lybrand* case, you did not call back the Government's brief?

Mr. REYNOLDS. No, sir, not in that case.

Senator LEAHY. Did you call back a brief in a case with similar facts as those in *McCain* v. *Lybrand?*

Mr. REYNOLDS. No, sir.

Senator LEAHY. Have you ever called back a brief, a Government's brief, already in the U.S. Attorney's office in South Carolina on any matter?

Mr. REYNOLDS. What do you mean call back? I think you are thinking of the case, I believe it was *De Boise* v. *Lybrand* which was a case in which we were considering whether to participate as *amicus* and I made the decision not to participate.

Senator LEAHY. Is that not the same litigation?

Mr. REYNOLDS. No, sir, that was not.

Senator LEAHY. Entirely different litigation? That had absolutely nothing to do with *McCain* v. *Lybrand*?

Mr. REYNOLDS. That is correct.

Senator LEAHY. Nothing to do, not similar facts, no way related whatsoever?

Mr. REYNOLDS. That was a section 5 case.

Senator LEAHY. Entirely different?

Mr. REYNOLDS. Entirely different.

Senator LEAHY. It did not involve the same facts, none of the same evidence, nothing at all to do with *McCain* v. *Lybrand*?

Mr. REYNOLDS. No, sir; that was a different case.

Senator LEAHY. Not even the same people?

Mr. REYNOLDS. Well, I guess *Lybrand* is the same person.

Senator LEAHY. I was wondering if there was anything that really did to it.

Mr. REYNOLDS. No, sir; if you are trying to suggest that that case was somehow an offshoot of collateral to or associated with the other case, the answer is no. It was a different case. It was a section 5 case and involved submission under section 5—or lack of submission.

Senator LEAHY. It did not involve any of the same practices as in *McCain*?

Mr. REYNOLDS. No, sir, I do not believe——

Senator LEAHY. It did not involve any of the—I want to make sure I understand your testimony. It did not involve any of the same practices as in *McCain*?

Mr. REYNOLDS. It was the same at-large system that was involved.

Senator LEAHY. So there was some similarity?

Mr. REYNOLDS. Again I would say the answer is "No."

Senator LEAHY. So your answer is no, that there was no similarity, just simply involved the same election practices?

Mr. REYNOLDS. It involved the question of a change and whether that change had been submitted——

Senator LEAHY. Involved the same at large——

Mr. REYNOLDS [continuing]. To the Department of Justice under section 5 and the litigation related to the question of submission of that change.

Senator LEAHY. It involved the same at-large elections, right?

Mr. REYNOLDS. No; the same at-large election system.

Senator LEAHY. But there are no similarities between the two?

Mr. REYNOLDS. One was a dilution—well, I am not aware of any similarities. I am not aware of the record in *McCain* v. *Lybrand.* Certainly the decisions that were made with regard to the section 5 case were not made or formed or any part of the record or the case that was going on in the *McCain* v. *Lybrand* case and I was not aware of any relationship at all between the two.

Senator LEAHY. Why did you take the brief back?

Mr. REYNOLDS. I made the decision that the issues were well briefed and argued by the parties in the case and that there was nothing we could add to it and therefore it was not something that suggested to me that it warranted our *amicus* participation.

Senator LEAHY. Did you tell somebody from the New York Times that you were asked to withdraw it?

Mr. REYNOLDS. No, I never said I was asked to withdraw it.

Senator LEAHY. Did you ever tell the New York Times——

Mr. REYNOLDS. I was never asked to withdraw it.

Senator LEAHY. Did you tell the New York Times that you received last-minute input from a source you did not care to disclose to them and that that affected your thinking in withdrawing the brief?

Mr. REYNOLDS. I said that I received information that suggested to me that the matter was being fully briefed and covered by the parties and therefore we could not add anything to it.

Senator LEAHY. What was the source you would not disclose to the New York Times?

Mr. REYNOLDS. Well, that was again information that I received——

Senator LEAHY. But what was the source you would not disclose to the New York Times?

Mr. REYNOLDS. That the information that the briefing was being handled—the issue had been briefed and was handled before the——

Senator LEAHY. What was the source you would not disclose to the New York Times, not the result of what that source said or what your conclusion was from it?

Mr. REYNOLDS. That was the source, that was the information.

Senator LEAHY. What was the source, not the information? Who was the person?

Mr. REYNOLDS. Well, at this juncture I am not at liberty to tell you the person.

Senator LEAHY. Why not?

Mr. REYNOLDS. Because that relates to an internal matter within the Division.

Senator LEAHY. Well, let me just see if I understand this. When you, like anybody else, who comes before us for possible confirmation—are you required to be confirmed by the U.S. Senate in your position?

Mr. REYNOLDS. I am.

Senator LEAHY. And prior to the confirmation was not one of the sort of catch-all questions would you answer questions of this sort being from the appropriate oversight committee.

Mr. REYNOLDS. Would I answer questions—what?

Senator LEAHY. From this as the appropriate oversight committee of your department.

Mr. REYNOLDS. I believe I am here to testify today on the Voting Rights Act and I will——

Senator HATCH. If it relates to this legislation—Mr. Reynolds will be glad to testify about it; let us not belabor this.

Senator LEAHY. I appreciate you helping me out and reexplaining my questions for him, and I do appreciate it and it touches me deeply, you would take that concern but, believe me——

Senator HATCH. If you would yield, I would appreciate it if you would go to the point.

Senator LEAHY. Having been a member of this committee for some time, and a Member of the Senate, with all due respect, even longer than our distinguished subcommittee chairman, I can ask the question myself.

The question is: Who told you to withdraw the brief?

Mr. REYNOLDS. Nobody told me to withdraw the brief.

Senator LEAHY. Who gave you the information or the last minute input that made you decide to withdraw the brief?

Mr. REYNOLDS. Again, Senator, I received the information that the matter was being briefed by both sides and it was well briefed before the Court and I made the decision not to proceed forward with it.

Senator LEAHY. Did your input that you did not want to disclose come from the Justice Department or from the White House?

Mr. REYNOLDS. The input came from neither.

Senator LEAHY. Was it what you call a political intervention?

Mr. REYNOLDS. No, it was not.

Senator LEAHY. I am simply wondering how the DOJ policy is being made. I have seen some rather remarkable flipflops on questions of tax exemptions for schools that practice desegregation—a lot of us up here on both sides of the aisle are just wondering how that policy is made. Now you give an example on page 15 of your testimony—I will not push it further, the fact that you do not want to answer the question I wished you would. But perhaps when you think it over you may change your mind.

You gave an example on page 15 of your testimony on how you would apply the language of the second sentence of the—that is the language disclaiming any congressional intent to mandate proportional representation. You seem to assume, as I read this, that a fair-minded judge would require that a proportional representation requirement, unless it can be shown that the minorities are stuck in their rights by not voting—is there anything in the House report or any case that would cause you to reach that conclusion?

Mr. REYNOLDS. I think the House report does suggest that there is a link, for example, between at-large systems and proportionate representation that would suggest that that would run afoul of the "effects" test.

Senator LEAHY. That by itself would?

Mr. REYNOLDS. That is right.

Senator LEAHY. Where do you read that in the House report because I do not find that conclusion in there?

Mr. REYNOLDS. I think what it says is there is a correlation between the at-large elections and disproportionate representation of minorities. That is something that this particular amendment is designed to reach.

Senator LEAHY. You do not think that the hearings conducted by Senator Hatch and those in the House make it crystal clear that Congress is trying to reinstate a sizable body of case law at odds with your hypothetical, cases like *White* v. *Register* and *Zimmer* v. *McKeithen*?

Mr. REYNOLDS. Senator, those cases are fully consistent with my testimony and with my statement and do not at all suggest the kind of test that would be required under the amendment to the House bill.

Senator LEAHY. Do you think—it is your position then that the House report would say that the fair-minded judge would read a requirement for proportional representation of the Voting Rights Act as you describe on page 15?

Mr. REYNOLDS. I think you restated what my statement was and I did not get it.

Senator LEAHY. What is your statement——

Mr. REYNOLDS. I am not sure what you are referring to.

Senator LEAHY. Page 15 and the question of whether a judge will require proportional representation.

Mr. REYNOLDS. I think as I testified, that a judge under this standard could well say that if you have an at-large system and underrepresentation, that that would be sufficient to run afoul of the "results" test under section 2 as suggested by the House and that the language in the second sentence that says disproportionate representation in and of itself will not be a violation, would not be a basis to avoid that result.

Senator LEAHY. Mr. Reynolds, you say on page 15 of your prepared statement that a brief look at the statistics would lead to the conclusion, and I bring this up because the Chairman referred to it, would lead to the conclusion that minority underrepresentation in Northern cities like Hartford, Conn., might result in restructuring by Federal courts. Is that a basic fair restatement of your position on page 16?

Mr. REYNOLDS. That is what it says, yes.

Senator LEAHY. I understand that Hartford has a black mayor, a black deputy mayor, one-third of the nine-member city council is minority comprising two blacks and one Hispanic. Under the tests of *White* v. *Register* and *Zimmer* v. *McKeithen,* which are revised, what possible basis could anyone find for restructuring anything in Hartford?

Mr. REYNOLDS. I believe you are looking at—your information is based on outdated figures in Hartford and that is not what the situation is.

Senator LEAHY. What is the situation in Hartford today? Do they have a black mayor?

Mr. REYNOLDS. A black mayor—an at-large system with nine members of the city council. One is black and one is Hispanic and

a jurisdiction that has 33 percent black population and 20 percent Hispanic. A total minority population of some 55 percent.

Senator LEAHY. Is the deputy mayor a voting member on that board?

Mr. REYNOLDS. I am not sure.

Senator LEAHY. Is the deputy mayor black or white?

Mr. REYNOLDS. There is one black member on the city council and it may be the deputy mayor. I do not know the position he holds.

Senator LEAHY. So am I wrong in stating that Hartford has a black mayor, a black deputy mayor, one-third of the nine-member city council is minority, two blacks and one Hispanic? Are those facts wrong?

Mr. REYNOLDS. My information is that there is only one black and one Hispanic and that the percentage is 22 percent on the city council out of a 55 percent total minority population.

Senator LEAHY. So there is not a black man, a black deputy mayor and one-third of the nine-member city council that is minority, two blacks and one Hispanic?

Mr. REYNOLDS. That is not the information I have, Senator.

Senator LEAHY. Even taking your figures and mine are that there is a black mayor and a black deputy mayor who is a voting member, under *White* v. *Register* and *Zimmer* v. *McKeithen*, which revise section 2, even taking your figures, could anybody possibly find a basis for restructuring anything in Hartford?

Mr. REYNOLDS. I think under the "results" test if you did not have an element of your proof of intent, that jurisdiction would be vulnerable to a restructuring.

Senator LEAHY. Do you have anything in the House report that would support that conclusion?

Mr. REYNOLDS. Yes. I think the House report does say on page 30 that "numerous empirical studies based on data collected from many communities have found a strong link between the at-large elections and the lack of minority representation."

Senator LEAHY. I think that that——

Mr. REYNOLDS. It says, "not all at-large elections would be prohibited but only those which are imposed or applied in a manner which accomplishes a discriminatory result."

Senator LEAHY. I think your conclusion would probably come as a great surprise to the vast majority of House Members who overwhelmingly voted for it.

Thank you.

Mr. REYNOLDS. I think it would come as a surprise to a vast majority of the jurisdictions that would be subject to it.

Senator HATCH. This would certainly be true in the case of communities such as Boston and Cincinnati and Baltimore, to which the "effects" test has never been applied.

Mr. REYNOLDS. Let me, in response, to an earlier question by Senator Leahy—maybe I misspoke and I indicated that I could provide a copy of the report to the President——

Senator LEAHY. You what?

Mr. REYNOLDS. I may have misspoken.

Senator LEAHY. I have never heard of that word in the English language. You made a misstatement of fact?

Mr. REYNOLDS. I believe I misspoke to the Senator before when I indicated I would supply a copy of the report that the Attorney General had submitted to the President. I am not at liberty to furnish that report. I can certainly look into it and see whether the President is willing to have that report released and if so furnish a copy.

Senator LEAHY. If I may, for a moment, because I would have asked different questions if I would have realized he would not go through what he said he would earlier.

Do you know how many pages there are in that report?

Mr. REYNOLDS. I indicated before I do not know how many pages are in the report.

Senator LEAHY. Do you recall, and am I correct in my assumption, that the whole part of the report that referred to section 2 was probably no more than half a dozen sentences?

Mr. REYNOLDS. That could well be the case.

Senator LEAHY. Does that gibe with your recollection?

Mr. REYNOLDS. I am not in a position to dispute that.

Senator LEAHY. My understanding is it is and I mention that only because of your—how much importance is put on it and, Mr. Chairman, I would ask unanimous consent that the article actually from the Richmond Times Dispatch of September 30, 1981, taken from the New York Times service be made a part of the record in this being referred to.

Senator HATCH. Without objection.

Regardless of its length or how many paragraphs it contains, is there anything in that report that would contradict the testimony you have been given here today about the "effects" versus the "intent" test?

Mr. REYNOLDS. No; there is not.

Senator LEAHY. Wait a minute, Mr. Chairman. He already testified he does not remember how many pages it was and he is not all that familiar with everything in it. Even when I refreshed his memory he could not remember and now he can state black and white that there is nothing that contradicts in any way his testimony here. A little fun and games is always appropriate but that is going a little bit too far. The easiest way to tell is to get the report.

Senator HATCH. You described the one paragraph earlier and it basically is consistent with what Mr. Reynolds has said. Some people can say things in much less time than others among us.

Senator Mathias?

Senator MATHIAS. Mr. Chairman, I have——

Senator LEAHY. If the Senator could yield, could I ask whether the record will stay open so that with the questions that have been asked and with the ones I am submitting, if we can determine—we might want to call Mr. Reynolds back to determine how many of the questions he will not answer.

Senator HATCH. Let me say, we need to have your questions to Mr. Reynolds today. Hopefully you can accomplish this because we must close the record by the end of the week if we want to meet our time schedule. If you can get your questions to him today it would.

Senator LEAHY. Yes. But I want to make——

Senator HATCH. We will keep open the record until Friday and I would appreciate it if you would answer those as soon as possible.

Senator LEAHY. Including the ones where he says he has to go back to consult to see if he could answer the questions that he earlier said he would.

Senator HATCH. My personal feeling is that if we do not close the record Friday we will have a difficult time meeting the schedule I would like to meet.

Senator MATHIAS. Mr. Chairman, I have here the opinion of the circuit court of appeals in the case of *Herman Lodge, et al.* v. *J. K. Buxton,* the famous *Burke County* case, and the findings in that case are extremely interesting. I will not review them because I am sure Mr. Reynolds is familiar with them. They have been reviewed at least in part by Senator Specter. But there is one compelling sentence that I think is worth quoting:

"The vestiges of racism encompass the totality of life in Burke County."

Now, the interesting thing about the case, it seems to me, is that the opponents of the amended section 2 have argued that the *Burke County* case is an example of the ability of plaintiffs to win voting dilution cases after *Mobile* by using circumstantial evidence of intent. In that case the court summarized the situation and held that given the individual segregation of all social, religious and business organizations, the result obtains that blacks are cut out of the normal course of politics in this tightly knit rural county.

The Carter administration, viewing these facts, concluded that it was appropriate to file an amicus brief, a brief in favor of plaintiff's position.

Now why did this Department of Justice not either stand on that brief or file a similar brief?

Mr. REYNOLDS. Well, Senator, I disagree with the brief that was filed to the extent that it suggests that an "effect" test was included in section 2 and the fifth circuit disagreed with that.

Senator MATHIAS. Do you disagree with the facts?

Mr. REYNOLDS. Do I disagree with what?

Senator MATHIAS. Do you disagree with the facts?

Mr. REYNOLDS. I cannot agree or disagree with the facts. Whatever they are, they are.

Senator MATHIAS. You accept the facts?

Mr. REYNOLDS. Certainly. The facts are found by the court. I cannot very well do anything about that.

Senator MATHIAS. Do you accept the facts as characterized by the fifth circuit?

Mr. REYNOLDS. I think those are the facts that are given—unless there was a clearly erroneous claim that was made, that I am not aware of.

Senator MATHIAS. What is your response to those facts?

Mr. REYNOLDS. Well, as I say, two courts found below there was discriminatory purpose which was sufficient to find a violation of section 2. That is the issue that is pending in the Supreme Court. We had taken a position, the Department had taken a position, that we did not need to show purpose under section 2 in the court below. That was rejected by the fifth circuit and the decision was

made not to file an *amicus* brief taking a different position in the Supreme Court.

Senator MATHIAS. On what basis, what philosophy?

Mr. REYNOLDS. The legal issue was not before the court at that time. The only question before the court is essentially a fact question as to whether the facts constituted a sufficient showing of purpose. That is a rather peculiar kind of an issue for the Department of Justice to get involved in.

Senator MATHIAS. Do you think the facts did show a sufficient showing? That seems to be part of your job as Assistant Attorney General in protecting the field of civil rights, to make those conclusions.

Mr. REYNOLDS. That is right.

Senator MATHIAS. Do you?

Mr. REYNOLDS. I have to make those judgments and I will tell you right after the court decides the case.

Senator MATHIAS. You will—I do not want to repeat the harangue that you have had on this subject but you were willing to talk about it on television.

Mr. REYNOLDS. I think you are taking out of context the conclusion on television.

Senator MATHIAS. It was a pending case there just as it is now.

Mr. REYNOLDS. But the discussion on television related to the whole question of the at large system of election and whether or not if you have an at large system and underrepresentation of minorities, that that effect is one that is so offensive to the act. Without singling out Burke County, I did not pick the spots before I went on television. They were picked by the ABC Network. Without singling out Burke County——

Senator MATHIAS. But you specifically mentioned Burke County.

Mr. REYNOLDS. Certainly because the questioner asked me about——

Senator MATHIAS. You could say to them just what you said to us, I cannot discuss Burke County.

Mr. REYNOLDS. I think that is right, that in terms of——

Senator MATHIAS. It is a case pending in the courts and I cannot discuss it on television.

Mr. REYNOLDS. That is right, but the question that was asked was whether the at large system and underrepresentation would have a discriminatory effect. That was the nature of the question. They were not asking me——

Senator MATHIAS. You went beyond that because you said Burke County does not violate the law and the Constitution.

Mr. REYNOLDS. I do not believe I said Constitution.

Senator MATHIAS. Well, violate the law and that implies the Constitution.

Mr. REYNOLDS. I said that those circumstances alone would not be a violation of the law as I understand it today—that is, the existence of an at-large system and underrepresentation. That is true, and I will say that to you, I do not think those factors alone are sufficient to establish a violation of section 2, whether in Burke County or the other places, in Miami, Hartford, Baltimore, Md.

Senator MATHIAS. Is that why you did not file the amicus brief?

Mr. REYNOLDS. I explained the decision I made on the considerations which I alluded to before.

Senator MATHIAS. Let us move on to *Dove* v. *Moore* which was mentioned a minute ago which was a challenge to the at-large system of electing city council members in Pine Bluff, Ark. Are you familiar with that case?

Mr. REYNOLDS. No, I am not, Senator. What is the name of it?

Senator MATHIAS. *Dove* v. *Moore.*

Mr. REYNOLDS. I do not believe we were in that case.

Senator MATHIAS. In your testimony you imply that the proposed amendment of section 2 would mean that the at-large systems would be vulnerable to attacks. That was your testimony.

Mr. REYNOLDS. That is correct.

Senator MATHIAS. *Dove* v. *Moore* bears on that question. In that case the court applied the test of *White* v. *Regester* and so it seems to me that in the light of the testimony you have given, it might be a good case to review.

Mr. REYNOLDS. I will certainly do that. If it applies to *White* v. *Regester,* it has safeguards against the prospect of the proportional representation problem because *White* v. *Regester* requires a modicum of intent as an element of the case. So it seems to me there again the protection that one has against the potential for having a violation of the act based on this proportional representation is built into *White* v. *Regester.* It is built into *Mobile* and *Whitcomb* v. *Chavis* and all the cases that say that one needs to show in addition some evidentiary basis for purposeful or intentional discrimination. If you have that then you have a violation and in the lot of the cases—a lot of them say disproportionate representation is not alone enough. It clearly is not where the standard includes a purpose or intent requirement.

Senator MATHIAS. Of course, we have already disagreed on this point. When the courts say that they go on to say what the additional burden is. Now in this case, in *Dove* v. *Moore,* the court laid it out. They said the plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than the residents of the district to participate in the political processes and to elect legislators of their choice. That seems to me to lay it out pretty clearly.

Mr. REYNOLDS. That certainly would not suggest to me that they are not looking for purpose or intent. It says it is "not equally open."

Senator MATHIAS. Look at the findings. In the *Dove* case the court found that blacks have full open and equal access to the city's political process and blacks play an active and significant role in city politics—unlike the *Edgefield County* case where the district court ruled initially, that is prior to *Mobile,* that whites absolutely refused to vote for a black. The court found that in Pine Bluff whites have voted for blacks and vice versa and in significant numbers and that the constitutional touch tone is whether the system is open to full minority participation, not, as you would argue, that it is whether proportional representation is in fact achieved.

Now the court went on then to say that in the *Pine Bluff* case that blacks and whites alike have rejected race as the overriding criteria in voting for candidates in the city elections in Pine Bluff unlike Edgefield County where the court found ample proof that candidates tended to lose not on their merits but solely because of their race.

So really, in the light of these cases, such as *Pine Bluff,* which follows the *White* v. *Regester* case, you have the totality of circumstances test.

Mr. REYNOLDS. Who prevailed in that case, Senator?

Senator MATHIAS. The defendant prevailed. The attack or the challenge was turned back.

Mr. REYNOLDS. Well, based on what you suggest to the findings, I would think it would be turned back. It did not have purpose or effect.

Senator MATHIAS. That is exactly what we will predict will happen under amended section 2. That is the operation of the "result" test.

Mr. REYNOLDS. In that case there was no purpose nor effect.

Senator MATHIAS. That is the operation of the "result" test.

Mr. REYNOLDS. Based on the findings in that case, whatever the test would be, you get the same result.

Senator MATHIAS. But the court did not rely on intent. The court relied on results.

Mr. REYNOLDS. I have not seen the case. I do not know.

Senator MATHIAS. It is an important case for the argument that you make and, Mr. Chairman, I would offer—I ask unanimous consent to submit the decision of the court in *Dove* v. *Moore* as part of this record.

Senator HATCH. Without objection, that will be included—in what court was that?

Senator MATHIAS. Eighth circuit court, *William Dove,* not a hawk but a dove, v. *Charles E. Moore,* U.S. Court of Appeals, eighth circuit, 539 Federal Record 2d series.

Senator HATCH. Without objection, that will go into the record. We will leave the record open if you care to add any other information to that after you have read the case.

Mr. Reynolds, I did some research over the weekend and found that the 18 members of the Congressional Black Caucus were elected in 1980 by an average vote percentage of 85 percent. The average minority population of these districts was approximately 80 percent, according to the most recent Almanac of American Politics. Now I can understand why a minority representative might be pleased with these figures, but could I get your views on whether or not such minority districts, which have been called "minority political ghettos" by some in testifying before the committee, really maximize the influence of minority voters as opposed to simply the number of minority representatives.

Has there not been a concern voiced that consideration should be given to the suggestion that such voters might have significantly more influence if they were dispersed into a significantly larger number of districts, even if they did not always elect a minority representative.

Mr. REYNOLDS. Certainly that would be a consideration. I think that one of the concerns, if we are talking about a test that leads to a proportional representation, is that from a political science standpoint we are encouraging rather than discouraging the notion that blacks vote for blacks and whites vote for whites and in so doing I think you wind up in the long run, if that becomes a standard, doing a disservice to the minority community rather than serving it. That certainly is one of the adverse effects of this kind of a test.

Senator HATCH. The avowed purpose of those who would amend section 2 is to nullify the decision of the Supreme Court in *Mobile* v. *Bolden.* In your opinion, is the amendment as written in the House bill, constitutional?

Mr. REYNOLDS. I think that the proposed amendment as it is now written I think could well be questioned on constitutional grounds. I am not sure about that challenge. The concern that one would have from a constitutional standpoint is that a standard is being put in place not unlike the "effect" test in section 5 without the kind of evidentiary basis or record that normally you would expect to be developed to show the need for this departure from the constitutional norm of the 15th amendment. I think that certainly in *South Carolina* v. *Katzenbach,* the Court upheld the special provisions of section 5 based on a record that sustained the egregious conditions that were present at the time, and in that particular area, and said that, based on that kind of a record, Congress could take this sort of action. It would seem to me that that is the constitutional question raised by a standard now being put in section 2 that would move to an "effects" test without showing any need nationwide to amend or alter the standard in the 15th amendment.

Senator HATCH. What about the constitutionality of the permanent extension of the section 5 bailout provision by the House?

Mr. REYNOLDS. Well, that again would raise a question and I think that the resolution of that question would probably turn on the extent to which the bailout provision was a reasonable one that would allow those jurisdictions that could demonstrate full compliance with the Constitution to bail out and to the extent that it would permit that, then the temporary feature of the bailout or that section of the act that was emphasized in *South Carolina* v. *Katzenbach* would still probably be in place.

To the extent that the bailout provision is onerous and does not provide for a reasonable bailout, then I think it well could come under a constitutional challenge.

Senator HATCH. In a paper delivered to the American Political Science Association in 1980, one of the attorneys of the Civil Rights Division stated:

> No matter how many changes an official submits to the Attorney General, a student of section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.

Would you agree with this observation? If so, what would be the impact upon bailout of the provision in the House legislation requiring that, in order to bail out, a jurisdiction must make all submissions required under section 5?

Mr. REYNOLDS. Well, I think there is a lot of truth to the statement you have read and I think that is a reason for concern to some extent with the House bailout provision. You are going to have to call on all counties seeking to bail out to answer for all the political subunits in the county with regard to submissions, no matter how miniscule or irrelevant they were, and I think that could have the unfortunate effect of holding a jurisdiction in even though it was not one that anyone would say was operating in a discriminatory fashion.

Senator HATCH. Let me briefly get your views on the other factors with which a jurisdiction must comply to secure bailout under the House bill. Maybe you could give me your views as I go through each one.

No. 1, no test or device has been used by the jurisdiction for the previous 17 years?

Mr. REYNOLDS. Well, my sense is that a large number of jurisdictions would be able to meet that test at this stage.

Senator HATCH. That is basically present law?

Mr. REYNOLDS. Present law and I think they would generally speaking be able to meet that.

Senator HATCH. No final judgment of a Court has determined a violation of voting rights for 10 years?

Mr. REYNOLDS. I do not know what the impact of that provision would be because there are certainly some private cases as well as ones we have been involved in. I think that the information we have is that there are some 17 jurisdictions that would be—17 cases that would fall into that category and that the jurisdictions in that category would be subject for some period, whatever the 10-year period would be, would be subject to coverage after those judgments. But I do not see that as being an onerous requirement.

Senator HATCH. No consent decree has been entered into resulting in the abandonment of any voting practice?

Mr. REYNOLDS. I think that that is one that certainly bears some careful thought. It discourages settlements which are aimed at curing problems on a voluntary basis.

Senator HATCH. How many cases do you have that are settled by consent decree?

Mr. REYNOLDS. I do not know the number of cases that would come under that category but clearly the preference is to settle cases and to try to obtain consent decrees and that is a way to resolve these litigations if we can. It seems to me to sound like it might be a disincentive to jurisdictions to enter that kind of arrangement—if you are going to penalize them for agreeing to a settlement for consent decree.

Senator HATCH. There would be no incentive to participate in a consent decree if that is the provision?

Mr. REYNOLDS. Well, I think it would certainly discourage consent decrees.

Senator HATCH. No. 4, no Federal examiners have been assigned to such a jurisdiction?

Mr. REYNOLDS. Well, again I am not real sure what that means. Federal examiners are assigned to jurisdictions in connection with the registration process and listing eligible voters. If that is all it pertains to, I think there are a limited number of counties that

would be affected. But, on the other hand, Federal examiners also are assigned to different counties in conjunction with sending in Federal observers on request to observe different elections. If the assignment of Federal examiners for that purpose were to be included as an element which would prevent bailout, there would be a large number of counties under that particular requirement and it is not clear from the language or the House report exactly what is intended there.

Senator HATCH. It is a totally discretionary determination by the Attorney General, is it not?

Mr. REYNOLDS. Certainly as to sending in observers and to do that we have to have a county that has been certified to have a Federal examiner.

Senator HATCH. So an Attorney General who simply did not want a jurisdiction to be eligible for bailout could send one in. Is that correct? Let us say such an Attorney General did exist.

Mr. REYNOLDS. I would hope that would not——

Senator HATCH. I agree. I hope not also, but there is no legal barrier to it. That is the problem.

Senator MATHIAS. Mr. Chairman, if I could interrupt you, Mr. Reynolds and others have mentioned the *Zimmer* case frequently during the course of testimony and again, so that those who review this record can have a comprehensive view of the record, I would ask unanimous consent that the *Zimmer* case be included.

Senator HATCH. Without objection, we will include that right after the *Dove* case.

Senator MATHIAS. This is going to be one of the longer records.

Senator HATCH. I believe so, Senator.

Senator MATHIAS. Therefore, to give members of the committee adequate time to review it, have you any date in mind when the transcript would be available?

Senator HATCH. I would like to have the record complete by Friday. It will take us a little while after that to get it in shape but my goal is to have this matter resolved by the subcommittee on or before the 20th of this month.

Senator MATHIAS. Do you know when the transcript will be available?

Senator HATCH. Perhaps it will be available by Wednesday?

Mr. REYNOLDS. It might be enlightening to place the case of *Nevitt* v. *Sides* at the same point where you include the *Zimmer* case.

Senator HATCH. Without objection, so ordered.

[The material was received for the record and appears in the appendix of the hearing.]

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Senator HATCH. In fact, we will include all the relevant cases. By compiling the record in that manner, anyone reading it can have the benefit of reading the relevant case law, if they so desire.

No. 5, no objection to a section 5 submission has been interposed by the Attorney General. What about that?

Mr. REYNOLDS. Well, we have interposed some 695 objections so that there are certainly a large number of jurisdictions that would be affected by that.

Senator HATCH. Some of those are more or less important than others; some are even trivial. Is that correct?

Mr. REYNOLDS. That is correct. Some are far more important but this does not differentiate, as I understand it. So any objection would be a bar.

Senator HATCH. So, although we refer to it as a bailout provision, for all intents and purposes there is no effective way for most jurisdictions to bail out under this provision.

Mr. REYNOLDS. I think there has been one objection to submissions from each of the covered States since 1965 and I think there are another 196 counties that we have counted that have had at least one objection.

Senator HATCH. No. 6, the jurisdiction has eliminated all voting procedures and methods which "inhibit or dilute" equal access to the electoral process. What about that?

Mr. REYNOLDS. This requirement is a troublesome one because it introduces into the equation a whole new factor that was never contemplated when the jurisdiction came under the act. It goes beyond determining a violation of the Act or the Constitution and would require in each bailout suit a full-blown litigation as to whether or not the conduct or the methods of election had either a purpose or effect of intimidating or discouraging minority participation. That is a very complex kind of litigation to go through in a bailout suit.

Senator HATCH. Of course, if the Congress so desires, it can alter the intent of the original act to reflect goals which may be completely contrary to those sought by the legislation as originally passed.

Mr. REYNOLDS. It would introduce a whole new feature that had not been in the act at the time these jurisdictions were put under and require a wholly different element of proof other than simply requiring a 10-year period of compliance with the act.

Senator HATCH. When we talk about voting procedures which inhibit and dilute, we are talking about a whole new area of law that will have to be determined?

Mr. REYNOLDS. That is right, and what one means by inhibit or dilute, I guess, would be subject to a great deal of litigation.

Senator HATCH. No. 7, the jurisdiction has engaged in "constructive" efforts to eliminate intimidation and harassment and in "constructive" efforts to expand opportunities for minorities in the electoral process?

Mr. REYNOLDS. Well, this is the same kind of requirement which does go well beyond existing law. It is also well to remember in terms of the bailout that the House bill calls for counties to show not only that they can meet these requirements but also all political subunits within the counties. Therefore you are talking, for

bailout purposes, when you focus on the last two criteria you mentioned, about mammoth litigation that will demonstrate that the constructive efforts have been made by all of these political subdivisions within the county as well as the county and that they have done whatever is necessary to insure there is no inhibition or dilution of minority votes.

Senator HATCH. Could you summarize then the likelihood of jurisdictions bailing out under the House bill? Do you have an estimate as to how many jurisdictions are likely to bail out under that provision?

Mr. REYNOLDS. Well, we have heard estimates of some 25 percent. Our assessment of it is that there are very few, if any, jurisdictions that would be able to bail out of the bill for a considerable period of time. Certainly once the bill is enacted, if you were to run over the next 10 years with everybody aware of what the particular features of the bill are, then some jurisdictions would obviously be able to eventually bail out. But we do not see much prospect in the near future for many jurisdictions to bail out under the standards that the House bill proposed.

Senator HATCH. An earlier witness noted that a desirable amendment to the act would allow for an appeal by an aggrieved person of a decision by the Attorney General not to object to a submitted voting change. Would you comment on how such an amendment would affect the Department and the Voting Rights Section?

Mr. REYNOLDS. An appeal of a preclearance, is that what the question is?

Senator HATCH. Yes.

Mr. REYNOLDS. Well, I think we would have to probably quadruple our staff to start with in that instance. We have a large number of preclearances and if everyone of those is going to be subject to the appeal process, and I do not know what follows after the appeal, but a review session and an opportunity for hearings and what have you, that would be a monumental kind of an administrative procedure to add onto what we now do under the section 5 preclearance provisions. At the present time I foresee it would be virtually unmanageable, but clearly if something like that were to be added to the bill, it would require a significant increase in resources.

[Attachments to Mr. Reynolds' statement follow:]

ATTACHMENTS TO THE STATEMENT OF WM. BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

ATTACHMENT A-1

The Provisions of the Voting Rights Act, as amended

A. Overview

The Voting Rights Act of 1965 consisted of (1) permanent provisions of general applicability and (2) special, temporary provisions that applied only to states or counties that had used a literacy test or other such tests or devices, and had low voter participation. The special provisions included Section 4(a), which suspended the use of literacy tests as a condition for voting; Section 5, which required the covered jurisdictions to obtain federal preclearance before implementing any change in voting laws; Section 6, which provided for use of federal examiners whose functions include determining voting qualifications; and Section 8, which authorized the use of federal observers, persons who observe the conduct of elections. 1/

The permanent provisions included Section 2, a broad prohibition against denial or abridgment of voting rights on the ground of race.

Under the coverage formula of the 1965 Act, the special provisions applied to certain states and counties in the South 2/ and to a few jurisdictions elsewhere. Section 4(a) provided that a covered jurisdiction could terminate application of the special provisions by bringing a declaratory judgment action against the

1/ The provisions of the Voting Rights Act, as amended, are codified in 42 U.S.C. 1973 to 1973bb-1.

2/ The states of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia and approximately one-half of the counties in North Carolina became subject to the special provisions in 1965. Another state, Alaska, bailed out, but was later recovered.

United States (a "bailout" action) and proving that, during the preceding five years, it had made no racially discriminatory use of a literacy test or other "test or device" for voting.

In 1970, Congress extended for five years the period of application of the special provisions to the states that became covered in 1965. In addition, a number of other jurisdictions, including certain counties in Arizona, California and New York, were brought under the special provisions as a result of 1970 amendments to the coverage formula. Another provision added in 1970 was Section 201, which extended to all states a temporary ban on literacy tests as a condition for voting.

Under amendments enacted in 1975, the time period for bail-out suits by the jurisdictions that became covered in 1965 or 1970 was increased by seven years. In addition, the coverage formula of Section 4(b) was amended to encompass certain states or counties that conducted elections only in English and had low voter participation. The latter change applies, for example, to Texas, Arizona and Alaska and makes them subject to Section 5 and to a requirement that elections be conducted in the language of pertinent "language minority groups," as well as in English. 3/ A similar requirement of bilingual elections was added with regard to jurisdictions coming within a separate formula provided in Section 203 of the Act.

3/ The Act's definition of "language minority group" includes Hispanics, American Indians, Alaskan Natives and Asian Americans.

Section 201 was amended in 1975 to make permanent the nationwide prohibition against use of literacy tests or other devices as a condition for voting. Also, Section 2 was amended to include a prohibition against voting discrimination based on membership in a language minority group.

B. Bailout suits under Section 4(a)

Bailout suits under Section 4(a) must be brought in the U.S. District Court for the District of Columbia. When an entire state is covered by the special provisions, only the state (not individual political subdivisions within it) may bring such an action. 4/

Unless the Act is amended, it appears that, in August 1982 or soon afterwards, most of the states that became covered in 1965 may be able to make the showing needed to obtain a bailout judgment. That is, they would be able to prove that there has been no racially discriminatory use of a test or device during the preceding 17 years. 5/ The Act requires the Attorney General to consent to entry of a bailout judgment if he has no reason to believe that

4/ City of Rome v. United States, 446 U.S. 156, 167-169 (1980).

When only some of a state's political subdivisions are covered, those subdivisions may bail out on an individual basis.

5/ A 17-year standard is also applicable to the jurisdictions covered by virtue of the 1970 formula. For most of them, unless the Act is amended, bailout will be possible after 1987.

A ten-year standard applies to jurisdictions, such as Texas, that became subject to the special provisions in 1975.

such use of a literacy test or other device occurred during the pertinent period. 6/

When a bailout judgment is granted, the court is to retain jurisdiction for five years and is to reopen the action upon a motion by the Attorney General alleging discriminatory use of a literacy test or other test or device. 7/

6/ Sixteen bailout suits under Section 4(a) have been brought. For a list of these suits, see Attachment G. In nine cases, the plaintiff or plaintiffs (e.g., several counties) obtained a bailout judgment. However, the plaintiffs in four of those cases were later brought under the Act again; e.g., the State of Alaska bailed out in 1966 and again in 1972, but was later covered by the 1975 amendments to the Act.

In all of the cases in which a bailout judgment was granted, the Attorney General had consented to entry of the judgment.

7/ In 1974, the Attorney General succeeded in reopening and setting aside the bailout judgment that three New York counties had obtained. As a result, it appears that those counties will be subject to the special provisions until 1991.

ATTACHMENT A-2

Experience of the Department of Justice under the Voting Rights Act

Summary. Prior to 1965, discrimination against blacks in the voter registration process, for example, discriminatory use of literacy tests, was prevalent in some parts of the South. Under the pre-1965 civil rights statutes, the remedies for such discrimination depended upon case-by-case litigation, a process that proved to be ineffective.

Congress' response, the Voting Rights Act, included new remedies that were not dependent upon Government-initiated lawsuits. Such provisions as the suspension of literacy tests and the authority of the Attorney General to call for the use of federal examiners were highly effective in eliminating obstacles to voter registration by blacks.

In some areas, as registration and voting by blacks increased, efforts were made, through such actions as racial gerrymandering, to limit the effectiveness of political participation by blacks. In consequence, the priorities of the Department of Justice shifted to implementation of Section 5, the preclearance requirement. This has been true since 1971. Section 5 is a highly effective means of preventing or remedying the adoption of racially discriminatory voting laws.

Currently, the other main aspects of our enforcement of the Voting Rights Act are use of federal observers, who monitor the conduct of elections, and litigation, under Section 2, to remedy dilution of the voting rights of blacks or language minorities.

This memorandum summarizes the Department's experience in enforcing the Act.

A. Prohibition against literacy tests. It appears that, in general, use of literacy tests in the 1965-covered states ceased after August 1965, when the special provisions took effect. There may be some exceptions. 1/

Since 1970, there has been a nationwide prohibition against use of literacy tests for voting. This prohibition has been effective.

B. Federal examiners. The use of federal examiners pursuant to Section 6 entails displacing the discretionary functions of local voter registration officials. In the years immediately after enactment of the 1965 Act, this Department's efforts were concentrated on the registration process. Even in those years, the Attorney General certified only a limited number of counties for appointment of federal examiners. 2/ Often, the threat of

1/ For example, judgments entered in suits against the states of Louisiana and Mississippi in August 1966 and May 1966, respectively, may extend until 17 years after those dates the period of coverage.

2/ There are two ways in which a political subdivision may be designated for the appointment of examiners--an order of a federal court, under Section 3(a), in a suit brought by the Attorney General or an aggrieved individual; or a certification by the Attorney General pursuant to Section 6. Such a certification by the Attorney General may be made only with respect to a political subdivision that is covered by Section 4(b).

During the years 1965-1967, the Attorney General certified a total of 62 counties as examiner counties: 13 in Alabama, 4 in Georgia, 9 in Louisiana, 34 in Mississippi and 2 in South Carolina. From January 1968 to August 1975, an additional 12 counties were certified. See Attachment K.

using federal examiners was sufficient to convince local officials to register black citizens. Since 1975, a number of counties have been certified by the Attorney General under Section 6.[3/] However, the purpose of these certifications was not to call for use of examiners to list eligible voters, but to give a basis for using federal observers at elections.[4/]

During the 1981 House subcommittee hearings, several of the witnesses referred to problems of racial discrimination in the administration of voter registration. In recent years, we have received some allegations of such problems.

C. Federal observers. The Department of Justice has made extensive use of its authority to direct the assignment of federal observers.[5/] For example, for primaries held in 1980 (excluding run-offs), 319 federal observers were used in 12 counties in two states (Alabama and Georgia); for the November 1980 general elec-

3/ Since August 1975, the Attorney General has certified 32 counties as examiner counties.

4/ Since 1975, listing by federal examiners has taken place in only two counties, both in Mississippi. They were certified as examiner counties in 1965.

5/ Section 8 authorizes the Attorney General to direct the assignment of federal observers to elections in any county where "an examiner is serving." This provision has been interpreted to permit the assignment of observers to any county for which an examiner certification has been made.

Under Section 8, federal observers are authorized to be present at polling places and the places where votes are counted. They are to report (e.g., on any complaints or any observed election misconduct) to a federal examiner who is present at the election.

tion, 313 observers were used in eight counties in three states (Alabama, Mississippi, and Texas). In 1981, 30 observers were used in four Mississippi counties for primary elections; 16 observers were used in two Mississippi counties during the general election. 6/

Most often, observers are used with regard to elections in which there is a contest between white and minority candidates and there exists a possibility of intimidation of or discrimination against minority voters. The presence of federal observers at the polls or during the counting of ballots helps to ensure that the election is conducted in a nondiscriminatory manner. Often, local officials ask this Department to have observers assigned to cover an election in their area.

When observers are assigned to an election, a federal examiner is also present; the examiner's primary function is to receive complaints.

D. Section 5

1. Section 5 requires preclearance of changes in the voting laws of jurisdictions that are covered by Section 4(b). For example, a state or county (or a political subunit) that is covered by virtue of the 1965 formula may not implement a voting law different from that in effect on November 1, 1964, unless it obtains federal preclearance. The most frequently used form of preclearance is for a covered jurisdiction to submit a proposed change to the Attorney General; if the Attorney General does not

6/ See Attachment L.

object to the change within 60 days, it may then be implemented. The alternative is for the jurisdiction to bring, in the U.S. District Court for the District of Columbia, an action for a declaratory judgment that the change does not have the purpose and will not have the effect of denying voting rights on account of race or membership in a language minority group. (See, e.g., City of Rome v. United States.) In such a preclearance suit, the defendant is the United States, and the plaintiff has the burden of proving the absence of discriminatory purpose and effect.

In the event that a jurisdiction subject to Section 5 attempts to implement a new voting practice or procedure without obtaining preclearance, the Attorney General or a private person may sue to enjoin that implementation. 7/

2. In 1969, the Supreme Court held that Section 5 reaches not only laws relating to the process of registering or voting, but also practices (e.g., redistricting) that could involve dilution of a minority group's voting power. 8/ In the years just after 1965, Section 5 was given low priority by the Department.

7/ Actions of this type by the Attorney General are expressly authorized by Section 12(d), 42 U.S.C. 1973j(d), and are brought, not in the District of Columbia, but in the local district court. The issues are limited to whether the practice or procedure is within the scope of Section 5 and, if so, whether preclearance has been obtained. The issue of entitlement to preclearance, i.e., deciding whether lack of discriminatory purpose and effect has been shown, may be litigated only in the District of Columbia. See Section 5, 42 U.S.C. 1973c, and Section 14(b), 42 U.S.C. 1973l(b).

8/ Allen v. State Board of Elections, 393 U.S. 544 (1969).

In amending the Act in 1970, Congress endorsed the Supreme Court's interpretation of Section 5 and stressed the need for effective enforcement.

In 1971, the Department of Justice issued guidelines for the administration of Section 5. [9/] By 1971, administrative and judicial enforcement of Section 5 had become a major priority in the Department's implementation of the Act.

As noted above, the form of preclearance used most often is submission of a proposed change to the Attorney General. [10/] The number of submissions is now huge. For example, during 1980, some 7,300 changes were submitted; more than 4,000 were from Texas. [11/] For 1981, through September 30, 5,039 changes were submitted. There has been little use of the alternative of judicial preclearance. [12/]

9/ See 42 C.F.R. Part 51. Revised guidelines were published as a proposal in March 1980 and issued in final form in January 1981. See Attachment B-3.

10/ The Department's Section 5 guidelines provide that the 60-day period begins when the submitting jurisdiction has provided the Department the kinds of information needed for consideration of the change. When the original submission is not adequate, the Division may ask the jurisdiction to provide additional information; upon receipt of that information, the 60-day period begins.

11/ A single "submission" under Section 5 may include several "changes" in voting laws. Attachment C-1 lists the number of changes submitted by year by state; Attachment C-2 lists the number of changes submitted for each year by type.

12/ The other form of preclearance is for a jurisdiction to bring a declaratory judgment action in the U.S. District Court for the District of Columbia. Jurisdictions have brought a total of 25 preclearance suits (20 since 1975) and have prevailed in five of them (three since 1975). (In two of the five, the Department consented to the judgment preclearing the change; and one of those was resolved by consent decree after the plan was amended to

(continued)

Since 1965, less than two percent of the submitted changes resulted in objections. More than 400 of the 695 objections have been made since 1975. 13/ More than 80 percent of the objections are to redistrictings, annexations, or changes in method of election (e.g., a majority-vote requirement for election to a particular office).

Some types of changes account for large numbers of submissions, but few objections. While polling place and precinct line changes account for more submissions than any other type of change (approximately one-third of all changes submitted), they have resulted in relatively few objections (five percent of the objections).

Some jurisdictions have been punctilious in submitting changes for Section 5 review. However, over the past six years, more than 50 suits have been brought, by this Department or by private persons, to enjoin implementation of changes that had not been precleared. Moreover, in 1980 alone, this Department sent

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12/ (continued)

remove the discriminatory features.) Four of the suits are still pending in the district court. Attachment N-5a is a list of preclearance suits.

13/ Attachment E-1 shows the number of changes objected to, by state by year. Attachments D-1 and D-2 are complete lists of objections by state.

The states accounting for the bulk of the objections are, in numerical order, Georgia, Texas, Louisiana, South Carolina, Mississippi, Alabama, and North Carolina. Objections have also been made to changes submitted by jurisdictions in Arizona, California, New York, South Dakota, and Virginia.

124 letters to covered jurisdictions referring to apparent failure to comply with Section 5 and requesting the jurisdiction to seek clearance of the change in question. In 1981, 99 such letters were sent.

Reapportionment under the 1980 Census is now in progress. To date, we have received 300 redistricting submissions based on the 1980 Census. Thirteen of these resulted in objections. 14/

E. Bilingual elections. In 1976, the Department of Justice issued interpretative guidelines on the Act's language minority provisions. 15/ The guidelines state that the basic standard is one of effectiveness. They provide, for example, that a jurisdiction may "target" bilingual material or oral assistance. In our dealings with affected jurisdictions, we have emphasized that the bilingual requirements should be interpreted in a reasonable way. We do not have detailed information on the extent to which bilingual assistance or materials have actually been provided by the jurisdictions or used by voters. 16/

14/ Of these objections, four concerned the reapportionments of state houses of representatives (North Carolina, South Carolina, Texas, and Virginia), three involved state senate districts (North Carolina, Texas, and Virginia), two involved U.S. congressional districts (North Carolina and Texas), and five were to county or city redistrictings in Alabama, New York and Texas. See Attachment F.

15/ 28 C.F.R. Part 55. The guidelines pertain to the bilingual election requirements imposed by Sections 4(f) and 203. See Attachment I.

16/ Some election officials claim that the costs of complying with the bilingual requirements are exorbitant. It appears that some of the jurisdictions are going beyond what, under our interpretation, is required by the Act.

Section 5 has been used in several instances to obtain compliance with the bilingual-election requirements of Section 4(f). Also, in a lawsuit against San Francisco County, the Department obtained a consent decree designed to protect the rights of citizens who speak Chinese or Spanish.[17/] We obtained a consent decree, to protect the rights of Navajos, in a suit against a New Mexico county. We have defended nine bailout suits by jurisdictions covered under the language minority provisions of Section 4 or Section 203.[18/]

F. Dilution of voting rights. An active area of voting litigation involves challenges to at-large election systems or districting systems that allegedly dilute the voting rights of blacks or other minorities.[19/] These suits relate to election

17/ In 1975, Attorney General Levi assigned primary responsibility for enforcing Section 203 to the United States Attorneys. The Civil Rights Division enforces the language minority provisions with regard to jurisdictions covered by Section 4, e.g., the States of Arizona and Texas.

18/ The Section 4 bailout process is described above. A different procedure is applicable under Section 203: a jurisdiction may end Section 203 coverage, before August 1985, by proving that the illiteracy rate of the pertinent language minority group is equal to or less than the national illiteracy rate. Four such suits have been brought, but only one resulted in a bailout judgment (partial bailout for a county in Hawaii).

Five suits to end Section 4 coverage have been brought by jurisdictions covered as a result of the 1975 (language minority) amendments. In two of these cases, the plaintiffs obtained bailout judgments.

19/ When an at-large system (e.g., for electing a county council) is challenged as racially discriminatory, the plaintiffs may seek adoption of a system using single-member districts, or a system that combines single-member districts with some at-large seats. Another possible remedy would be modification of features of the at-large system, such as eliminating a majority-vote or numbered-post requirement.

systems that are not subject to Section 5, because the system predates Section 5 coverage or the jurisdiction is not covered by Section 5. Since 1975, the Department has been a party to 17 lawsuits alleging unlawful dilution and has participated as amicus in seven other suits of this type. 20/

20/ See Attachment J.

ATTACHMENT B-1

JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT (BY STATE)

Jurisdiction	Date of Coverage		Possible Removal from Coverage */
Alabama (statewide)	Aug. 7, 1965		Aug. 7, 1982
Alaska (statewide)	Oct. 22, 1975	(A) **/	Oct. 22, 1985
Arizona (statewide)	Sep. 23, 1975	(S)	Sep. 23, 1985
Arizona counties:			
Apache	Mar. 27, 1971		Mar. 27, 1988
	Oct. 22, 1975	(I)	Oct. 22, 1985
Cochise	Mar. 27, 1971		Mar. 27, 1988
Coconino	Mar. 27, 1971		Mar. 27, 1988
	Oct. 22, 1975	(I)	Oct. 22, 1985
Mohave	Mar. 27, 1971		Mar. 27, 1988
Navajo	Mar. 27, 1971		Mar. 27, 1988
	Oct. 22, 1975	(I)	Oct. 22, 1985
Pima	Mar. 27, 1971		Mar. 27, 1988
Pinal	Mar. 27, 1971		Mar. 27, 1988
	Oct. 22, 1975	(I)	Oct. 22, 1985
Santa Cruz	Mar. 27, 1971		Mar. 27, 1988
Yuma	Jan. 25, 1966		Jan. 25, 1983
California counties:			
Kings	Sep. 23, 1975	(S)	Sep. 23, 1985
Merced	Sep. 23, 1975	(S)	Sep. 23, 1985
Monterey	Mar. 27, 1971		Mar. 27, 1988
Yuba	Mar. 27, 1971		Mar. 27, 1988
	Jan. 5, 1976	(S)	Jan. 5, 1986
Colorado county:			
El Paso	Sep. 23, 1975	(S)	Sep. 23, 1985
Connecticut towns:			
Groton	May 10, 1974		May 10, 1991
Mansfield	May 10, 1974		May 10, 1991
Southbury	May 10, 1974		May 10, 1991
Florida counties:			
Collier	Aug. 13, 1976	(S)	Aug. 13, 1986
Hardee	Sep. 23, 1975	(S)	Sep. 23, 1985
Hendry	Aug. 13, 1976	(S)	Aug. 13, 1986
Hillsborough	Sep. 23, 1975	(S)	Sep. 23, 1985
Monroe	Sep. 23, 1975	(S)	Sep. 23, 1985

*/ The coverage termination date depends upon the circumstances of the particular jurisdiction. Thus, a jurisdiction could be removed from coverage earlier than the date shown, if it could prove that its test or device was not discriminatory. On the other hand, the removal date would be later than the date shown in the case of a jurisdiction that continued use of a discriminatory test or device after coverage by the Act began.

**/ (A) represents coverage based on Alaskan Native language minority. American Indian language minority coverage is designated (I); Spanish heritage minority as (S).

Jurisdiction	Date of Coverage	Possible Removal from Coverage
Georgia (statewide)	Aug. 7, 1965	Aug. 7, 1982
Hawaii county:		
Honolulu	Nov. 19, 1965	Nov. 19, 1982
Idaho county:		
Elmore	Mar. 27, 1971	Mar. 27, 1988
Louisiana (statewide)	Aug. 7, 1965	Aug. 7, 1982
Massachusetts towns:		
Amherst	May 10, 1974	May 10, 1991
Ayer	May 10, 1974	May 10, 1991
Belchertown	May 10, 1974	May 10, 1991
Bourne	May 10, 1974	May 10, 1991
Harvard	May 10, 1974	May 10, 1991
Sandwich	May 10, 1974	May 10, 1991
Shirley	May 10, 1974	May 10, 1991
Sunderland	May 10, 1974	May 10, 1991
Wrentham	May 10, 1974	May 10, 1991
Michigan townships:		
Buena Vista	Aug. 13, 1976 (S)	Aug. 13, 1986
Clyde	Aug. 13, 1976 (S)	Aug. 13, 1986
Mississippi (statewide)	Aug. 7, 1965	Aug. 7, 1982
New Hampshire towns, townships, grants:		
Antrim	May 10, 1974	May 10, 1991
Benton	May 10, 1974	May 10, 1991
Boscawen	May 10, 1974	May 10, 1991
Millsfield	May 10, 1974	May 10, 1991
Newington	May 10, 1974	May 10, 1991
Pinkhams	May 10, 1974	May 10, 1991
Rindge	May 10, 1974	May 10, 1991
Stewartstown	May 10, 1974	May 10, 1991
Stratford	May 10, 1974	May 10, 1991
Unity	May 10, 1974	May 10, 1991
New York counties:		
Bronx	Mar. 27, 1971*	July 25, 1991
	Sep. 23, 1975 (S)	Sep. 23, 1985
Kings	Mar. 27, 1971*	July 25, 1991
	Sep. 23, 1975 (S)	Sep. 23, 1985
New York	Mar. 27, 1971*	July 25, 1991
North Carolina counties:		
Anson	Aug. 7, 1965	Aug. 7, 1982
Beaufort	Mar. 29, 1966	Mar. 29, 1983
Bertie	Aug. 7, 1965	Aug. 7, 1982

*/ Bailed out on April 3, 1972, but the bail-out judgment was reopened and the three counties became recovered on Jan. 10, 1974. Recoverage was based on a finding in Torres v. Sachs, 381 F.Supp. 309 (S.D. N.Y. 1974), that the counties had used a test or device; however, summary judgment in Torres was not granted until July 25, 1974. It thus appears that the 17-year period begins on July 25, 1974.

Jurisdiction	Date of Coverage		Possible Removal from Coverage
N. Car. counties (cont.):			
Bladen	Mar. 29, 1966		Mar. 29, 1983
Camden	Mar. 2, 1966		Mar. 2, 1983
Caswell	Aug. 7, 1965		Aug. 7, 1982
Chowan	Aug. 7, 1965		Aug. 7, 1982
Cleveland	Mar. 29, 1966		Mar. 29, 1983
Craven	Aug. 7, 1965		Aug. 7, 1982
Cumberland	Aug. 7, 1965		Aug. 7, 1982
Edgecombe	Aug. 7, 1965		Aug. 7, 1982
Franklin	Aug. 7, 1965		Aug. 7, 1982
Gaston	Mar. 29, 1966		Mar. 29, 1983
Gates	Aug. 7, 1965		Aug. 7, 1982
Granville	Aug. 7, 1965		Aug. 7, 1982
Greene	Aug. 7, 1965		Aug. 7, 1982
Guilford	Mar. 29, 1966		Mar. 29, 1983
Halifax	Aug. 7, 1965		Aug. 7, 1982
Harnett	Mar. 29, 1966		Mar. 29, 1983
Hertford	Aug. 7, 1965		Aug. 7, 1982
Hoke	Aug. 7, 1965		Aug. 7, 1982
Jackson	Oct. 22, 1975	(I)	Oct. 22, 1985
Lee	Mar. 29, 1966		Mar. 29, 1983
Lenoir	Aug. 7, 1965		Aug. 7, 1982
Martin	Jan. 4, 1966		Jan. 4, 1983
Nash	Aug. 7, 1965		Aug. 7, 1982
Northampton	Aug. 7, 1965		Aug. 7, 1982
Onslow	Aug. 7, 1965		Aug. 7, 1982
Pasquotank	Aug. 7, 1965		Aug. 7, 1982
Perquimans	Mar. 2, 1966		Mar. 2, 1983
Person	Aug. 7, 1965		Aug. 7, 1982
Pitt	Aug. 7, 1965		Aug. 7, 1982
Robeson	Aug. 7, 1965		Aug. 7, 1982
Rockingham	Mar. 29, 1966		Mar. 29, 1983
Scotland	Aug. 7, 1965		Aug. 7, 1982
Union	Mar. 29, 1966		Mar. 29, 1983
Vance	Aug. 7, 1965		Aug. 7, 1982
Washington	Jan. 4, 1966		Jan. 4, 1983
Wayne	Aug. 7, 1965		Aug. 7, 1982
Wilson	Aug. 7, 1965		Aug. 7, 1982
South Carolina (statewide)	Aug. 7, 1965		Aug. 7, 1982
South Dakota counties:			
Shannon	Jan. 5, 1976	(I)	Jan. 5, 1986
Todd	Jan. 5, 1976	(I)	Jan. 5, 1986
Texas (statewide)	Sep. 23, 1975	(S)	Sep. 23, 1985
Virginia (statewide)	Aug. 7, 1965		Aug. 7, 1982
Wyoming county:			
Campbell	Mar. 27, 1971		Mar. 27. 1988

ATTACHMENT B-2

JURISDICTIONS COVERED UNDER SECTION 4(b)
OF THE VOTING RIGHTS ACT (BY TERM OF COVERAGE)

Possible Removal from Coverage */	(Date of Coverage)	Jurisdiction
Aug. 7, 1982	(Aug. 7, 1965)	Alabama (statewide)
		Georgia (statewide)
		Louisiana (statewide)
		Mississippi (statewide)
		North Carolina counties:
		Anson
		Bertie
		Caswell
		Chowan
		Craven
		Cumberland
		Edgecombe
		Franklin
		Gates
		Granville
		Greene
		Halifax
		Hertford
		Hoke
		Lenoir
		Nash
		Northampton
		Onslow
		Pasquotank
		Person
		Pitt
		Robeson
		Scotland
		Vance
		Wayne
		Wilson
		South Carolina (statewide)
Nov. 19, 1982	(Nov. 19, 1965)	Virginia (statewide)
		Hawaii county:
		Honolulu
Jan. 4, 1983	(Jan. 4, 1966)	North Carolina counties:
		Martin
		Washington

*/ The coverage termination date depends upon the circumstances of the particular jurisdiction. Thus, a jurisdiction could be removed from coverage earlier than the date shown, if it could prove that its test or device was not discriminatory. On the other hand, the removal date would be later than the date shown in the case of a jurisdiction that continued use of a discriminatory test or device after coverage by the Act began.

Possible Removal from Coverage	(Date of Coverage)	Jurisdiction	
Jan. 25, 1983	(Jan. 25, 1966)	Arizona county:	
		Yuma	
Mar. 2, 1983	(Mar. 2, 1966)	North Carolina counties:	
		Camden	
		Perquimans	
Mar. 29, 1983	(Mar. 29, 1966)	North Carolina counties:	
		Beaufort	
		Bladen	
		Cleveland	
		Gaston	
		Guilford	
		Harnett	
		Lee	
		Rockingham	
		Union	
Sep. 23, 1985	(Sep. 23, 1975)	Arizona (statewide)	(S) **/
		California counties:	
		Kings	(S)
		Merced	(S)
		Colorado county:	
		El Paso	(S)
		Florida counties:	
		Hardee	(S)
		Hillsborough	(S)
		Monroe	(S)
		New York counties:	
		Bronx	(S)
		Kings	(S)
		Texas (statewide)	(S)
Oct. 22, 1985	(Oct. 22, 1975)	Alaska (statewide)	(A)
		Arizona counties:	
		Apache	(I)
		Coconino	(I)
		Navajo	(I)
		Pinal	(I)
		North Carolina county:	
		Jackson	(I)
Jan. 5, 1986	(Jan. 5, 1976)	California county:	
		Yuba	(S)
		South Dakota counties:	
		Shannon	(I)
		Todd	(I)

**/ (S) represents coverage based on Spanish heritage minority. American Indian language minority coverage will be designated (I); Alaskan Native language minority as (A).

Possible Removal from Coverage	(Date of Coverage)	Jurisdiction	
Aug. 13, 1986	(Aug. 13, 1976)	Florida counties:	
		Collier	(S)
		Hendry	(S)
		Michigan townships:	
		Buena Vista	(S)
		Clyde	(S)
Mar. 27, 1988	(Mar. 27, 1971)	Arizona counties:	
		Apache	
		Cochise	
		Coconino	
		Mohave	
		Navajo	
		Pima	
		Pinal	
		Santa Cruz	
		California counties:	
		Monterey	
		Yuba	
		Idaho county:	
		Elmore	
		Wyoming county:	
		Campbell	
May 10, 1991	(May 10, 1974)	Connecticut towns:	
		Groton	
		Mansfield	
		Southbury	
		Massachusetts towns:	
		Amherst	
		Ayer	
		Belchertown	
		Bourne	
		Harvard	
		Sandwich	
		Shirley	
		Sunderland	
		Wrentham	
		New Hampshire towns, townships, grants:	
		Antrim	
		Benton	
		Boscawen	
		Millsfield	
		Newington	
		Pinkhams	
		Rindge	
		Stewartstown	
		Stratford	
		Unity	

Possible Removal from Coverage	(Date of Coverage)	Jurisdiction
July 25, 1991	(Mar. 27, 1971) */	New York counties: Bronx Kings New York

*/ Bailed out on April 3, 1972, but the bail-out judgment was reopened and the three counties became recovered on Jan. 10, 1974. Recoverage was based on a finding in Torres v. Sachs, 381 F.Supp. 309 (S.D.N.Y. 1974), that the counties had used a test or device; however, summary judgment in Torres was not granted until July 25, 1974. It thus appears that the 17-year period begins on July 25, 1974.

ATTACHMENT B-3

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 51

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Revision of Procedures

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: Procedures with respect to the administration of Section 5 of the Voting Rights Act of 1965, as amended, the "preclearance" requirement of the Voting Rights Act, were established in 1971. 36 FR 18186 (Sept. 10, 1971), 28 CFR Part 51. As a result of experience under these Procedures, changes mandated by the 1975 Amendments to the Voting Rights Act, and interpretations of Section 5 contained in judicial decisions, it was decided that revisions were required. Proposed revised Procedures were published for comments on March 21, 1980 (45 FR 18367).

EFFECTIVE DATE: January 5, 1981.

FOR FURTHER INFORMATION CONTACT: David H. Hunter, Attorney, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530, (202) 724-7189.

SUPPLEMENTARY INFORMATION: In response to the March 21, 1980 request, 22 comments were received, including 1 from a Federal agency, 7 from representatives of State governments, 6 from representatives of local governments, 6 from private organizations, 1 from a political science professor, and 1 from a private citizen. (These comments are available for inspection at the Department of Justice.) All comments have been studied carefully, and a number of changes have been made in the Procedures as a result of the comments.

The discussion that follows focuses first on a number of general issues raised by the comments and second on a number of specific topics that were the subject of comments.

Scope. A number of commenters were concerned with issues outside the scope of the Procedures, for example, procedures and substantive standards required by statute, the legal consequences of the absence of preclearance, the Department's litigation policy, the Department's policy under the Freedom of Information Act [for which see 28 CFR 16.9], and the interests of particular jurisdictions.

Formality. To satisfy some commenters would require an increase in the formality of the preclearance process. They advocate, for example, requiring a limitation on telephone communication between Department personnel and submitting authorities, the inclusion of interested individuals and groups in any informal meetings held with submitting authorities, the preparation of transcripts of conferences held under § 51.48, adherence to the rules of evidence in the information gathering process, and increased notice requirements. Because submission of changes to the Attorney General was designed to be an expeditious alternative to declaratory judgement actions brought in the U.S. District Court for the District of Columbia, we believe the level of formality suggested is not appropriate.

Exercise of discretion. Some commenters sought assurance that the Attorney General would not abuse his discretion. Concern was expressed, for example, with respect to what would

constitute "good cause" justifying expedited consideration by the Attorney General (§ 51.32) or with respect to the possibility of the Attorney General's using an unjustified request for additional information (under § 51.35) to extend the 60-day period. Although written procedures can establish standards, they cannot by themselves guarantee reasonableness. To some extent, however, safeguards or alternatives do exist. For instance, submitting authorities always have the option of an action for a declaratory judgment (§ 51.1). On the other hand, interested individuals and groups are given the opportunity to participate in the preclearance process by the various notice requirements provided (see "Role of third parties" below) and, although a decision by the Attorney General not to object is not subject to judicial review (§ 51.48), independent actions otherwise available are preserved by the statute.

Misinterpretation. Misinterpretation of the intent of the proposed Procedures may be evidence of a lack of clarity. Where a commenter has failed to discern the intended meaning, we have given close scrutiny to whether that meaning could be more effectively communicated.

Some commenters misinterpreted the Procedures by reading one section in isolation from the remainder or by overlooking the section that addressed a particular issue. For example, one commenter believed that the Attorney General would not consider a change that must be adopted by referendum until after the referendum is held; this commenter failed to note that § 51.20 excepts from the finality requirement measures subject to a referendum requirement.

Role of third parties. Providing an opportunity for interested persons to express their views with respect to a submitted change is an important part of our preclearance procedures. A number of sections have been revised to indicate more clearly the practice of the Attorney General in this regard (see §§ 51.31, 51.35, 51.43, 51.44, 51.45, and 51.47). To summarize, the submitting authority is requested to provide names of minority contacts (§ 51.29(f)) and evidence of publicity and public participation (§ 51.38(e)) and may be requested to publicize a reconsideration request (§ 51.44(c)), and the Attorney General may publicize a submission in some circumstances (§ 51.36(b)). Persons who have commented on a submission or who have requested notification with respect to action taken on a specific submission are sent copies of letters requesting further information (§ 51.35(b)), letters of no objection (§ 51.40(c)), letters of objection (§ 51.43(d)), and letters following reconsiderations of objections (§ 51.47(d)). Such persons are also notified of reconsideration requests (§ 51.44(c)), reconsiderations at the instance of the Attorney General (§ 51.45(b)), and requests for conferences (§ 51.48(c)). Interested individuals and groups registered under § 51.30 are given notice of submissions (§ 51.31), requests for expedited consideration (§ 51.32(c)), additional information requests and receipts of additional information (§ 51.35(d)), objections (§ 51.43(e)), reconsiderations of objections (§§ 51.44(c) and 51.45(b)), and decisions after reconsideration (§ 51.47(e)). The 1971 Procedures had specified that "prompt" notice of submissions be given to registrants (§ 51.16); this was changed in the proposed Procedures (§ 51.31) to "regular" notice. In response to one comment, "weekly" notice, which has been the normal practice, is now specified.

One commenter objected to the maintenance of a registry of interested individuals and groups. Other commenters believe that the present notice system is inadequate. We believe the notice system as revised and described in the Procedures is both necessary and sufficient for the efficient and fair administration of the preclearance program.

Delegation of authority. §§ 51.2(b), 51.3. Two commenters, both representing States, expressed reservations with respect to the delegation of authority from the Attorney General to the Assistant Attorney General, Civil Rights Division, and opposed any delegation below the level of the Assistant Attorney General. As a practical matter, given the volume of Section 5 submissions, such delegation is unavoidable. It should be noted, however, that the Assistant Attorney General is the final decisionmaker when a determination adverse to a submitting authority is made.

Political parties. § 51.7. In response to one query, this section and § 51.23 have been revised to make it clear that a political party can make a submission on its own behalf.

Further clarification of what changes by political parties are subject to Section 5 has not been attempted. § 51.7 delineates in a general way which "political party" changes are covered; where there is uncertainty with respect to the applicability of Section 5, determinations should be made on a case-by-case basis.

Computation of time. § 51.8. Two commenters questioned the clarity and propriety of the method of determining when 60 days have elapsed. The method employed is identical to that of Rule 6(of the Federal Rules of Civil Procedure

It was suggested that the 60-day period commence with the date of mailing of the submission rather than the date of receipt by the Attorney General, and that the date of the Attorney General's response be the da of receipt by the submitting authority rather than the date of mailing by the Attorney General. Section 5, however, provides for a 60-day period for review by the Attorney General, and it is prop for the Procedures to allow a full 60 days for review by the Attorney General. This would not be the case if delivery time for the submission and delivery time for the decision were counted in the 60-day period. In our view, the full period is necessary for proper administration. See also § 51.32

Examples of changes. § 51.12. One commenter objected to including, as an example of a change cover by Section a change with respect to vote-counting procedures. Such changes, however, ar covered by Section 5. See *Allen v. Stat Board of Elections*, 393 U.S. 544, 563–6 (1969). Moreover, the submission requirement does not operate to preve State and local governments from implementing voting changes which th decide are desirable.

A new subsection k has been added based on experience since *Dougherty County, Board of Education v. White*, 439 U.S. 32 (1978), to clarify that governmental regulation of employee political activity is covered by Section *Recurrent practices, enabling legislation, and procedural changes. §§ 51.13, 51.14, 51.15.* These sections constitute an attempt to clarify what constitutes a change, when a change h occurred, and what the consequences preclearance of a change are. It is hope that § 51.13 will result in the reduction of submissions made unnecessarily. Fo example, a county which always conducts voter registration at extra locations prior to elections does not have to make a submission prior to eac election; a submission would be required only when the practice is first instituted or is changed. Sections 51.14 and 51.15 do not require that local implementation of a precleared State requirement of general, noncontingent application be precleared. For example were a State to lower its voting age fro 18 to 17, only one submission, by the State, would be required. (See also § 51.21) On the other hand, if a State were to pass legislation making a 17-

year voting age a matter of local option, the preclearance of exercise of the option would be required (§ 51.14).

Court-ordered changes. § 51.18. Requested clarification of the exemption from the preclearance requirement of changes ordered by Federal courts has not been attempted. This section is designed only to alert affected jurisdictions and the public to the existence of this exemption. Its exact scope can only be determined through the application of the developing case law in this area to the particular situation in question. See *Sanchez* v. *McDaniel*, 615 F. 2d 1023 (5th Cir. 1980), application for stay pending consideration of petition for certiorari granted, —— U.S. —— (Aug. 14, 1980) (Powell, Circuit Justice).

The issue of the status of changes resulting from orders of State courts is not addressed in the Procedures. The reference in § 51.20 to approval by State courts is to the system in some States by which courts have an administrative role in the approval of some voting changes.

Premature Submissions. § 51.20. This section has been expanded to conform to present practice under which we consider unripe for review proposed changes which are based upon or are otherwise directly related to other voting changes which have not been precleared.

Contents of submissions. §§ 51.24, 51.25, 51.26. A number of commenters complained of the burden imposed on jurisdictions by these sections: some commenters sought additional clarity. The specific requests for information contained in §§ 51.25 and 51.26 should be read in conjunction with the general provisions of § 51.24. See especially § 51.24(c) and (e). Providing the information requested should usually not be burdensome for the submitting authority but will result in more prompt and efficient handling of submissions, fewer requests under § 51.35, and fewer objections. For example, in many instances, "the anticipated effect of the change on members of racial or language minority groups" (§ 51.25(m)) could be provided by a brief statement. Also, in our view, identifying minority group contacts (§ 51.26(f)) does not place an undue burden on the submitting authority. Moreover, we do not expect jurisdictions with insignificant minority populations routinely to provide the names of minority contacts.

Because legal descriptions are generally integral parts of acts or ordinances, excluding them from a submission will frequently be a greater inconvenience than including them; accordingly, the exception for legal descriptions has been dropped from § 51.25(e). Revisions to increase clarity and specificity have been made in § 51.26.

Obtaining information. § 51.35(c). One commenter noted that we did not specify the event that triggers the beginning of the 60-day period when information necessary to complete a submission is obtained from a source other than the submitting authority. § 51.35 has been revised to indicate that the 60-day period begins on the date on which the Attorney General sends notification to the submitting authority of the receipt of the information.

Failure to complete submission. § 51.36. Two commenters were critical of the discretion allowed by § 51.36. That section provides that, if requested additional information is not received within 60 days, "the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 * * * may object to the change * * *." One commenter advocated the substitution of "shall" for "may", explaining that in order to postpone an adverse determination, political subdivisions will deliberately fail to provide additional information requested by the Department of Justice. To the extent that such a problem may exist, we believe that the practice described in § 51.36 provides a sufficient remedy. Ordinarily, the schedule by which requested information is provided is of greater interest to the submitting authority than to the Attorney General.

Burden of proof. § 51.39(e). One commenter opposed placing the burden of proof on the submitting authority. In our view, the burden of proof described in § 51.39(e) is consistent with and required by the scheme of Section 5. See *Georgia* v. *United States*, 411 U.S. 526, 536–39 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); see also *Evers* v. *State Board of Election Commissioners*, 327 F. Supp. 840 (S.D. Miss. 1971), appeal dismissed 406 U.S. 1001 (1972). *No objection. §§ 51.40, 51.42, 51.48* Concern with respect to the finality of a decision not to interpose an objection was expressed by one commenter. However, Section 5 itself states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." It is the practice of the Attorney General, reflected in § 51.40, to notify submitting authorities of this provision. The "subsequent action" referred to could not be under Section 5 but would have to have some other legal basis and could not constitute judicial review of the action of the Attorney General (see § 51.48). Accordingly, the Attorney General's reservation of the right to reexamine within the 60-day period a decision not to object (§ 51.42) is necessary if the Attorney General is to continue the practice of accommodating jurisdictions by making decisions as early as possible within the 60-day period.

Failure to respond. § 51.41 One commenter asserted that there would be insufficient procedural safeguards if preclearance were accomplished by the failure of the Attorney General to respond within the 60-day period. As § 51.41 was intended to make clear, it is the practice of the Attorney General to respond within the 60-day period. This section was added to clarify the rare occasions when, through the failure of administrative mechanisms, no response is made. Another commenter considered the provisos contained in the section inappropriate. The first proviso, that the submission be properly addressed, is necessary to assure that the submission can be routed to the proper unit within the Department of Justice. The second proviso, that response on the merits be appropriate, only makes clear that, if Section 5 does not apply (for one of the reasons listed in § 51.33), no preclearance is possible. In response to concern expressed by a number of commenters, § 51.41 has been changed to indicate explicitly (what was implicit in § 51.8(c)) that actions of the Attorney General under Section 5 are in writing.

Objections and Reconsiderations. §§ 51.43, 51.44, 51.45, 51.46, 51.47. The sections relating to notification of the decision to interpose an objection and the procedures for the reconsideration of objections have been reorganized and renumbered, without substantive change, to improve the clarity of presentation.

Accordingly, 28 CFR Part 51 is revised to read as set forth below.

Dated: December 18, 1980.

Benjamin R. Civiletti,

Attorney General.

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

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51.3 Delegation of authority.

Sec.
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Subpart F—Sanctions

51.50 Enforcement by the Attorney General.
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Subpart G—Petition to Change Procedures

51.52 Who may petition.
51.53 Form of petition.
51.54 Disposition of petition.

Appendix—Jurisdictions covered.

Authority: The provisions of this Part 51 are issued under 5 U.S.C. 301, 28 U.S.C. 509, 510, and 42 U.S.C. 1973c.

Subpart A—General Provisions

§ 51.1 Purpose.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by Section 4(b) of the Act, 42 U.S.C. 1973(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either (1) a declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or (2) it has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission. In order to make clear the responsibilities of the Attorney General under Section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of Section 5.

§ 51.2 Definitions.

As used in this part—

(a) "Act" means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Civil Rights Act of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, and the Voting Rights Act Amendments of 1975, 89 Stat. 400, 42 U.S.C. 1973 *et seq.* Section numbers, such as "Section 14(c)(3)," refer to sections of the Act.

(b) "Attorney General" means the Attorney General of the United States or the delegate of the Attorney General.

(c) "Vote" and "voting" are used, as defined in the Act, to include "all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." Section 14(c)(1).

(d) "Change affecting voting" means any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage under Section 4(b) and includes, *inter alia*, the examples given in § 51.12.

(e) "Political subdivision" is used, as defined in the Act, to refer to "* * * any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." Section 14(c)(2).

(f) "Covered jurisdiction" is used to refer to a State, where the determination referred to in § 51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis.

(g) "Preclearance" is used to refer to the obtaining of the declaratory judgment described in Section 5 or to the failure of the Attorney General to interpose an objection pursuant to Section 5.

(h) "Submission" is used to refer to the written presentation to the Attorney General by an appropriate official of any change affecting voting.

(i) "Submitting authority" means the jurisdiction on whose behalf a submission is made.

(j) "Language minority" or "language minority group" is used, as defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. Section 14(c)(3). See 28 CFR Part 55, Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups.

§ 51.3 Delegation of authority.

The responsibility and authority for determinations under Section 5 have been delegated by the Attorney General to the Assistant Attorney General, Civil Rights Division. With the exception of objections and decisions following the reconsideration of objections, the Chief of the Voting Section is authorized to act on behalf of the Assistant Attorney General.

§ 51.4 Date used to determine coverage; list of covered jurisdictions.

(a) The requirement of Section 5 takes effect upon publication in the Federal Register of the requisite determinations

of the Director of the Census and the Attorney General under Section 4(b). These determinations are not reviewable in any court. Section 4(b).

(b) Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964, November 1, 1968, or November 1, 1972. A list of covered jurisdictions, together with the applicable date used to determine coverage, is contained in the appendix to this part. Any additional determinations of coverage will be published in the Federal Register.

§ 51.5 Termination of coverage.

A covered jurisdiction may terminate the application of Section 5 by obtaining the declaratory judgment described in Section 4(a) of the Act.

§ 51.6 Political subunits.

All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of Section 5.

§ 51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of Section 5. A change affecting voting effected by a political party is subject to the preclearance requirement (1) if the change relates to a public electoral function of the party and (2) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of Section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of Section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

§ 51.9 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in §§ 51.35, 51.37, and 51.41 the 60-day period shall commence upon receipt by the Department of Justice of a submission.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

§ 51.9 Requirement of action for declaratory judgment or submission to the Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change must either (1) obtain a judicial determination from the U.S. District Court for the District of Columbia that denial or abridgment of the right to vote on account of race, color, or membership in a language minority group is not the purpose and will not be the effect of the change or (2) make to the Attorney General a proper submission of the change to which no objection is interposed. It is unlawful to enforce a change affecting voting without obtaining preclearance under Section 5. The obligation to obtain such preclearance is not relieved by unlawful enforcement.

§ 51.10 Right to bring suit.

Submission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change affecting voting does not have the prohibited discriminatory purpose or effect.

§ 51.11 Scope of requirement.

Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

§ 51.12 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

§ 51.13 Recurrent practices.

Where a jurisdiction implements a practice or procedure periodically or upon certain established contingencies, a change occurs (1) the first time such a practice or procedure is implemented by the jurisdiction, (2) when the manner in which such a practice or procedure is implemented by the jurisdiction is changed, or (3) when the rules for determining when such a practice or procedure will be implemented are changed. The failure of the Attorney General to object to a recurrent practice or procedure constitutes preclearance of the future use of the practice or procedure if its recurrent nature is clearly stated or described in the submission or is expressly recognized in the final response of the Attorney General on the merits of the submission.

§ 51.14 Enabling legislation and contingent or nonuniform requirements.

(a) The failure of the Attorney General to interpose an objection to legislation (1) that enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.

(b) Such legislation includes for example, (1) legislation authorizing counties, cities, or school districts to institute any of the changes described in § 51.12, (2) legislation requiring a political subunit that chooses a certain form of government to follow specified election procedures, (3) legislation requiring or authorizing political subunits of a certain size or a certain location to institute specified changes, (4) legislation requiring a political subunit to follow certain practices or procedures unless the subunit's charter or ordinances specify to the contrary.

§ 51.15 Distinction between changes in procedure and changes in substance.

The failure of the Attorney General to interpose an objection to a procedure for instituting a change affecting voting does not exempt the substantive change from the preclearance requirement. For example, if the procedure for the approval of an annexation is changed from city council approval to approval in a referendum, the preclearance of the new procedure does not exempt an annexation accomplished under the new procedure from the preclearance requirement.

§ 51.16 Court-ordered changes.

Changes affecting voting that are specifically ordered by a Federal court as a result of the court's equitable jurisdiction over an adversary proceeding are not subject to the preclearance requirement of Section 5. However, subsequent changes necessitated by the court order but decided upon by the jurisdiction are subject to the preclearance requirement. For example, although a court-ordered districting plan may not be subject to the preclearance requirement, changes in voting precincts and polling places made necessary by the new plan remain subject to Section 5.

§ 51.17 Request for notification concerning voting litigation.

A jurisdiction subject to the preclearance requirement of Section 5 that becomes involved in any litigation concerning voting is requested promptly to notify the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. Such notification will not be considered a submission under Section 5.

Subpart B—Procedures for Submission to the Attorney General

§ 51.18 Form of submissions.

Submissions may be made in letter or any other written form.

§ 51.19 Time of submissions.

Changes affecting voting should be submitted as soon as possible after they become final.

§ 51.20 Premature submissions.

The Attorney General will not consider on the merits (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received Section 5 preclearance. However, with respect to a change for which approval by referendum, a State court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

§ 51.21 Party and jurisdiction responsible for making submissions.

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation of local applicability) or other changes undertaken or required by the State shall be submitted by the State.

(b) A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party.

§ 51.22 Address for submissions.

Changes affecting voting shall be mailed or delivered to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page of the submission shall be clearly marked: Submission under Section 5 of the Voting Rights Act.

§ 51.23 Withdrawal of submissions.

If while a submission is pending the submitted change is repealed, altered, or declared invalid or otherwise becomes unenforceable, the jurisdiction may withdraw the submission. In other circumstances, a jurisdiction may withdraw a submission only if it shows good cause for such withdrawal.

Subpart C—Contents of Submissions

§ 51.24 General.

(a) The source of any information contained in a submission should be identified.

(b) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

(c) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

(d) A submitting authority that desires the Attorney General to consider any information supplied as part of an earlier submission may incorporate such information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

(e) Where information requested by this subpart is relevant but not known or available, or is not applicable, the submission should so state.

§ 51.25 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order or regulation embodying a change affecting voting.

(b) If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(c) The name, title, address, and telephone number of the person making the submission.

(d) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(e) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(f) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(h) The date of adoption of the change affecting voting.

(i) The date on which the change is to take effect.

(j) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(k) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(l) A statement of the reasons for the change.

(m) A statement of the anticipated effect of the change on members of racial or language minority groups.

(n) A statement identifying any past or pending litigation concerning the change or related voting practices.

(o) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(p) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.28 and is most likely to be needed with respect to redistricting, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.35.

§ 51.28 Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by § 51.25.

(a) *Demographic information.* (1) Total and voting age population of the affected area before and after the change by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.

(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(b) *Maps.* Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

(1) The prior and new boundaries of the voting unit or units.

(2) The prior and new boundaries of voting precincts.

(3) The location of racial and language minority groups.

(4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

(5) The location of prior and new polling places.

(6) The location of prior and new voter registration sites.

(c) *Election returns.* Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

(1) The name of each candidate.

(2) The race or language group of each candidate, if known.

(3) The position sought by each candidate.

(4) The number of votes received by each candidate, by voting precinct.

(5) The outcome of each contest.

(6) The number of registered voters, by race and language group, for each voting precinct for which election returns a furnished. Information with respect to elections held during the last ten years will normally be sufficient.

(d) *Language usage.* Where a change is made affecting the use of the language of a language minority group in the electoral process, information that will enable the Attorney General to determine whether the change is consistent with the minority language requirements of the Act. The Attorney General's interpretation of the minority language requirements of the Act is contained in Interpretive Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 CFR Part 55.

(e) *Publicity and participation.* For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

(1) Copies of newspaper articles discussing the proposed change.

(2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings or that announce submission to and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).

(3) Minutes or accounts of public hearings concerning the proposed change.

(4) Statements, speeches, and other public communications concerning the proposed change.

(5) Copies of comments from the general public.

(6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(f) *Minority group contacts.* For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members who can be expected to be familiar with the proposed change or who have been active in the political process.

Subpart D—Communications From Individuals and Groups

§ 51.27 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which Section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

(b) The communications should be mailed to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page should be marked: Comment under Section 5 of the Voting Rights Act.

(c) Comments by individuals or groups concerning any change affecting voting may be sent at any time; however, individuals and groups are encouraged to comment as soon as they learn of the change.

(d) Department of Justice officials and employees shall comply with the request of any individual that his or her identity not be disclosed to any person outside the Department, to the extent permitted by the Freedom of Information Act, 5 U.S.C. 552. In addition, whenever it appears to the Attorney General that disclosure of the identity of an individual who provided information regarding a change affecting voting "would constitute a clearly unwarranted invasion of personal privacy" under 5 U.S.C. 552(b)(6), the identity of the individual shall not be disclosed to any person outside the Department.

(e) When an individual or group desires the Attorney General to consider information that was supplied in connection with an earlier submission, it is not necessary to resubmit the information but merely to identify the earlier submission and the relevant information.

§ 51.26 Action on communications from individuals or groups.

(a) If there has already been a submission received of the change affecting voting brought to the attention of the Attorney General by an individual or group, any evidence from the individual or group shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If such a submission has not been received, the Attorney General shall advise the appropriate jurisdiction of the requirement of Section 5 with respect to the change in question.

§ 51.29 Communications concerning voting suits.

Individuals and groups are urged to notify the Assistant Attorney General, Civil Rights Division, of litigation concerning voting in jurisdictions subject to the requirement of Section 5.

§ 51.30 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups, which shall contain the name and address of any individual or group that wishes to receive notice of Section 5 submissions. Information relating to this registry and to the requirements of the Privacy Act of 1974, 5 U.S.C. 552a *et seq.*, is contained in Justice/CRT-004, 43 FR 44878 (Sept. 28, 1978).

Subpart E—Processing of Submissions

§ 51.31 Notice to registrants concerning submissions.

Weekly notice of submissions that have been received will be given to the individuals and groups who have registered for this purpose under § 51.30.

§ 51.32 Expedited consideration.

(a) When a submitting authority is required under State law or local ordinance or otherwise finds it necessary to implement a change within the 60-day period following submission, it may request that the submission be given expedited consideration. The submission should explain why such consideration is needed and provide the date by which a determination is required.

(b) Jurisdictions should endeavor to plan for changes in advance so that expedited consideration will not be required and should not routinely request such consideration. When a submitting authority demonstrates good cause for expedited consideration the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given.

(c) Notice of the request for expedited consideration will be given to interested parties registered under § 51.30.

§ 51.33 Disposition of inappropriate submissions.

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include the submission of changes that do not affect voting (see, e.g., § 51.12), the submission of standards, practices, or procedures that have not been changed (see, e.g., §§ 51.4, 51.13), the submission of changes that affect voting but are not subject to the requirement of Section 5 (see, e.g., § 51.16), premature submissions (see § 51.20), and submissions by jurisdictions not subject to the requirement of Section 5 (see §§ 51.4, 51.5).

§ 51.34 Release of information concerning submissions.

The Attorney General shall have the discretion to call to the attention of the submitting authority or any interested individual or group information or comments related to a submission.

§ 51.35 Obtaining information from the submitting authority.

(a) If a submission does not satisfy the requirements of § 51.25, the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission and no later than the 60th day following its receipt.

(b) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(c) If, after a request for further information is made pursuant to this section, the information requested becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority, and the 60-day period will commence upon the date of such notification.

(d) Notice of the request for and receipt of further information will be given to interested parties registered under § 51.30.

§ 51.36 Obtaining information from others.

(a) The Attorney General may at any time request relevant information from governmental jurisdictions and from interested groups and individuals and may conduct any investigation or other inquiry that is deemed appropriate in making a determination.

(b) If a submission does not contain evidence of adequate notice to the

public, and the Attorney General believes that such notice is essential to a determination, steps will be taken by the Attorney General to provide public notice sufficient to invite interested or affected persons to provide evidence as to the presence or absence of a discriminatory purpose or effect. The submitting authority shall be advised when any such steps are taken.

§ 51.37 Supplementary submissions.

When a submitting authority provides documents and information materially supplementing a submission (or a request for reconsideration of an objection) or, before the expiration of the 60-day period, makes a second submission such that the two submissions cannot be independently considered, the 60-day period for the original submission will be calculated from the receipt of the supplementary information or the second submission.

§ 51.38 Failure to complete submissions.

If after 60 days the submitting authority has not provided further information in response to a request made pursuant to § 51.35(a), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 described in § 51.39(e), may object to the change, giving notice as specified in § 51.43.

§ 51.39 Standards for determination by the Attorney General.

(a) Section 5 provides for submission to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(b) Guided by the relevant judicial decisions, the Attorney General shall base a determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

(c) If the Attorney General determines that a submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(d) If the Attorney General determines that a submitted change has the prohibited purpose or effect, and objection shall be interposed to the change.

(e) The burden of proof on a submitting authority when it submits a change to the Attorney General is the same as it would be if the change was the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. Therefore, if the evidence as to the purpose or effect of a change is conflicting and the Attorney General is unable to determine that the submitted change does not have the prohibited purpose or effect, an objection shall be interposed to the change.

§ 51.40 Notification of decision not to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose no objection to a submitted change affecting voting.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.41 Failure of the Attorney General to respond.

It is the practice and intention of the Attorney General to respond to each submission within the 60-day period. However, the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change, provided the submission is addressed as specified in § 51.22 and is appropriate for a response on the merits as described in § 51.33.

§ 51.42 Reexamination of decision not to object.

After notification to the submitting authority of a decision to interpose no objection to a submitted change affecting voting has been given, the Attorney General may reexamine the submission if, prior to the expiration of the 60-day period, information indicating the possibility of the prohibited discriminatory purpose or effect is received. In this event, the Attorney General may interpose an objection provisionally and advise the submitting authority that examination of the change in light of the newly raised issues will continue and that a final decision will be rendered as soon as possible.

§ 51.43 Notification of decision to object.

(a) The Attorney General shall within the 60-day period allowed notify the submitting authority of a decision to interpose an objection. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider an objection upon a request by the submitting authority.

(c) The submitting authority shall be advised further that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited discriminatory purpose or effect.

(d) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision to interpose an objection will be given to interested parties registered under § 51.30.

§ 51.44 Request for reconsideration.

(a) The submitting authority may at any time request the Attorney General to reconsider an objection.

(b) Requests may be in letter or any other written form and should contain relevant information or legal argument.

(c) Notice of the request will be given to any party who commented on the submission or requested notice of the Attorney General's action thereon and to interested parties registered under § 51.30. In appropriate cases the Attorney General may request the submitting authority to give local public notice of the request.

§ 51.45 Reconsideration of objection at the insistance of the Attorney General.

(a) Where there appears to have been a substantial change in operative fact or relevant law, an objection may be reconsidered, if it is deemed appropriate, at the insistance of the Attorney General.

(b) Notice of such a decision to reconsider shall be given to the submitting authority, to any party who commented on the submission or requested notice of the Attorney General's action thereon, and to interested parties registered under § 51.30, and the Attorney General shall decide whether to withdraw or to continue the objection only after such persons have had a reasonable opportunity to comment.

§ 51.46 Conference.

(a) A submitting authority that has requested reconsideration of an

objection pursuant to § 51.44 may request a conference to produce information or legal argument in support of reconsideration.

(b) Such a conference shall be held at a location determined by the Attorney General and shall be conducted in an informal manner.

(c) When a submitting authority requests such a conference, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any notice of a request for reconsideration shall be notified and given the opportunity to confer.

(d) The Attorney General shall have the discretion to hold separate meetings to confer with the submitting authority and other interested groups or individuals.

(e) Such conferences will be open to the public or to the press only at the discretion of the Attorney General and with the agreement of the participating parties.

§ 51.47 Decision after reconsideration.

(a) The Attorney General shall within the 60-day period following the receipt of a reconsideration request or following notice given under § 51.45(b) notify the submitting authority of the decision to continue or withdraw the objection, provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide. The reasons for the decision shall be stated.

(b) The objection shall be withdrawn if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group.

(c) If the objection is not withdrawn, the submitting authority shall be advised that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General does not have the prohibited purpose or effect.

(d) A copy of the notification shall be sent to any party who has commented on the submission or reconsideration or has requested notice of the Attorney General's action thereon.

(e) Notice of the decision after reconsideration will be given to interested parties registered under § 51.30.

§ 51.48 Absence of judicial review.

The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable. However, Section 5 states: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

§ 51.49 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a Section 5 file for each submission, containing the submission, related written materials, correspondence, memoranda, investigative reports, notations concerning conferences with the submitting authority or any interested individual or group, and copies of any letters from the Attorney General concerning the submission.

(b) Objection files: Brief summaries regarding each submission and the general findings of the Department of Justice investigation and decision concerning it will be prepared when a decision to interpose, continue, or withdraw an objection is made. Files of these summaries, arranged by jurisdiction and by the date upon which such decision is made, will be maintained.

(c) Computer file: Records of all submissions and of their dispositions by the Attorney General shall be electronically stored and periodically retrieved in the form of computer printouts.

(d) The contents of the above-described files shall be available for inspection and copying by the public during normal business hours at the Civil Rights Division, Department of Justice, Washington, D.C. Materials that are exempt from inspection under the Freedom of Information Act, 5 U.S.C. 552(b), may be withheld at the discretion of the Attorney General. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.27(d) shall be available only as provided by § 51.27(d). Applicable fees, if any, for the copying of the contents of these files are contained in the Department of Justice regulations implementing the Freedom of Information Act, 28 CFR 16.8.

Subpart F—Sanctions

§ 51.50 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including Section 5. See Section 12(d).

(b) Certain violations may be subject to criminal sanctions. See Sections 12 (a) and (c).

§ 51.51 Enforcement by private parties.

Private parties have standing to enforce Section 5.

Subpart G—Petition To Change Procedures

§ 51.52 Who may petition.

Any jurisdiction or interested individual or group may petition to have these procedural guidelines amended.

§ 51.53 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name, address, and telephone number of the petitioner, the change requested, and the reasons for the change.

§ 51.54 Disposition of petition.

The Attorney General shall promptly consider and dispose of a petition under this subpart and give notice of the disposition, accompanied by a simple statement of the reasons, to the petitioner.

Appendix—Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The date in parentheses is the date that was used to determine coverage for the jurisdiction it follows.

Alabama (statewide) [Nov. 1, 1964]
Alaska (statewide) [Nov. 1, 1972]
Arizona (statewide) [Nov. 1, 1972]
[The following Arizona counties were covered individually through the use of earlier dates.]
Apache County [Nov. 1, 1964]
Cochise County [Nov. 1, 1968]
Coconino County [Nov. 1, 1964]
Mohave County [Nov. 1, 1964]
Navajo County [Nov. 1, 1968]
Pima County [Nov. 1, 1968]
Pinal County [Nov. 1, 1968]
Santa Cruz County [Nov. 1, 1968]
Yuma County [Nov. 1, 1964]
California (the following counties only)
Kings County [Nov. 1, 1972]
Merced County [Nov. 1, 1972]
Monterey County [Nov. 1, 1968]
Yuba County [Nov. 1, 1968]
Colorado (the following county only)
El Paso [Nov. 1, 1972]
Connecticut (the following towns only)
Groton Town [Nov. 1, 1964]
Mansfield Town [Nov. 1, 1964]
Southbury Town [Nov. 1, 1964]
Florida (the following counties only)
Collier County [Nov. 1, 1972]
Hardee County [Nov. 1, 1972]
Hendry County [Nov. 1, 1972]

Hillsborough County (Nov. 1, 1972)
Monroe County (Nov. 1, 1972)
Georgia (statewide) (Nov. 1, 1964)
Hawaii (the following county only)
Honolulu County (Nov. 1, 1964)
Idaho (the following county only)
Elmore County (Nov. 1, 1966)
Louisiana (statewide) (Nov. 1, 1964)
Massachusetts (the following towns only)
Amherst Town (Nov. 1, 1966)
Ayer Town (Nov. 1, 1966)
Belchertown (Nov. 1, 1966)
Bourne Town (Nov. 1, 1966)
Harvard Town (Nov. 1, 1966)
Sandwich Town (Nov. 1, 1966)
Shirley Town (Nov. 1, 1966)
Sunderland Town (Nov. 1, 1966)
Wrentham Town (Nov. 1, 1966)
Michigan (the following townships only)
Buena Vista Township (Saginaw County) (Nov. 1, 1972)
Clyde Township (Allegan County) (Nov. 1, 1972)
Mississippi (statewide) (Nov. 1, 1964)
New Hampshire (the following political subdivisions only)
Antrim Town (Nov. 1, 1966)
Benton Town (Nov. 1, 1966)
Boscawen Town (Nov. 1, 1966)
Millsfield Township (Nov. 1, 1966)
Newington Town (Nov. 1, 1966)
Pinkhams Grant (Nov. 1, 1966)
Rindge Town (Nov. 1, 1966)
Stewartstown (Nov. 1, 1966)
Stratford Town (Nov. 1, 1966)
Unity Town (Nov. 1, 1966)
New York (the following counties only)
Bronx County (Nov. 1, 1966)
Kings County (Nov. 1, 1966)
New York County (Nov. 1, 1966)
North Carolina (the following counties only)
Anson County (Nov. 1, 1964)
Beaufort County (Nov. 1, 1964)
Bertie County (Nov. 1, 1964)
Bladen County (Nov. 1, 1964)
Camden County (Nov. 1, 1964)
Caswell County (Nov. 1, 1964)
Chowan County (Nov. 1, 1964)
Cleveland County (Nov. 1, 1964)
Craven County (Nov. 1, 1964)
Cumberland County (Nov. 1, 1964)
Edgecombe County (Nov. 1, 1964)
Franklin County (Nov. 1, 1964)
Gaston County (Nov. 1, 1964)
Gates County (Nov. 1, 1964)
Granville County (Nov. 1, 1964)
Greene County (Nov. 1, 1964)
Guilford County (Nov. 1, 1964)
Halifax County (Nov. 1, 1964)
Harnett County (Nov. 1, 1964)
Hertford County (Nov. 1, 1964)
Hoke County (Nov. 1, 1964)
Jackson County (Nov. 1, 1972)
Lee County (Nov. 1, 1964)
Lenoir County (Nov. 1, 1964)
Martin County (Nov. 1, 1964)
Nash County (Nov. 1, 1964)
Northampton County (Nov. 1, 1964)
Onslow County (Nov. 1, 1964)
Pasquotank County (Nov. 1, 1964)
Perquimans County (Nov. 1, 1964)
Person County (Nov. 1, 1964)
Pitt County (Nov. 1, 1964)
Robeson County (Nov. 1, 1964)
Rockingham County (Nov. 1, 1964)
Scotland County (Nov. 1, 1964)
Union County (Nov. 1, 1964)
Vance County (Nov. 1, 1964)
Washington County (Nov. 1, 1964)
Wayne County (Nov. 1, 1964)
Wilson County (Nov. 1, 1964)
South Carolina (statewide) (Nov. 1, 1964)
South Dakota (the following counties only)
Shannon County (Nov. 1, 1972)
Todd County (Nov. 1, 1972)
Texas (statewide) (Nov. 1, 1972)
Virginia (statewide) (Nov. 1, 1964)
Wyoming (the following county only)
Campbell County (Nov. 1, 1966)

[FR Doc. 81-135 Filed 1-2-81; 8:45 am]
BILLING CODE 4110-03-M

DEPARTMENT OF JUSTICE

28 CFR Part 51

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Revision of Procedures; Correction

AGENCY: Department of Justice.

ACTION: Final rule; correction.

SUMMARY: The Attorney General published as a final rule, effective January 5, 1981, a revision of 28 CFR, Part 51, (Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended) (FR Doc. 81-125, appearing at 46 FR 870 January 5, 1981). That rule requires correction and is corrected as shown below.

EFFECTIVE DATE: January 5, 1981.

FOR FURTHER INFORMATION CONTACT: David H. Hunter, Attorney, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530, (202) 724-7189.

1. The rule is assigned Attorney General Order No. 921-80.

2. In the Table of Contents, the headings for §§ 51.27 and 51.28 (both appearing at 46 FR 873, first column) should be changed to correspond to the headings as set forth in the text of the rule.

3. (a) The heading to § 51.45 (appearing at 46 FR 873, first column and 878, third column) should read: "§ 51.45 Reconsideration of objection at the instance of the Attorney General"

(b) In § 51.45(a) (appearing at 46 FR 878, third column), in the fifth line "insistance" should read "instance."

4. In § 51.14(a) (appearing at 46 FR 875, first column), in the third line "permists" should read "permits" and in the sixth line "institus" should read "institute."

5. In numbered clause (6) of paragraph (c) of § 51.28 (appearing at 46 FR 876, second column), the phrase "for which election returns a furnished" should read "for which election returns are furnished."

6. In § 51.39(d), the third line (appearing at 46 FR 878, second column) should read "prohibited purpose or effect, an" or rather than "prohibited purpose or effect, and."

7. In the Appendix, in the list of North Caroline counties in which the preclearance requirement of Section 5 of the Voting Rights Act applies (appearing at 46 FR 880, first column) "Craven County" should read "Craven County."

Stephen J. Wilkinson,
Department of Justice, Federal Register Liaison Officer (Alternate).

[FR Doc. 81-3437 Filed 1-28-81; 8:45 am]

BILLING CODE 4410-01-M

ATTACHMENT C-1

NUMBER OF CHANGES SUBMITTED UNDER SECTION 5 AND REVIEWED BY
THE DEPARTMENT OF JUSTICE, BY STATE AND YEAR, 1965-SEPTEMBER 30, 1981

STATE	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
ALABAMA	1	0	0	0	13	2	86	111	60	58	299	349
ALASKA***	0	0	0	0	-	0	0	0	-	-	0	3
ARIZONA****	0	0	0	0	0	0	19	69	33	28	52	228
CALIFORNIA*	-	-	-	-	-	0	0	6	1	5	0	382
COLORADO*	-	-	-	-	-	-	-	-	-	-	0	12
CONNECTICUT**	-	-	-	-	-	-	-	-	-	0	0	0
FLORIDA*	-	-	-	-	-	-	-	-	-	-	1	57
GEORGIA	0	1	0	62	35	60	138	226	114	173	284	252
HAWAII*	0	0	0	0	0	0	0	0	0	0	0	6
IDAHO*	0	0	-	-	-	0	0	0	0	0	0	0
LOUISIANA	0	0	0	0	2	3	71	136	283	137	255	303
MAINE*	-	-	-	-	-	-	-	-	-	0	0	3
MASSACHUSETTS**	-	-	-	-	-	-	-	-	-	0	0	11
MICHIGAN**	-	-	-	-	-	-	-	-	-	-	0	3
MISSISSIPPI	0	0	0	0	4	28	221	68	66	41	107	152
NEW HAMPSHIRE**	-	-	-	-	-	-	-	-	-	0	0	0
NEW MEXICO*	-	-	-	-	-	-	-	-	-	-	0	65
NEW YORK*	-	-	-	-	-	0	4	-	-	84	78	106
OKLAHOMA*	-	-	-	-	-	-	-	-	-	-	0	1
NORTH CAROLINA*	0	0	0	0	0	2	75	28	35	54	293	125
SOUTH CAROLINA	0	25	52	37	80	114	160	117	135	221	201	419
SOUTH DAKOTA*	-	-	-	-	-	-	-	-	-	-	0	0
TEXAS	-	-	-	-	-	-	-	-	-	-	249	4,694
VIRGINIA	0	0	0	11	0	46	344	181	123	186	259	301
WYOMING*	-	-	-	-	-	-	0	0	0	1	0	0
TOTALS	1	26	52	110	134	255	1,118	942	850	988	2,078	7,472

* Selected county (counties) covered rather than entire state.
** Selected town (towns) covered rather than entire state.
*** Entire state covered 1965-1960; selected election districts covered 1970-1972; since 1975 entire state covered.
\- Not covered for years indicated.

NUMBER OF CHANGES SUBMITTED UNDER SECTION 5 AND REVIEWED BY THE DEPARTMENT OF JUSTICE, BY STATE AND YEAR, 1965-SEPTEMBER 30, 1981

STATE	1977	1978	1979	1980 1/	1981 11/	TOTAL
ALABAMA	153	146	144	295	258	1,973
ALASKA***	0	25	1	8	11	48
ARIZONA****	180	311	163	655	240	1,978
CALIFORNIA*	99	105	8	89	26	721
COLORADO*	4	34	147	36	23	256
CONNECTICUT**	0	0	0	0	0	0
FLORIDA*	8	46	28	28	91	259
GEORGIA	242	444	371	689	563	3,654
HAWAII	0	0	0	3	12	21
IDAHO*	0	0	0	1	0	1
LOUISIANA	460	254	336	356	244	2,840
MAINE*	0	-	-	-	-	1
MASSACHUSETTS**	0	6	0	0	65	82
MICHIGAN**	0	0	0	0	0	1
MISSISSIPPI	114	123	112	153	117	1,306
NEW HAMPSHIRE**	0	0	0	0	0	0
NEW MEXICO*	-	-	-	-	-	65
NEW YORK*	96	72	27	25	298	790
OKLAHOMA*	0	0	-	-	-	1
NORTH CAROLINA*	183	156	89	158	230	1,428
SOUTH CAROLINA	299	212	138	192	288	2,690
SOUTH DAKOTA*	0	2	4	0	1	7
TEXAS	1,735	2,425	2,917	4,188	1,935	18,143
VIRGINIA	434	314	267	464	637	3,567
WYOMING	0	0	0	0	0	1
TOTALS	4,007	4,675	4,750	7,340	5,039	39,837

1/ In 1980, the method for counting changes was altered to more accurately reflect the number of changes submitted.

11/ Through September 30, 1981.

NUMBER OF CHANGES SUBMITTED UNDER SECTION 5 AND REVIEWED BY 1/
THE DEPARTMENT OF JUSTICE, BY TYPE AND YEAR, 1965-SEPTEMBER 30, 1981

TYPE OF CHANGE	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
REDISTRICTING	0	2	4	0	12	25	201	97	47	55	53	335	79	48
ANNEXATION	0	1	2	0	2	6	256	272	242	244	571	1,499	939	880
POLLING PLACE	0	2	4	4	7	28	174	127	131	154	408	1,983	844	1,402
PRECINCT	0	2	9	7	11	22	144	69	55	81	82	608	266	299
REGISTRATION	0	0	1	0	0	2	52	15	6	4	46	147	366	162
INCORPORATION	0	0	1	0	0	0	4	1	3	1	5	15	12	5
ELECTION LAW	1	18	24	96	67	105	226	332	258	422	620	1,831	1,094	1,450
BILINGUAL	0	0	0	0	0	0	0	0	0	0	22	781	171	280
MISCELLANEOUS	0	0	0	3	14	8	15	26	99	12	65	168	150	65
NOT WITHIN THE SCOPE OF SECTION 5	0	1	7	0	21	59	46	3	9	15	206	105	86	84
TOTALS	1	26	52	110	134	255	1,118	942	850	988	2,078	7,472	4,007	4,675

(continued)

1/ These figures are based on computer tabulations. The computer program is limited to the above general classifications plus 7 others which were added in 1980. For purposes of this chart, however, the pre-1980 classifications were used throughout.

TYPE OF CHANGE	1979	1980 [2]	1981 [3]	TOTAL
REDISTRICTING	53	85	141	1,237
ANNEXATION	1,130	1,205	1,234	8,483
POLLING PLACE	1,122	3,058	1,049	10,497
PRECINCT	542	982	830	4,009
REGISTRATION	271	743	325	2,140
INCORPORATION	11	58	89	205
ELECTION LAW	1,230	724	577	9,075
BILINGUAL	294	201	112	1,861
MISCELLANEOUS	68	284	682	1,659
NOT WITHIN THE SCOPE OF SECTION 5	29	0	0	671
TOTALS	4,750	7,340	5,039	39,837

2/ In 1980, the method for counting changes was altered to more accurately reflect the number of changes submitted. Prior to 1980, the number was recorded at the time the submission was received and was based upon changes evident on the face of the submission. Since 1980, the number has been recorded after the submission has been analyzed in detail and thus reflects all changes, including those not evident on the face of the submission.

3/ Through September 30, 1981.

ATTACHMENT D-1

LISTING OF OBJECTIONS PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT, 1965 - DECEMBER 31, 1974

STATE: ALABAMA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Candidate Qualification	8-1-69
Baldwin, Dale, Morgan, Montgomery, Mobile, Lee, Escambia, and Russell Counties *	Miscellaneous (poll list signature requirement in eight counties)	11-13-69
Mobile County *	Miscellaneous (poll list signature requirement)	12-16-69
State *	Voter Registration Procedure	3-13-70
Birmingham (Jefferson Cty.) *	Method of Election (numbered posts)	7-9-71
Talladega (Talladega Cty.) *	Method of Election (anti-single shot)	7-23-71
Autauga County *	Method of Election (at-large for school board and county commissioners; majority vote for commissioners)	3-20-72
State*	Miscellaneous (two changes restricting assistance to illiterates)	4-4-72

* State enactment

STATE: ALABAMA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Candidate Qualifications (two changes in signature requirements)	8-14-72
State *	Method of Election (elective to appointive justices of the peace)	12-26-72
Mobile (Mobile Cty.) *	Candidate Qualification	8-3-73
Pike County *	Methods of Election (majority vote; residency requirement; staggered terms)	8-12-74
Sumter Cty. Democratic Executive Committee	Method of Election (anti-single shot)	10-29-74

STATE: ARIZONA

JURISDICTION AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Miscellaneous (method of circulating recall petitions)	10-9-73 1/

1/ Withdrawn 3-15-74.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Miscellaneous (assistance to illiterates)	6-19-68
State *	Miscellaneous (assistance to illiterates; literacy test; poll officials' qualifications)	7-11-68
State *	Voter Registration Procedure (literacy test for registration)	8-30-68
Webster County	Consolidation of Political Units (consolidation for special election)	12-12-68
Clarke Cty. Board of Education *	Form of Government (reduction in size of board); Redistricting	8-6-71
Bibb County Board of Education	Method of Election (at-large)	8-24-71
Hinesville (Liberty Cty.)	Methods of Election (majority vote; numbered posts)	10-1-71
Newnan (Coweta Cty.)	Method of Election (numbered posts)	10-13-71
Albany (Dougherty Cty.)	Polling Place	11-16-71 1/
Conyers (Rockdale Cty.) *	Methods of Election (term of office; numbered posts; majority vote)	12-2-71
Waynesboro (Burke Cty.) *	Method of Election (majority vote)	1-7-72
Albany (Dougherty Cty.) *	Miscellaneous (dates of elections)	1-7-72 1/
Jonesboro (Clayton Cty.)	Methods of Election (numbered posts; majority vote)	2-4-72
State *	Redistricting (congressional)	2-11-72
State *	Redistricting (state Senate and House)	3-3-72
State *	Redistricting (state House)	3-24-72

1/ Withdrawn 12-7-73 upon modification of plan.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Newnan (Coweta Cty.)	Methods of Election (numbered posts; majority vote)	7-31-72
Twiggs County *	Methods of Election (at-large; residency requirement)	8-7-72
Thomasville School Board * (Thomas Cty.)	Methods of Election (numbered posts; majority vote)	8-24-72
Atlanta (Fulton Cty.)	Polling Places; Voting Precincts	11-27-72
Harris County*	Method of Election (numbered posts)	12-5-72 1/
Cochran (Bleckley Cty.)	Method of Election (majority vote)	1-29-73
Cuthbert (Randolph Cty.)	Method of Election (numbered posts)	4-9-73
Ocilla (Irwin Cty.) *	Method of Election (majority vote); Candidate Qualification (filing fee increase)	6-22-73
Sumter Cty. School Board	Methods of Election (at-large; residency requirement; majority vote)	7-13-73
Hogansville * (Troup Cty.)	Methods of Election (majority vote for city council; majority vote and numbered posts for school board)	8-2-73
Perry (Houston Cty.)	Method of Election (majority vote)	8-14-73
Thomasville Board of Education (Thomas Cty.) *	Methods of Election (majority vote; residency requirement)	8-27-73

1/ Withdrawn 3-30-73 because change was in effect in 1964, prior to coverage of the Act.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Albany (Dougherty Cty.)	Candidate Qualification (filing fees)	12-7-73
East Dublin (Laurens Cty.) *	Methods of Election (numbered posts; staggered terms)	3-4-74
Ft. Valley (Peach Cty.) *	Methods of Election (numbered posts; majority vote)	5-13-74
Fulton County *	Methods of Election (numbered posts; majority vote)	5-22-74 1/
Clarke Cty. Board of Education *	Methods of Election (at-large; majority vote; numbered posts)	5-30-74
Louisville (Jefferson Cty.) *	Methods of Election (numbered posts; majority vote)	6-4-74
East Dublin (Laurens Cty.)	Miscellaneous (postponement of election)	6-19-74
Meriwether County *	Method of Election (at-large)	7-31-74 2/
Jones County	Polling Place	8-12-74
Thomson (McDuffie Cty.)	Methods of Election (numbered posts; staggered terms; majority vote)	9-3-74
Wadley (Jefferson Cty.) *	Methods of Election (numbered posts; majority vote)	10-30-74

1/ Withdrawn 7-2-76.

2/ Withdrawn 10-25-74.

STATE: LOUISIANA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Method of Election (elimination of a minimum of 5 districts for parish police juries and school boards)	6-26-69 1/
St. Helena Parish	Method of Election (at-large police jury)	5-14-71
Jefferson Davis Parish	Method of Election (multi-member police jury districts)	6-4-71
Assumption Parish	Redistricting (school board)	7-8-71
Franklin Parish	Method of Election (at-large police jury)	7-8-71
St. Charles Parish	Method of Election (at-large police jury)	7-22-71
Jefferson Davis Parish	Redistricting (school board)	7-23-71
Ascension Parish	Redistricting (police jury); Method of Election (multi-member districts)	7-23-71
Bossier Parish	Redistricting (school board)	7-30-71
DeSoto Parish	Method of Election (at-large police jury)	8-6-71
East Baton Rouge Parish	Form of Government (parish council expansion)	8-6-71 2/
Webster Parish	Redistricting (police jury)	8-6-71 3/

1/ Withdrawn with respect to school boards 4-14-72, upon subsequent state action.

2/ Withdrawn 10-1-71.

3/ Withdrawn 9-14-71.

STATE: LOUISIANA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Pointe Coupee Parish	Redistricting (police jury)	8-9-71
State*	Redistrictings (House; Senate)	8-20-71
Natchitoches Parish	Redistricting (school board)	9-20-71
East Feliciana Parish	Method of Election (at-large police jury)	9-20-71
St. Helena Parish	Method of Election (at-large police jury)	10-8-71
Caddo Parish	Redistricting (school board)	10-8-71
St. James Parish	Redistricting (police jury)	11-2-71
East Feliciana Parish	Redistricting (police jury)	12-28-71
St. Mary Parish	Redistricting (school board)	1-12-72
St. Helena Parish	Method of Election (staggered terms for school board)	3-17-72
Ascension Parish	Redistricting (school board); Method of Election (multi-member districts)	4-20-72
East Feliciana Parish	Method of Election (multi-member school board districts)	4-22-72
Pointe Coupee Parish	Redistricting (school board)	6-7-72
Lafayette Parish	Redistricting (school board); Method of Election (multi-member districts)	6-16-72
Lake Providence (East Carroll Parish)	Annexation	12-1-72

STATE: LOUISIANA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
St. Landry Parish	Polling Place	12-6-72
New Orleans (Orleans Parish)	Redistricting (city council)	1-15-73
State *	Method of Election (numbered posts for all multi-member districts)	4-20-73
Newellton (Tensas Parish)	Annexation	6-12-73
New Orleans (Orleans Parish)	Redistricting (city council)	7-9-73 1/
New Orleans (Orleans Parish)	Polling Place	7-17-73
Bogalusa (Washington Parish)	Method of Election (residency requirement)	10-29-73
Evangeline Parish	Redistrictings (school board and police jury); Method of Election (multi-member districts)	6-25-74
Evangeline Parish	Redistrictings (school board and police jury); Method of Election (multi-member districts)	7-26-74

1/ Declaratory judgment received 7-29-76.

STATE: MISSISSIPPI

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
State *	Method of Election (elected to appointed county superintendents of education)	5-21-69
State *	Method of Election (at-large); Two Candidate Qualifications	5-21-69
State *	Miscellaneous (repeal of assistance to illiterates)	5-26-69
Copiah County	Redistricting	3-5-70
Leake County	Redistricting	1-8-71
Warren County	Redistricting	4-4-71
Marion County	Redistricting	5-25-71
Jasper County	Reregistration	6-8-71
Grenada County	Methods of Election (at-large; numbered posts)	6-30-71
Attala County	Methods of Election (numbered posts; at-large)	6-30-71
Hinds County	Redistricting	7-14-71
Lafayette County	Polling Place	7-16-71
Yazoo County	Redistricting	7-19-71
State*	Methods of Election (at-large; numbered posts for county boards of supervisors)	9-10-71
Tate County	Redistricting	12-3-71

STATE: MISSISSIPPI

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Marshall County	Voting Precincts; Polling Places	12-3-71
Grenada (Grenada Cty.)	Methods of Election (at-large; numbered posts; majority vote)	3-20-72
Tate County	Redistricting	11-28-72
Indianola (Sunflower Cty.)	Method of Election (numbered posts)	4-20-73
McComb (Pike Cty.)	Annexation	5-30-73 1/
Hollandale (Washington Cty.)	Method of Election (elected to appointed city clerk)	7-9-73
Grenada County	Redistricting	8-9-73
Pearl (Rankin Cty.)	Incorporation	11-21-73 2/
Shaw (Bolivar Cty.)	Method of Election (elected to appointed city clerk)	11-21-73
State *	Method of Election (open primary)	4-26-74
Attala County	Redistricting	9-3-74

1/ Withdrawn 9-12-73.

2/ Withdrawn 1-3-74 upon modification of annexation policies.

STATE: NEW YORK

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Kings, Bronx and New York Counties *	Redistrictings (congressional; state Senate; state Assembly)	4-1-74
New York (New York Cty.)	Three Polling Places	9-3-74 1/

1/ Withdrawn 11-14-77 upon addition of other polling places.

STATE: NORTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Plymouth (Washington Cty.) *	Method of Election (at-large)	3-17-71
State *	Voter Registration Procedure (literacy test for registration)	3-18-71
State *	Voter Registration Procedure (literacy test for registration)	4-20-71
State *	Method of Election (numbered posts in state House and Senate)	7-30-71
State *	Method of Election (numbered posts in state House and Senate)	9-27-71

STATE: SOUTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OBJECTION
State *	Redistricting (Senate); Methods of Election (multi-member districts; numbered posts; majority vote)	3-6-72
State *	Method of Election (numbered posts for all multi-member offices)	6-30-72
Aiken County *	Method of Election (numbered posts)	8-25-72
Saluda County *	Special Election (school district referendum)	11-13-72
State *	Redistricting (Senate); Methods of Election (multi-member districts; numbered posts; majority vote)	7-20-73
Darlington (Darlington Cty.)	Methods of Election (majority vote; residency requirement)	8-17-73
Clarendon County *	Method of Election (abolishment of elected superintendent of education)	11-13-73
State *	Redistricting (House); Methods of Election (multi-member districts; numbered posts; majority vote)	2-14-74
Dorchester County *	Method of Election (at-large)	4-22-74
McClellanville (Charleston Cty.)	Two Annexations	5-6-74 1/
Walterboro (Colleton Cty.)	Method of Election (residency requirement)	5-24-74

1/ Withdrawn 10-21-74 upon modification of annexation policies.

STATE: SOUTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Lancaster Cty. Board of Education*	Methods of Election (staggered terms; numbered posts); Form of Government (decreased board size)	7-30-74
Calhoun Cty. Board of Education *	Methods of Election (at-large; staggered terms)	8-7-74
Bishopville (Lee Cty.) *	Method of Election (staggered terms)	9-3-74
Bamberg County *	Methods of Election (at-large; residency requirement; staggered terms)	9-3-74 9-20-74
Charleston (Charleston Cty.)	Seven Annexations	9-20-74 1/
Charleston County *	Methods of Election (at-large; multi-member districts; numbered posts; majority vote; residency requirement)	9-24-74
Lancaster County *	Methods of Election (numbered posts; majority vote; residency requirement; staggered terms)	10-1-74
York County	Method of Election (at-large)	11-12-74

1/ Withdrawn 5-13-75 upon adoption of single-member districts.

STATE: VIRGINIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION
Portsmouth	Method of Election (40% plurality requirement)	6-26-70
Richmond	Annexation	5-7-71
State *	Redistrictings (House multi-member districts; Senate districts)	5-7-71 1/
Caroline County	Voting Precincts	9-10-71
Mecklenburg County	Redistricting (multi-member districts)	12-7-71
Petersburg	Annexation	2-22-72
Martinsville	Voting Precincts	4-19-74
Newport News	Polling Place	5-17-74
Suffolk	Polling Place	9-23-74 2/

1/ Withdrawn re House plan 6-10-71.

2/ Withdrawn 10-24-74.

LISTING OF OBJECTIONS PURSUANT TO SECTION 5

OF THE VOTING RIGHTS ACT, NOTING POST-OBJECTION ACTION,

JANUARY 1, 1975 THROUGH DECEMBER 31, 1981

POST-OBJECTION ACTION CODE:

A. Compliance without litigation or new submission.
B. Litigation - Section 5 enforcement action - U.S.
C. Litigation - Section 5 enforcement action - private.
D. Litigation - Section 5 declaratory relief action.
E. Litigation - private non-Section 5 action mooted change (court altered procedures underlying the Section 5 change).
F. New Submission - no objection.
G. New Submission - objection.
H. Objection withdrawn.
I. Change implemented over the objection--appropriate action being considered.
J. Recent objection--compliance being monitored.

STATE: ALABAMA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Talladega (Talladega Cty.)	Method of Election (numbered posts)	3-14-75	A
Fairfield (Jefferson Cty.)	Annexation	4-10-75 1/	H
Alabaster (Shelby Cty.)	Six Annexations	7-7-75	I
Bessemer (Jefferson Cty.)	Seven Annexations	9-12-75	A
Phenix City (Russell Cty.)*	Method of Election (staggered terms)	12-12-75	F
State*	Miscellaneous (party nomination date; contested election procedures)	1-16-76	F
Pickens County	Redistricting (Democratic Party Executive Committee)	2-18-76	E
Bibb and Hale Counties*	Consolidation of Political Units (two counties combined into one judicial district)	2-20-76	A
Mobile (Mobile Cty.)*	Form of Government (mayor-council); Miscellaneous (specified duties for commissioners)	3-2-76	A
Pickens Cty. Board of Education*	Methods of Election (at-large; numbered posts)	3-5-76	E
Chambers County*	Method of Election (at-large nomination of county commissioners)	3-8-76	F
Chambers County Board of Education*	Methods of Election (at-large; numbered posts; majority vote	3-10-76	F
Hale County*	Method of Election (at-large)	4-23-76	H, D

* State enactment

1/ Withdrawn 10-8-76.

STATE: ALABAMA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Sheffield (Colbert Cty.)	Methods of Election (at-large; residency requirement; numbered posts)	7-6-76	B
Hale County*	Method of Election (at-large)	12-29-76	B, D
Alabaster (Shelby Cty.)	Two Annexations	12-27-77	I
Barbour County*	Methods of Election (at-large; residency requirements)	7-28-78	B,
Hayneville (Lowndes Cty.)	Incorporation	12-29-78	F
Clarke County*	Method of Election (at-large)	2-26-79	B
Pleasant Grove (Jefferson Cty.)*	Annexation	2-1-80	D
Selma (Dallas Cty.)	Redistricting	4-28-80	C
Sumter County*	Voting Methods (voting machines); Polling Place Changes; Method of Election	10-17-80	J
Barbour County	Redistricting	7-21-81	G, F
Conecuh County*	Method of Election (multi-member districts)	9-14-81	J
Perry County*	Voter Purge	9-25-81	J
Sumter County*	Voter Purge	10-2-81	B, C, J
Wilcox County*	Voter Purge	10-26-81	J
Perry County*	Voting Methods (voting machines)	10-26-81	J
Barbour County*	Redistricting	11-16-81	F

STATE: ARIZONA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Cochise County College Board	Redistricting	2-3-75	I
Apache Cty. High School District No. 90	Special Election; Bilingual Procedures (oral publicity)	10-4-76	D
Apache Cty. High School District No. 90	Special Election; Polling Place; Bilingual Procedures (oral publicity)	3-20-80 1/	M

1/ Withdrawn 5-7-80.

STATE: CALIFORNIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Yuba County	Bilingual Procedures (English-only ballots; candidate qualification statement)	5-26-76 1/	M
Monterey County	Bilingual Procedures (oral assistance; English-only ballots; English-only petitions and information materials)	3-4-77	P

1/ Withdrawn 5-19-78 upon receipt of revisions to procedures.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Stockbridge (Henry Cty.)	Voter Registration Procedure	5-9-75	A
Newnan (Coweta Cty.)*	Method of Election (staggered terms)	6-10-75	A
Macon (Bibb Cty.)	Redistricting	6-13-75	F
Madison (Morgan Cty.)*	Methods of Election (majority vote; numbered posts)	7-29-75	E
Rome (Floyd Cty.)	Sixty Annexations	8-1-75 1/	H, D
Harris Cty. Board of Education*	Methods of Election (at-large; residency requirements)	8-18-75	A
Covington (Newton Cty.)*	Methods of Election (majority vote; numbered posts; staggered terms)	8-26-75	C, F
Ocilla (Irwin Cty.)	Candidate Qualifications (filing fees for aldermen and mayor)	10-7-75	A
Rome (Floyd Cty.) Board of Commissioners and Board of Education	Methods of Election (majority vote, numbered posts, staggered terms for City Commission and Board of Education; residency requirement for Board of Education)	10-20-75	D
Crawfordville* (Talliaferro Cty.)	Form of Government (new charter); Methods of Election (majority vote; numbered posts)	10-20-75	A
Athens (Clarke Cty.)*	Method of Election (majority vote)	10-23-75	I

1/ Partial withdrawal (47) 10-20-75; final withdrawal (13) 8-5-80 upon change in electoral system.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Newton Cty. Board of Education*	Methods of Election (at-large; multi-member districts; staggered terms; majority vote; residency requirement)	11-3-75	F
Glynn County*	Methods of Election (majority vote; staggered terms)	11-17-75	D, A
Newton County*	Methods of Election (at-large; multi-member districts; staggered terms; residency requirements)	1-29-76	F
Sharon (Taliaferro Cty.)*	Method of Election (residency posts)	2-10-76	A
Wilkes Cty. Board of Education and Commissioners	Methods of Election (at-large; residency requirements; staggered terms; numbered posts)	6-4-76	D
Social Circle (Walton Cty.)*	Methods of Election (staggered terms; increased term)	6-18-76	A
Long Cty. Board of Education*	Method of Election (residency requirement)	7-16-76	F
Monroe (Walton Cty.)	Two Annexations	10-13-76 1/	W
Rockmart (Polk Cty.)	Methods of Election (at-large; residency requirements)	11-26-76	A
Palmetto (Fulton Cty.)	Method of Election (numbered posts)	4-27-77	A
Bainbridge (Decatur Cty.)	Form of Government; Methods of Election (majority vote; numbered posts)	6-3-77	C

1/ Withdrawn 11-25-77.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Charlton County*	Methods of Election (numbered posts; staggered terms)	6-21-77	I
Charlton Cty. Board of Education*	Methods of Election (at-large; residency requirement; numbered posts; staggered terms; majority vote)	6-21-77 1/	D
Moultrie (Colquitt Cty.)*	Method of Election (majority vote)	6-26-77	C
Rockdale County*	Methods of Election (at-large; numbered posts; staggered terms; majority vote)	7-1-77 2/	H
City of Palmetto (Fulton Cty.)*	Method of Election (majority vote)	7-7-77	A
College Park (Fulton Cty.)	Redistricting; Seventeen Annexations	12-9-77 3/	H, F
Terrell Cty. Board of Education*	Methods of Election (at-large; staggered terms; residency districts)	12-16-77	C
Quitman (Brooks Cty.)*	Method of Election (majority vote)	6-16-78	A
Savannah (Chatham Cty.)	Annexation; Methods of Election (at-large; numbered posts)	6-27-78 4/	H
Kingsland (Camden Cty.)	Polling Place	8-4-78	A

1/ Declaratory judgment received 11-1-78.

2/ Withdrawn 9-9-77.

3/ Withdrawn to annexations only 5-22-78.

4/ Withdrawn 10-2-78.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Mitchell Cty. Board of Education*	Methods of Election (at-large; numbered posts; majority vote)	9-15-78 1/	W
Lakeland (Lanier Cty.)*	Method of Election (numbered posts)	10-17-78 2/	W
Pike Cty. Board of Education*	Methods of Election (at-large; residency requirement)	3-15-79	C
Henry County*	Methods of Election (at-large; residency requirement; staggered terms)	7-23-79	G
Henry Cty. Board of Education*	Methods of Election (at-large; residency requirement; staggered terms)	7-23-79	C
Statesboro (Bulloch Cty.)	Annexation	12-10-79	A
Alapaha (Berrien Cty.)*	Methods of Election (numbered posts; majority vote); Voter Registration Procedure (dual registration); Candidate Qualification (filing fees)	3-24-80	A
Henry County*	Redistricting; Method of Election (at-large)	5-27-80	C
Dooly County*	Methods of Election (at-large; residency requirement; staggered terms)	7-31-80	C
Statesboro (Bulloch Cty.)	Annexation	8-15-80	A

1/ Withdrawn 5-2-79.

2/ Withdrawn 2-9-79.

STATE: GEORGIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
DeKalb County	Voter Registration Procedure (disallowance of neighborhood voter registration drives)	9-11-80	C
Statesboro (Bulloch Cty.)*	Method of Election (increased terms)	2-2-81 1/	H
Augusta (Richmond Cty.)*	Method of Election (majority vote)	3-2-81	J
Griffin-Spalding County Board of Education (Spalding Cty.)*	Methods of Election (abolition of multi-member districts and residency districts; numbered posts)	7-6-81	J
State*	Voter Registration Procedures; Miscellaneous (voter assistance)	9-18-81	A

1/ Withdrawn 5-13-81.

STATE: LOUISIANA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Orleans Parish*	Redistricting; Methods of Election (majority vote; numbered post)	8-15-75	F
State*	Method of Election (full slate requirement)	12-15-75	A
Rapides Parish	Redistrictings (police jury; school board)	12-24-75	E
Shreveport (Caddo Parish)	Fifty-one Annexations	3-31-76 1/	H, F
Many (Sabine Parish)	Redistricting	4-13-76	F
Ouachita Parish School Board (Ouachita Parish)*	Miscellaneous (disenfranchising residents of the City of Monroe from Ouachita Parish school board elections)	3-7-77	A
New Orleans (Orleans Parish)	Polling Place	5-12-78	A
Pointe Coupee Parish	Polling Place	8-11-78	G
Pointe Coupee Parish	Polling Place	10-20-78 2/	H
Baton Rouge (East Baton Rouge Parish)	Form of Government (creation of Division "C" judgeship)	2-7-80 3/	H
Baton Rouge (East Baton Rouge Parish)*	Form of Government (creation of Division "D" judgeship)	2-7-80 4/	H

1/ Withdrawn 5-12-78 upon annexation of minority area and change in electoral system.

2/ Withdrawn 4-17-79.

3/ Withdrawn 10-10-80.

4/ Withdrawn 10-10-80.

STATE: MISSISSIPPI

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Grenada (Grenada Cty.)	Annexation	2-5-75 1/	G, F, H
Bolivar Cty. Board of Education	Method of Election (at-large)	4-8-75	B
Grenada (Grenada Cty.)	Six Annexations	5-2-75 2/	F, H
State*	Candidate Qualification Requirements	6-4-75	A
State*	Redistrictings (House; Senate)	6-10-75	B, C, G
Warren County	Polling Place	6-16-75	A
Lowndes Cty. Board of Education	Method of Election (at-large)	6-23-75	A
Clay County	Two Polling Places	7-25-75	F
Kemper, Warren, Marshall, Benton and Leake Counties*	Method of Election (at-large school boards in five counties)	12-1-75	A
Grenada County	Redistricting	3-30-76	B, C
State*	Method of Election (open primary)	8-23-76	G
Kosciusko (Attala Cty.)	Methods of Election (at-large; numbered posts; majority vote)	9-20-76	A
Vicksburg (Warren Cty.)	Annexation	10-1-76 3/	F, H
Jackson (Hinds Cty.)	Annexation	12-3-76 4/	H

1/ Withdrawn 6-25-76 upon annexation of minority area.

2/ Withdrawn 6-25-76 upon annexation of minority area.

3/ Withdrawn 4-28-77 upon submission of single-member district plan.

4/ Withdrawn 7-22-81.

1770

STATE: MISSISSIPPI

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Tunica County	Method of Election (elective to appointive Superintendent of Education)	1-24-77	A
Lexington (Holmes Cty.)	Method of Election (at-large)	2-25-77	A
Lee County	Reregistration	4-4-77 1/	H
Canton (Madison Cty.)	Redistricting	4-13-77	E, F
Coahoma, DeSoto, Holmes, Humphreys, Leflore, Quitman, Sunflower, Tallahatchie, Tunica, and Yazoo Counties*	Methods of Election (school boards in 18 counties by at-large; residency districts)	7-8-77	A
Gidon (Leflore Cty.)	Annexation	10-28-77	A
State*	Redistricting (House; Senate)	7-31-78 2/	D
Walthall County	Redistricting	11-27-78	A
State*	Methods of Election (open primary; majority vote)	6-11-79	D
State*	Miscellaneous (three changes restricting assistance to illiterates)	7-6-79	A
Tunica County	Voting Methods (paper ballots to voting machines)	10-16-79	F
Louisville Municipal Separate School District (Winston Cty.)	Method of Election (majority vote)	3-28-80	A

1/ Withdrawn 8-19-77 upon submission of modifications to procedures.

2/ Declaratory judgment received 6-1-79.

STATE: MISSISSIPPI

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Orange Grove (Harrison Cty.)	Incorporation	6-2-80	A
Batesville (Panola Cty.)	Redistricting	9-29-80	J
Mendenhall (Simpson Cty.)	Annexation	1-12-81	J
State*	Voter Purge; Miscellaneous (campaigning restriction near a polling place)	4-6-81	J
Indianola (Sunflower Cty.)	1965 Annexation	6-1-81	C
Holly Springs (Marshall Cty.)	Redistricting	6-9-81	J

STATE: NEW YORK

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
New York Cty. Democratic Party	Consolidation of Political Units (leadership areas in 62nd State Assembly District)	9-3-75	A
New York (New York, Bronx, and Kings counties)	Miscellaneous (bifurcation of councilmanic districts)	9-18-81	A
New York (New York, Bronx, and Kings counties)	Redistricting (city council)	10-27-81	A

STATE: NORTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Lumberton City School District (Robeson Cty.)*	Three Annexations	6-2-75	C
Craven Cty. Board of Education*	Redistricting; Method of Election	9-23-75 1/	H
Robeson Cty. Board of Education*	Methods of Election (at-large; staggered terms); Miscellaneous	12-29-75	F
Williamston (Martin Cty.)	Method of Election (staggered terms)	2-4-77	A
Rocky Mount (Edgecombe Cty.)	Thirty-six Annexations	12-9-77 2/	H
Pasquotank County	Polling Place	1-3-78	A
Laurinburg (Scotland Cty.)	Methods of Election (majority vote; separation of electoral contests)	12-12-78	A
Reidsville (Rockingham Cty.)	Method of Election (staggered terms)	8-3-79	A
Greenville (Pitt Cty.)	Method of Election (majority vote)	4-7-80	A
New Bern (Craven Cty.)	Two Annexations	9-29-80 3/	H
State*	Miscellaneous (prohibition of division of counties in reapportionment)	11-30-81	J
State*	Redistricting (Senate; Congressional)	12-7-81	J

1/ Withdrawn 3-15-76.

2/ Withdrawn 6-9-78.

3/ Withdrawn 10-5-81.

STATE: SOUTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Charleston (Charleston Cty.)	Three Redistricting plans	2-18-75	F
Clarendon County*	Method of Election (elected to appointed county supervisor)	9-8-75	A
Bamberg County*	Redistricting	7-30-76 1/	M
Seneca (Oconee Cty.)	Method of Election (majority vote)	9-13-76	A
Sumter Cty. School District No. 2*	Methods of Election (at-large; residency requirement; appointment of one trustee)	10-1-76	A
Horry County*	Method of Election (at-large)	11-12-76	C, D, F, M
Cameron (Calhoun Cty.)	Method of Election (majority vote)	11-15-76	F
Bishopville (Lee Cty.)	Methods of Election (majority vote; staggered terms)	11-26-76	F
Sumter County*	Method of Election (at-large)	12-3-76	B, C
Calhoun Falls (Abbeville Cty.)	Method of Election (majority vote)	12-13-76	A
Pageland (Chesterfield Cty.)	Method of Election (majority vote)	3-22-77	A
Hollywood (Charleston Cty.)	Method of Election (majority vote)	6-3-77	A
Charleston County	Form of Government	6-14-77	B, C

1/ Withdrawn 11-1-76.

STATE: SOUTH CAROLINA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Bamberg County School Board	Method of Election (at-large)	8-31-77	A
Chester County*	Methods of Election (at-large; residency districts for county council and county school board)	10-28-77	B
Allendale County*	Method of Election (at-large seats for board of education)	11-25-77	F
Colleton County	Form of Government; Method of Election (at-large)	2-6-78	B, C
Mullins (Marion Cty.)	Method of Election (majority vote)	6-30-78	A
Marion (Marion Cty.)	Method of Election (majority vote)	7-5-78	I
Nichols (Marion Cty.)	Method of Election (majority vote)	9-19-78	A
Lancaster (Lancaster Cty.)	Method of Election (majority vote)	9-19-78	A
St. George (Dorchester Cty.)	Method of Election (staggered terms)	10-2-78	I
Rock Hill (York Cty.)	Method of Election (majority vote)	12-12-78	A
Edgefield County	Form of Government	2-8-79	C
Colleton County*	Miscellaneous (transfer of power to unprecleared authority)	9-4-79	I
Chester County*	Miscellaneous (postponement of elections by single-member districts)	9-26-79	B
Colleton County	Method of Election (at-large)	12-19-79	B
State*	Redistricting (House)	11-18-81	J

STATE: SOUTH DAKOTA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Todd County	Redistricting	10-26-78	B
Todd and Shannon Counties*	Division of Political Units	10-22-79	B, D

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
State*	Voter Purge	12-10-75	[illegible]
State*	Redistricting (state House - Jefferson and Tarrant Counties)	1-23-76	E
State*	Redistricting (state House - Nueces County)	1-26-76	E
State*	Method of Election (convention requirement)	1-26-76	A
Tyler (Smith Cty.)	Redistricting	2-25-76	E
Harris County	Miscellaneous (composition of precinct polling staff)	3-5-76 1/	M
Forney ISD** (Kaufman Cty.)	Methods of Election (numbered posts; majority vote)	3-9-76	A
Texas City (Galveston Cty.)	Method of Election (numbered posts)	3-10-76	A
Monahans (Ward Cty.)	Method of Election (numbered posts)	3-11-76 2/	M
Dumas ISD (Moore Cty.)	Methods of Election (numbered posts; majority vote)	3-12-76	A
Orange Grove ISD (Jim Wells Cty.)	Method of Election (numbered posts)	3-19-76	A
Pecos (Reeves Cty.)	Method of Election (numbered posts)	3-23-76	A
Chapel Hill ISD (Smith Cty.)	Method of Election (majority vote)	3-24-76	B
Luling (Caldwell Cty.)	Method of Election (numbered posts)	3-29-76	[illegible]

[illegible]

** Independent School District

1/ Withdrawn 3-11-76.

[illegible]

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Lockney ISD (Floyd Cty.)	Methods of Election (numbered posts; majority vote)	3-30-76	A
San Antonio (Bexar Cty.)	Thirteen Annexations	4-2-76 1/	F, M
Victoria County	Consolidation of two school districts	4-2-76 2/	M
Frio County	Redistricting	4-16-76	C, F
Liberty ISD (Liberty Cty.)	Methods of Election (numbered posts; majority vote)	4-19-76	G
Pettus ISD (Bee Cty.)	Method of Election (numbered posts)	5-5-76	A
Lockhart (Caldwell Cty.)	Method of Election (majority vote)	5-11-76	A
Rusk (Cherokee Cty.)	Method of Election (numbered posts)	5-17-76	F
Trinity ISD (Trinity Cty.)	Method of Election (numbered posts)	5-21-76	B
Hereford ISD (Castro, Deaf Smith & Parmer Ctys.)	Methods of Election (numbered posts; majority vote)	5-24-76	D, G
Crockett County	Redistricting	7-7-76	B, C
Waller County	Redistrictings (commissioner, justice, and election precincts)	7-27-76	L
Marshall ISD (Harrison Cty.)	Method of Election (majority vote)	7-29-76	A
Hawkins ISD (Wood Cty.)	Methods of Election (numbered posts; majority vote)	8-2-76	B

1/ Withdrawn 1-24-77 upon change in electoral system.

2/ Withdrawn 8-16-76.

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Midland ISD (Midland Cty.)	Methods of Election (numbered posts; majority vote)	8-6-76 1/	B, H
Uvalde County	Redistricting	10-13-76	H, C
Woodville (Tyler Cty.)	Method of Election (numbered posts)	11-12-76	I
Westheimer ISD (Harris Cty.)	Special Election (creation of a new school district)	1-13-77	C, H
South Park ISD (Jefferson Cty.)	Method of Election (numbered posts)	2-25-77	A
Somerset ISD* (Atascosa and Bexar Ctys.)	Method of Election (numbered posts)	3-17-77	H
Ralls ISD (Crosby Cty.)	Method of Election (majority vote)	3-22-77	A
Lufkin ISD (Angelina Cty.)	Methods of Election (numbered posts; majority vote)	3-24-77	A
Raymondville ISD (Willacy Cty.)	Polling Place	3-25-77	A
Comal ISD (Comal Cty.)	Method of Election (numbered posts)	4-4-77	G
Prairie Lea ISD (Caldwell Cty.)	Methods of Election (numbered posts; majority vote)	4-11-77 2/	H
Fort Bend County	Polling places	5-2-77	F
Clute (Brazoria Cty.)	Method of Election (majority vote)	6-17-77	A

1/ Withdrawn 11-13-78.

2/ Withdrawn 3-3-78.

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Caldwell County	Redistricting	8-1-77	I
Lamar CISD*** (Fort Bend Cty.)	Bilingual Procedure (oral assistance)	10-3-77 1/	M
Fort Worth ISD (Tarrant Cty.)*	Miscellaneous (delayed implementation of single-member districts)	1-16-78 2/	M
Harris County	Polling Place	3-1-78	A
Waller CISD (Waller Cty.)	Miscellaneous (election date)	3-10-78	F
Nueces County	Redistricting	3-24-78	F
Southwest Texas Junior College District (Uvalde and Zavala Ctys.)	Polling Place	3-24-78	A
Port Arthur (Jefferson Cty.)	Consolidation of Political Units; Redistricting (residency districts)	3-24-78	D, B
Neches ISD (Anderson Cty.)	Methods of Election (numbered posts; majority vote)	4-7-78	A
Medina County	Redistricting	4-14-78	G, D, F
Edwards County	Redistricting	4-26-78	C

*** Consolidated Independent School District

1/ Withdrawn 11-15-77 after modifications to program procedures.

2/ Withdrawn 2-17-78 upon satisfactory implementation.

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Aransas County	Redistricting	4-28-78	A
Corsicana ISD (Navarro Cty.)	Methods of Election (numbered posts; majority vote)	4-28-78	F
Harris Cty. School District	Miscellaneous (election date)	5-1-78	B
Brazos County	Redistricting	6-30-78 1/	H
Jim Wells County	Redistricting	7-3-78	C, G
Ector County ISD (Ector Cty.)	Methods of Election (numbered posts; majority vote)	7-7-78	F
Harrison County	Redistricting	8-8-78	E
Terrell County	Redistricting	12-27-78	C, F
Hereford ISD (Castro, Deaf Smith, & Parmer Ctys.)	Method of Election (numbered posts)	1-18-79	A
Beeville (Bee Cty.)	Method of Election (single-member district plan)	2-1-79	A
Alto ISD (Cherokee Cty.)	Methods of Election (numbered posts; majority vote)	5-11-79	A
Houston (Harris Cty.)	Fourteen Annexations	6-11-79 2/	B, C, F, H

1/ Withdrawn 11-15-78.

2/ Withdrawn 9-21-79 upon change in electoral system.

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
San Antonio (Bexar Cty.)	Polling Place	8-17-79 1/	H
Comal ISD (Comal Cty.)	Method of Election (numbered posts)	9-12-79	A
Lockhart (Caldwell Cty.)	Methods of Election (numbered posts; staggered terms)	9-14-79	D
Taylor (Williamson Cty.)	Polling Place	12-3-79	A
Atascosa County	Redistrictings (commissioners, justice, and constable districts)	12-7-79	C
Medina County	Redistricting	12-11-79	C, D, F
Port Arthur (Jefferson Cty.)	Special Election (referendum)	12-21-79	G
La Porte (Harris Cty.)	Form of Government; Redistricting	12-27-79	F
Port Arthur (Jefferson Cty.)	Special Election (referendum)	1-15-80	A
Harris Cty. School District	Miscellaneous (election date)	1-17-80	B
Comal County	Redistricting; Voting Precincts	2-1-80 2/	H
Jim Wells County	Redistricting	2-1-80	G
Cochran County	Redistricting; Voting Precincts; Polling Places	2-25-80	C, F
Port Arthur (Jefferson Cty.)	Annexation	3-5-80	D, B

1/ Withdrawn 3-24-80.

2/ Withdrawn 9-22-80.

STATE: TEXAS

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Nacogdoches ISD (Nacogdoches Cty.)	Redistricting	4-3-80	F
Corpus Christi ISD (Nueces Cty.)	Redistricting	4-16-80	F
Port Arthur (Jefferson Cty.)	Special Election (referendum)	7-23-80	B, D
Cleveland ISD (Liberty Cty.)	Method of Election (numbered posts)	8-8-80	A
Jim Wells County	Redistricting	8-12-80	A
Victoria (Victoria Cty.)	Four Annexations	9-3-80 1/	F, H
Wilson County	Polling Place	11-4-80	A
West Orange-Cove CISD (Orange Cty.)	Methods of Election (numbered posts; majority vote)	2-9-81	J
Liberty ISD (Liberty County)	Method of Election (numbered posts)	3-16-81	J
Burleson Cty. Hospital District (Burleson Cty.)	Polling Place	6-5-81	J

1/ Withdrawn 3-13-81 upon change in electoral system.

STATE: VIRGINIA

JURISDICTIONS AFFECTED	TYPES OF CHANGES OBJECTED TO	DATE OF OBJECTION	POST-OBJECTION ACTION
Lynchburg	Annexation	7-14-75 1/	F, H
Gretna (Pittsylvania Cty.)*	Method of Election (staggered terms)	9-27-79	A
Hopewell	Form of Government (decrease in number of council members)	10-27-80	J
State*	Redistricting (state Senate)	7-17-81	F
State*	Redistricting (state House of Delegates)	7-31-81	F

1/ Withdrawn 4-12-76 upon change in electoral system.

NUMBER OF CHANGES*/ TO WHICH OBJECTIONS HAVE BEEN INTERPOSED**/
BY STATE AND YEAR, 1965 - DECEMBER 31, 1981

STATE	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	TOTAL
ALABAMA	0	0	0	0	10	1	2	9	1	4	15	17	2	3	1	5	7	77
ALASKA	-	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0
ARIZONA	-	0	0	0	0	0	0	0	0	0	1	2	0	0	0	0	0	3
CALIFORNIA	-	-	-	-	-	-	0	0	0	0	0	2	3	0	0	0	0	5
COLORADO	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0
CONNECTICUT	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0
FLORIDA	-	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0
GEORGIA	0	0	0	6	0	0	10	16	15	18	43	13	17	2	9	11	5	165
HAWAII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
IDAHO	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0	0	0	0
LOUISIANA	0	0	0	0	2	0	19	10	6	8	6	52	1	2	0	0	0	106
MAINE	-	-	-	-	-	-	-	-	-	-	0	0	0	-	-	-	-	0
MASSACHUSETTS	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0
MICHIGAN	-	-	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0
MISSISSIPPI	0	0	0	0	5	1	16	3	5	2	16	7	7	3	6	3	5	79
NEW HAMPSHIRE	-	-	-	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0
NEW MEXICO	-	-	-	-	-	-	-	-	-	-	0	0	-	-	-	-	-	0
NEW YORK	-	-	-	-	-	-	0	0	0	6	1	0	0	0	0	0	2	9
NORTH CAROLINA	0	0	0	0	0	0	7	0	0	0	6	0	1	3	1	1	3	22
OKLAHOMA	-	-	-	-	-	-	-	-	-	-	0	0	0	0	-	-	-	0
SOUTH CAROLINA	0	0	0	0	0	0	0	7	7	34	4	10	9	8	4	0	1	84
SOUTH DAKOTA	-	-	-	-	-	-	-	-	-	-	-	0	0	1	1	0	0	2
TEXAS	-	-	-	-	-	-	-	-	-	-	1	47	12	20	29	17	4	130
VIRGINIA	0	0	0	0	0	1	4	1	0	2	1	0	0	0	1	1	2	13
WYOMING	-	-	-	-	-	-	0	0	0	0	0	0	0	0	0	0	0	0
TOTALS	0	0	0	6	17	3	58	46	34	74	94	150	52	42	52	38	29	695

*/ The number of changes objected to is greater than the number of objection letters sent to jurisdictions. For example, if a letter to a jurisdiction states that we object to 2 annexations and a change in the location of a polling place, it is counted as 3 changes objected to (2 under annexation; 1 under polling place).

**/ All figures exclude changes for which objections were withdrawn based on new information or a reconsideration of existing information. The figures include, however, objections withdrawn after a jurisdiction made a change in its election procedure which removed the basis for the objection.

ATTACHMENT E-1

NUMBER OF CHANGES*/ TO WHICH OBJECTIONS HAVE BEEN INTERPOSED**/
BY TYPE AND YEAR FROM 1965 - DECEMBER 31, 1981

TYPE OF CHANGE	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	TOTAL
REDISTRICTING	0	0	0	0	0	1	20	10	4	9	10	13	3	12	5	8	9	104
ANNEXATION	0	0	0	0	0	0	1	2	1	9	37	66	3	0	15	7	2	143
POLLING PLACE	0	0	0	0	0	0	3	2	1	5	3	0	2	6	1	3	1	27
PRECINCT	0	0	0	0	0	0	2	1	0	1	0	0	0	0	0	1	0	5
REREGISTRATION OR VOTER PURGE	0	0	0	0	0	0	1	0	0	0	1	0	1	0	0	0	4	7
INCORPORATION	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	1	0	3
BILINGUAL PROCEDURES	0	0	0	0	0	0	0	0	0	0	0	3	4	0	0	0	0	7
METHOD OF ELECTION	0	0	0	0	4	1	28	25	24	48	36	62	35	18	21	10	7	319
FORM OF GOVERNMENT	0	0	0	0	0	0	1	0	0	1	1	1	2	1	2	1	0	10
CONSOLIDATION OR DIVISION OF POLITICAL UNITS	0	0	0	1	0	0	0	0	0	0	1	1	0	1	1	0	0	5
SPECIAL ELECTION	0	0	0	0	0	0	0	1	0	0	0	1	1	0	1	2	0	6
VOTING METHODS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	3
CANDIDATE QUALIFICATION	0	0	0	0	3	0	0	2	3	0	3	0	0	0	0	1	0	12
VOTER REGISTRATION PROCEDURES	0	0	0	1	0	1	2	0	0	0	1	0	0	0	0	2	1	8
MISCELLANEOUS	0	0	0	4	10	0	0	3	0	1	1	3	1	3	5	1	4	36
TOTALS	0	0	0	6	17	3	58	46	34	74	94	150	52	42	52	38	29	695

*/ The number of changes objected to is greater than the number of objection letters sent to jurisdictions. For example, if a letter to a jurisdiction states that we object to 2 annexations and a change in the location of a polling place, it is counted as 3 changes objected to (2 under annexation; 1 under polling place).

**/ All figures exclude changes for which objections were withdrawn based on new information or a reconsideration of existing information. The figures include, however, objections withdrawn after a jurisdiction made a change in its election procedure which removed the basis for the objection.

ATTACHMENT E-2

ATTACHMENT E-3

RANK ORDER */ OF NUMBER OF CHANGES OBJECTED TO
BY STATE SINCE 1965 AND SINCE 1975

	Number of Changes Objected to **/	
	1965-12/31/81	8/6/75-12/31/81
A. 1965-Covered States		
1. Georgia	165	82
2. Louisiana	106	61
3. South Carolina	84	33
4. Mississippi	79	32
5. Alabama	77	43
6. North Carolina	22	12
7. Virginia	13	4
	546	267
B. 1970 and 1975 Covered States		
1. Texas	130	130
2. New York	9	3
3. California	5	5
4. Arizona	3	2
5. South Dakota	2	2
6. Alaska	0	0
7. Colorado	0	0
8. Connecticut	0	0
9. Florida	0	0
10. Hawaii	0	0
11. Idaho	0	0
12. Maine	0	0
13. Massachusetts	0	0
14. Michigan	0	0
15. New Hampshire	0	0
16. New Mexico	0	0
17. Oklahoma	0	0
18. Wyoming	0	0
	149	142
C. All States	695	409

*/ States are ranked according to the number of changes objected to for the 17-year period 1965-1981, as shown in the left column. Their ranking for the period August 6, 1975 through December 31, 1981, as shown in the right column, is slightly different.

**/ The above figures do not include changes for which objections were withdrawn based on new information or a reconsideration of existing information. The figures do include, however, changes for which objections were withdrawn after the jurisdiction made a change in its election procedure in response to the objection.

ATTACHMENT F

SECTION 5 OBJECTIONS TO REAPPORTIONMENT SUBMISSIONS
BASED ON THE 1980 CENSUS */

Submitting Jurisdiction	Type of Reapportionment	Date of Objection
Alabama		
Barbour County	County Commission	7/21/81
Barbour County	County Commission	11/16/81
New York		
New York City (Kings, Bronx and New York counties)	City Council	10/27/81
North Carolina		
State	U.S. Congressional	12/7/81
State	State Senate	12/7/81
State	State House	1/20/82
South Carolina		
State	State House	11/18/81
Texas		
Uvalde County	County Commission	1/22/82
State	State House	1/25/82
State	State Senate	1/25/82
State	U.S. Congressional	1/29/82
Virginia		
State	State Senate	7/17/81
State	State House	7/31/81

*/ This list includes all objections interposed through January 31, 1982. It excludes objections withdrawn absent a change in the original submission.

"BAILOUT" SUITS FILED UNDER SECTION 4(a) OF THE VOTING RIGHTS ACT OF 1965, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
Apache, Navajo and Coconino Counties, Arizona v. United States, 256 F.Supp. 903 (1966)	2/4/66	Plaintiff (7/26/66) */
Elmore County, Idaho v. United States, C.A. No. 320-66	2/9/66	Plaintiff (9/22/66)
Alaska v. United States, C.A. No. 101-66	4/28/66	Plaintiff (8/17/66)
Wake County, N.C. v. United States, C.A. No. 1198-66	5/9/66	Plaintiff (6/23/67)
Nash County, N.C. v. United States, C.A. No. 1702-66	6/27/66	Defendant (9/26/69)
Gaston County, N.C. v. United States, 395 U.S. 285 (1969)	8/11/66	Defendant (6/2/69)
Alaska v. United States, C.A. No. 2122-71	10/26/71	Plaintiff (3/10/72)
New York v. United States, C.A. No. 2419-71	12/3/71	Plaintiff (4/3/72) **/
Commonwealth of Virginia v. United States, 386 F.Supp. 1319 (1974), affirmed, 420 U.S. 901 (1975)	6/5/73	Defendant (1/27/75)

*/ With respect to all suits in which the plaintiff prevailed, the Attorney General consented to the bailout.

**/ Reopened 11/5/73, and recovered 1/10/74.

ATTACHMENT G

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
New York v. United States, C.A. No. 2419-71	11/5/73	Defendant (1/10/74)
Maine v. United States, C.A. No. 75-2125	11/25/75	Plaintiff (9/17/76)
Yuba County, California v. United States, C.A. No. 75-2170	12/30/75	Defendant (5/25/76)
Curry, McKinley and Otero Counties, New Mexico v. United States, C.A. No. 76-0067	1/12/76	Plaintiff (7/30/76)
Choctaw and McCurtain Counties, Oklahoma v. United States, C.A. No. 76-1250	7/6/76	Plaintiff (5/12/78)
El Paso County, Colorado v. United States, C.A. No. 77-0185	2/1/77	Defendant (11/8/77)
City of Rome v. United States, 446 U.S. 156 (1980)	5/9/77	Defendant (4/22/80)
Alaska v. United States, C.A. No. 78-0484	3/21/78	Defendant (5/10/79)

***/ Rescinded the 4/3/72 bailout judgment.

"BAILOUT" SUITS FILED UNDER SECTION 203 OF
THE VOTING RIGHTS ACT OF 1965, AS AMENDED
THROUGH DECEMBER 31, 1981

CASE NAME	DATE SUIT WAS FILED	PREVAILING PARTY (DATE)
Maine v. United States, C.A. No. 75-2125 (D.D.C.)	11/25/75	Defendant (7/5/77)
Simenson v. Bell (Roosevelt County, Montana), C.A. No. CV-76-59-HG (D. Mont.)	6/22/76	Defendant (3/17/78)
Doi v. Bell (Hawaii), C.A. No. 77-0256 (D. Hawaii)	7/14/77	Split (partial) */
County of Placer (Calif.) v. United States, C.A. No. S-80-123 MLS (E.D. Cal.)	2/20/80	Defendant (6/13/80)

*/ Summary judgment granted for Japanese language minority in Maui County, denied for all others, 449 F. Supp. 267 (3/28/78); remainder of case dismissed (8/21/79).

ATTACHMENT H

ATTACHMENT I

§ 51.27

Title 28—Judicial Administration

PART 55—IMPLEMENTATION OF THE PROVISIONS OF THE VOTING RIGHTS ACT REGARDING LANGUAGE MINORITY GROUPS

Subpart A—General Provisions

Sec.

55.1 Definitions.
55.2 Purpose; standards for measuring compliance.
55.3 Statutory requirements.

Subpart B—Nature of Coverage

55.4 Effective date; list of covered jurisdictions.
55.5 Coverage under Section 4(f)(4).
55.6 Coverage under Section 203(c).
55.7 Termination of coverage.
55.8 Relationship between Section 4(f)(4) and Section 203(c).
55.9 Coverage of political units within a county.
55.10 Types of elections covered.

Subpart C—Determining the Exact Language

55.11 General.
55.12 Language used for written material.
55.13 Language used for oral assistance and publicity.

Subpart D—Minority Language Materials and Assistance

55.14 General.
55.15 Affected activities.
55.16 Standards and proof of compliance.
55.17 Targeting.
55.18 Provision of minority language materials and assistance.
55.19 Written materials.
55.20 Oral assistance and publicity.
55.21 Record keeping.

Subpart E—Preclearance

55.22 Requirements of Section 5 of the Act.

Subpart F—Sanctions

55.23 Enforcement by the Attorney General.

Subpart G—Comment on This Part

55.24 Procedure.

APPENDIX—Jurisdictions covered under secs. 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1975

AUTHORITY: 5 U.S.C. 301, 28 U.S.C. 509, 510, Pub. L. 94-73.

Source: Order No. 855-76, 41 FR 29998, July 20, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 55.1 Definitions.

For purposes of this part—

(a) "Act" means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the Voting Rights Act Amendments of 1970, 84 Stat. 314, and the Voting Rights Act Amendments of 1975, Pub. L. 94-73, 42 U.S.C. 1973 *et seq.* Section numbers, such as "Section 14(c)(3)," refer to the Act.

(b) "Attorney General" means the Attorney General of the United States.

(c) "Language minority" or "Language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. Sections 14(c)(3), 203(e). For the purposes of the Act the following Asian American groups are considered language minority groups: Chinese Americans, Filipino Americans, Japanese Americans, and Korean Americans. As used in this part, "applicable language minority group" refers to the group or groups listed in the determinations as to coverage published in the FEDERAL REGISTER. As used in this part, each of the seven following groups is considered a "single language minority group": American Indians, Alaskan Natives, persons of Spanish heritage, Chinese Americans, Filipino Americans, Japanese Americans, and Korean Americans.

(d) "Political subdivision" means: "• • • any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." Section 14(c)(2).

§ 55.2 Purpose; standards for measuring compliance.

(a) The purpose of this part is to set forth the Attorney General's interpretation of the provisions of the Voting Rights Act, as amended by Pub. L. 94-73 (1975), which require certain States and political subdivisions to conduct elections in the language of certain "language minority groups" in addition to English.

(b) In the Attorney General's view the objective of the Act's provisions is to enable members of applicable language minority groups to participate effectively in the electoral process. This part establishes two basic standards by which the Attorney General will measure compliance: (1) That materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities; and (2) that an affected jurisdiction should take all reasonable steps to achieve that goal.

(c) The determination of what is required for compliance with Section 4(f)(4) and Section 203(c) is the responsibility of the affected jurisdiction. These guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction.

(d) Jurisdictions covered under Section 4(f)(4) of the Act are subject to the preclearance requirements of Section 5. See Part 51 of this Chapter. Such jurisdictions have the burden of establishing to the satisfaction of the Attorney General or to the United States District Court for the District of Columbia that changes made in their election laws and procedures in order to comply with the requirements of Section 4(f)(4) are not discriminatory under the terms of Section 5. However, Section 5 expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the changes.

(e) Jurisdictions covered solely under Section 203(c) of the Act are not subject to the preclearance requirements of Section 5, nor is there a Federal apparatus available for preclearance of Section 203(c) compliance activities. The Attorney General will not preclear jurisdictions' proposals for compliance with Section 203(c).

(f) Consideration by the Attorney General of a jurisdiction's compliance with the requirements of Section 4(f)(4) occurs in the review pursuant to Section 5 of the Act of changes with respect to voting, in the consideration of the need for litigation to enforce

the requirements of Section 4(f)(4), and in the defense of suits for termination of coverage under Section 4(f)(4). Consideration by the Attorney General of a jurisdiction's compliance with the requirements of Section 203(c) occurs in the consideration of the need for litigation to enforce the requirements of Section 203(c).

(g) In enforcing the Act—through the Section 5 preclearance review process, through litigation, and through defense of suits for termination of coverage under Section 4(f)(4)—the Attorney General will follow the general policies set forth in this part.

(h) This part is not intended to preclude affected jurisdictions from taking additional steps to further the policy of the Act. By virtue of the Supremacy Clause of Art. VI of the Constitution, the provisions of the Act override any inconsistent State law.

§ 55.3 Statutory requirements.

The Act's requirements concerning the conduct of elections in languages in addition to English are contained in Section 4(f)(4) and Section 203(c). These sections state that whenever a jurisdiction subject to their terms "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in * * * English. * * *"

Subpart B—Nature of Coverage

§ 55.4 Effective date; list of covered jurisdictions.

(a) The 1975 Amendments took effect upon the date of their enactment, August 6, 1975.

(1) The requirements of Section 4(f)(4) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census and the Attorney General. Such determinations are not reviewable in any court.

(2) The requirements of Section 203(c) take effect upon publication in the FEDERAL REGISTER of the requisite determinations of the Director of the Census. Such determinations are not reviewable in any court.

(b) Jurisdictions determined to be covered under Section 4(f)(4) or Section 203(c) are listed, together with the language minority group with respect to which coverage was determined, in the Appendix to this part. Any additional determinations of coverage under either Section 4(f)(4) or Section 203(c) will be published in the FEDERAL REGISTER.

§ 55.5 Coverage under Section 4(f)(4).

(a) *Coverage formula.* Section 4(f)(4) applies to any State or political subdivision in which (1) over five percent of the voting-age citizens were, on November 1, 1972, members of a single language minority group, (2) registration and election materials were provided only in English on November 1, 1972, and (3) fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.

All three conditions must be satisfied before coverage exists under Section 4(f)(4).[1]

(b) Coverage may be determined with regard to Section 4(f)(4) on a statewide or political subdivision basis.

(1) Whenever the determination is made that the bilingual requirements of Section 4(f)(4) are applicable to an entire State, these requirements apply to each of the State's political subdivisions as well as to the State. In other words, each political subdivision within a covered State is subject to the same requirements as the State.

(2) Where an entire State is not covered under Section 4(f)(4), individual political subdivisions may be covered.

§ 55.6 Coverage under Section 203(c).

There are two ways in which coverage under Section 203(c) may be established.[2]

(a) Under the first method, a preliminary determination is made by the Director of the Census of States in which more than five percent of the voting-age citizens are members of a

[1] Coverage is based on Sections 4(b) (third sentence), 4(c), and 4(f)(3).

[2] The criteria for coverage are contained in Section 203(b).

single language minority group the illiteracy rate of which, in the particular State, is greater than the national illiteracy rate. In these States, a particular political subdivision is covered with respect to the State's applicable language minority group if five percent or more of the voting-age citizens of the political subdivision are members of the applicable language minority group.

(b) The second method of establishing coverage is used with respect to language minority groups not reached by the preliminary determination based on statewide data. Under the second method, covered political subdivisions are those in which more than five percent of the voting-age citizens are members of a single language minority group the illiteracy rate of which, in the particular political subdivision, is greater than the national illiteracy rate.

(c) For the purpose of determinations of coverage under Section 203(c), "illiteracy means the failure to complete the fifth primary grade." Section 203(b).

§ 55.7 Termination of coverage.

(a) *Section 4(f)(4).* A covered jurisdiction may terminate coverage under Section 4(f)(4) (via Section 4(a)) by obtaining from the United States District Court for the District of Columbia a declaratory judgment that there has been no discriminatory use of a test or device for a period of ten years. The term "test or device" is defined in Section 4(c) and Section 4(f)(3). When an entire State is covered in this regard, only the State, and not individual political subdivisions within the State, may bring an action to terminate coverage.

(b) *Section 203(c).* The requirements of Section 203(c) apply until August 6, 1985. A covered jurisdiction may terminate such coverage earlier if it can prove in a declaratory judgment action in a United States district court, that the illiteracy rate of the applicable language minority group is equal to or less than the national illiteracy rate.

§ 55.8 Relationship between Section 4(f)(4) and Section 203(c).

(a) The statutory requirements of Section 4(f)(4) and Section 203(c) regarding minority language material and assistance are essentially identical.

(b) Jurisdictions subject to the requirements of Section 4(f)(4)—but not jurisdictions subject only to the requirements of Section 203(c)—are also subject to the Act's special provisions, such as Section 5 (regarding preclearance of changes in voting laws) and Section 6 (regarding Federal examiners).[1] See Part 51 of this Chapter.

(c) Although the coverage formulas applicable to Section 4(f)(4) and Section 203(c) are different, a political subdivision may be included within both of the coverage formulas. Under these circumstances, a judgment terminating coverage of the jurisdiction under one provision would not have the effect of terminating coverage under the other provision.

§ 55.9 Coverage of political units within a county.

Where a political subdivision (e.g., a county) is determined to be subject to Section 4(f)(4) or Section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.

§ 55.10 Types of elections covered.

(a) *General.* The language provisions of the Act apply to registration for and voting in any type of election, whether it is a primary, general or special election. Section 14(c)(1). This includes elections of officers as well as elections regarding such matters as bond issues, constitutional amendments and referendums. Federal, State and local elections are covered as are elections of special districts, such as school districts and water districts.

(b) *Elections for statewide office.* If an election conducted by a county re-

[1] In addition, a jurisdiction covered under Section 203(c) but not under Section 4(f)(4) is subject to the Act's special provisions if it was covered under Section 4(b) prior to the 1975 Amendments to the Act.

lates to Federal or State offices or issues as well as county offices or issues, a county subject to the bilingual requirements must insure compliance with those requirements with respect to all aspects of the election, i.e., the minority language material and assistance must deal with the Federal and State offices or issues as well as county offices or issues.

(c) *Multi-county districts.* Regarding elections for an office representing more than one county, e.g., State legislative districts and special districts that include portions of two or more counties, the bilingual requirements are applicable on a county-by-county basis. Thus, minority language material and assistance need not be provided by the government in counties not subject to the bilingual requirements of the Act.

Subpart C—Determining the Exact Language

§ 55.11 General.

The requirements of Section 4(f)(4) or Section 203(c) apply with respect to the languages of language minority groups. The applicable groups are indicated in the determinations of the Attorney General or the Director of the Census. This Subpart relates to the view of the Attorney General concerning the determination by covered jurisdictions of precisely the language to be employed. In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions for use in the electoral process enable members of applicable language minority groups to participate effectively in the electoral process. It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective.

§ 55.12 Language used for written material.

(a) *Language minority groups having more than one language.* Some language minority groups, for example, Filipino Americans, have more than one language other than English. A jurisdiction required to provide election materials in the language of such a group need not provide materials in more than one language other than English. The Attorney General will consider whether the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(b) *Languages with more than one written form.* Some languages, for example, Japanese, have more than one written form. A jurisdiction required to provide election materials in such a language need not provide more than one version. The Attorney General will consider whether the particular version of the language that is used for election materials is the one most widely used by the jurisdiction's voting-age citizens who are members of the language minority group.

(c) *Unwritten Languages.* Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten.

§ 55.13 Language used for oral assistance and publicity.

(a) *Languages with more than one dialect.* Some languages, for example, Chinese, have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects. (See § 55.20.)

(b) *Language minority groups having more than one language.* In some jurisdictions members of an applicable language minority group speak more than one language other than English. Where a jurisdiction is obligated to provide oral assistance in the language of such a group, the ju-

risdiction's obligation is to ascertain the languages that are commonly used by members of that group in the jurisdiction and to provide oral assistance in such languages. (See § 55.20)

Subpart D—Minority Language Materials and Assistance

§ 55.14 General.

(a) This Subpart sets forth the views of the Attorney General with respect to the requirements of Section 4(f)(4) and Section 203(c) concerning the provision of minority language materials and assistance and some of the factors that the Attorney General will consider in carrying out his responsibilities to enforce Section 4(f)(4) and Section 203(c). Through the use of his authority under Section 5 and his authority to bring suits to enforce Section 4(f)(4) and Section 203(c), the Attorney General will seek to prevent or remedy discrimination against members of language minority groups based on the failure to use the applicable minority language in the electoral process. The Attorney General also has the responsibility to defend against suits brought for the termination of coverage under Section 4(f)(4) and Section 203(c).

(b) In discharging these responsibilities the Attorney General will respond to complaints received, conduct on his own initiative inquiries and surveys concerning compliance, and undertake other enforcement activities.

(c) It is the responsibility of the jurisdiction to determine what actions by it are required for compliance with the requirements of Section 4(f)(4) and Section 203(c) and to carry out these actions.

§ 55.15 Affected activities.

The requirements of Sections 4(f)(4) and 203(c) apply with regard to the provision of "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." The basic purpose of these requirements is to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities. Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

§ 55.16 Standards and proof of compliance.

Compliance with the requirements of Section 4(f)(4) and Section 203(c) is best measured by results. A jurisdiction is more likely to achieve compliance with these requirements if if has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group. In planning its compliance with Section 4(f)(4) or Section 203(c), a jurisdiction may, where alternative methods of compliance are available, use less costly methods if they are equivalent to more costly methods in their effectiveness.

§ 55.17 Targeting.

The term "targeting" is commonly used in discussions of the requirements of Section 4(f)(4) and Section 203(c). "Targeting" refers to a system in which the minority language materials or assistance required by the Act are provided to less than all persons or registered voters. It is the view of the Attorney General that a targeting system will normally fulfill the Act's minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.

§ 55.18 Provision of minority language materials and assistance.

(a) *Materials provided by mail.* If materials provided by mail (or by some comparable form of distribution) generally to residents or registered voters are not all provided in the applicable minority language, the Attorney General will consider whether an effective targeting system has been developed.

For example, a separate mailing of materials in the minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials may be sufficient.

(b) *Public notices.* The Attorney General will consider whether public notices and announcements of electoral activities are handled in a manner that provides members of the applicable language minority group an effective opportunity to be informed about electoral activities.

(c) *Registration.* The Attorney General will consider whether the registration system is conducted in such a way that members of the applicable language minority group have an effective opportunity to register. One method of accomplishing this is to provide, in the applicable minority language, all notices, forms and other materials provided to potential registrants and to have only bilingual persons as registrars. Effective results may also be obtained, for example, through the use of deputy registrars who are members of the applicable language minority group and the use of decentralized places of registration, with minority language materials available at places where persons who need them are most likely to come to register.

(d) *Polling place activities.* The Attorney General will consider whether polling place activities are conducted in such a way that members of the applicable language minority group have an effective opportunity to vote. One method of accomplishing this is to provide all notices, instructions, ballots, and other pertinent materials and oral assistance in the applicable minority language. If very few of the registered voters scheduled to vote at a particular polling place need minority language materials or assistance, the Attorney General will consider whether an alternative system enabling those few to cast effective ballots is available.

(e) *Publicity.* The Attorney General will consider whether a covered jurisdiction has taken appropriate steps to publicize the availability of materials and assistance in the minority language. Such steps may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations.

[Order No. 655-76, 41 FR 29998, July 20, 1976, as amended by Order No. 733-77, 42 FR 35970, July 13, 1977]

§ 55.18 Written materials.

(a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and petitions.

(b) *Accuracy, completeness.* It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials.

(c) *Ballots.* The Attorney General will consider whether a jurisdiction provides the English and minority language versions on the same document. Lack of such bilingual preparation of ballots may give rise to the possibility, or to the appearance, that the secrecy of the ballot will be lost if a separate minority language ballot or voting machine is used.

(d) *Voting machines.* Where voting machines that cannot mechanically accommodate a ballot in English and in the applicable minority language are used, the Attorney General will

consider whether the jurisdiction provides sample ballots for use in the polling booths. Where such sample ballots are used the Attorney General will consider whether they contain a complete and accurate translation of the English ballots, and whether they contain or are accompanied by instructions in the minority language explaining the operation of the voting machine. The Attorney General will also consider whether the sample ballots are displayed so that they are clearly visible and at the same level as the machine ballot on the inside of the polling booth, whether the sample ballots are identical in layout to the machine ballots, and whether their size and typeface are the same as that appearing on the machine ballots. Where space limitations preclude affixing the translated sample ballots to the inside of polling booths, the Attorney General will consider whether language minority group voters are allowed to take the sample ballots into the voting booths.

§ 55.20 Oral assistance and publicity.

(a) *General.* Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

(b) *Assistance.* The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.

(c) *Helpers.* With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his own choice. The basic standard is one of effectiveness.

§ 55.21 Record keeping.

The Attorney General's implementation of the Act's provisions concerning language minority groups would be facilitated if each covered jurisdiction would maintain such records and data as will document its actions under those provisions, including, for example, records on such matters as alternatives considered prior to taking such actions, and the reasons for choosing the actions finally taken.

Subpart E—Preclearance

§ 55.22 Requirements of Section 5 of the Act.

For many jurisdictions, changes in voting laws and practices will be necessary in order to comply with Section 4(f)(4) or Section 203(c). If a jurisdiction is subject to the preclearance requirements of Section 5 (see § 55.8(b)), such changes must either be submitted to the Attorney General or be made the subject of a declaratory judgment action in the United States District Court for the District of Columbia. Procedures for the administration of Section 5 are set forth in Part 51 of this chapter.

Subpart F—Sanctions

§ 55.23 Enforcement by the Attorney General.

(a) The Attorney General is authorized to bring civil actions for appropriate relief against violations of the Act's provisions, including Section 4 and Section 203. See Sections 12(d) and 204.

(b) Also, certain violations may be subject to criminal sanctions. See Sections 11(a)–(c) and 205.

Subpart G—Comment on This Part

§ 55.24 Procedure.

These guidelines may be modified from time to time on the basis of experience under the Act and comments received from interested parties. The Attorney General therefore invites

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public comments and suggestions on these guidelines. Any party who wishes to make such suggestions or comments may do so by sending them to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530.

APPENDIX—JURISDICTIONS COVERED UNDER SECS. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Alaska	Alaskan Natives [1].	
Election District 1		Alaskan Natives.
Election District 2		Do.
Election District 3		Do.
Election District 4		Do.
Election District 5		Do.
Election District 13		Do.
Election District 14		Do.
Election District 15		Do.
Election District 16		Do. [1]
Election District 17		Do. [1]
Election District 18		Do.
Election District 19		Do.
Election District 21		Do.
Election District 22		Do.
Arizona	Spanish heritage [1].	
Apache County	American Indian.	Spanish heritage. American Indian.
Cochise County		Spanish heritage.
Coconino County	American Indian.	American Indian. Spanish heritage.
Gila County		Do.
Graham County		Do.
Greenlee County		Do.
Maricopa County		Do.
Mohave County		Do.
Navajo County	American Indian.	American Indian. Spanish heritage.
Pima County		Spanish heritage.
Pinal County	American Indian.	American Indian. Spanish heritage.
Santa Cruz County		Spanish heritage.
Yavapai County		Do.
Yuma County		Do.
California:		
Alameda County		Do.
Amador County		Do.
Colusa County		Do.
Contra Costa County		Do.
Fresno County		Do.
Imperial County		Do.
Inyo County		American Indian.
Kern County		Spanish heritage.
Kings County	Spanish heritage.	Do.
Lassen County		Do.
Los Angeles County		Do.
Madera County		Do.

[1] See footnote at end of table.

APPENDIX—JURISDICTIONS COVERED UNDER SEC. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
California—Continued		
Merced County	Spanish heritage.	Spanish heritage.
Monterey County		Do.
Napa County		Do.
Orange County		Do.
Placer County		Do.
Riverside County		Do.
Sacramento County		Do.
San Benito County		Do.
San Bernardino County		Do.
San Diego County		Do.
San Francisco County		Spanish heritage. Chinese American.
San Joaquin County		Spanish heritage.
San Luis Obispo County		Do.
San Mateo County		Do.
Santa Barbara County		Do.
Santa Clara County		Do.
Santa Cruz County		Do.
Shasta County		Do.
Solano County		Do.
Sonoma County		Do.
Stanislaus County		Do.
Sutter County		Do.
Tulare		Do.
Tuolumne County		Do.
Ventura County		Do.
Yolo County		Do.
Yuba County	Spanish heritage.	Do.
Colorado:		
Adams County		Do.
Alamosa County		Do.
Archuleta County		Do.
Baca County		Do.
Boulder County		Do.
Chaffee County		Do.
Clear Creek County		Do.
Conejos County		Do.
Costilla County		Do.
Crowley County		Do.
Delta County		Do.
Denver County		Do.
Eagle County		Do.
El Paso County	Spanish heritage.	Do.
Fremont County		Do.
Huerfano County		Do.
Jackson County		Do.
Lake County		Do.
La Plata County		Do.
Las Animas County		Do.
Mesa County		Do.
Moffat County		Do.

APPENDIX—JURISDICTIONS COVERED UNDER SEC. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975—Continued

(Applicable language minority group(s))

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Colorado—Continued		
Montezuma County	———	Spanish heritage, American Indian.
Montrose County	———	Spanish heritage.
Morgan County	———	Do.
Otero County	———	Do.
Prowers County	———	Do.
Pueblo County	———	Do.
Rio Grande County	———	Do.
Saguache County	———	Do.
San Juan County	———	Do.
San Miguel County	———	Do.
Sedgwick County	———	Do.
Weld County	———	Do.
Connecticut:		
Bridgeport Town (Fairfield County).	———	Do.
Florida:		
Collier County	Spanish heritage.	Do.
Dade County	———	Do.
Glades County	———	American Indian.
Hardee County	Spanish heritage.	Spanish Heritage.
Hendry County	Do.	Do.
Hillsborough County	Do.	Do.
Monroe County	Do.	Do.
Hawaii:		
Hawaii County	Spanish heritage.	Filipino American, Japanese American.
Honolulu County	———	Chinese American, Filipino American.
Kauai County	———	Filipino American, Japanese American.
Maui County	———	Filipino American.
Idaho:		
Bingham County	———	American Indian.
Cassia County	———	Spanish heritage.
Kansas:		
Finney County	———	Do.
Grant County	———	Do.
Wichita County	———	Do.
Louisiana:		
St. Bernard Parish	———	Do.
Maine:		
Passamaquoddy Pleasant Point Indian Reservation (Washington County).	———	American Indian.
Michigan:		
Clyde Township (Allegan County).	Spanish heritage.	Spanish heritage.
Orangeville Township (Barry County).	———	Do.
Sugar Island Township (Chippewa County).	———	American Indian.
Ivesy Township (Lapeer County).	———	Spanish heritage.
Adrian City (Lenawee County).	———	Do.
Madison Township (Lenawee County).	———	Do.
Grant Township (Newaygo County).	———	Do.
Buena Vista Township (Saginaw County).	Spanish heritage.	Do.
Saginaw City (Saginaw County).	———	Do.
Minnesota:		
Beltrami County	———	American Indian.
Cass County	———	Do.
Mississippi:		
Neshoba County	———	Do.
Montana:		
Blaine County	———	Do.
Glacier County	———	Do.
Hill County	———	Do.
Lake County	———	Do.
Roosevelt County	———	Do.
Rosebud County	———	Do.
Valley County	———	Do.
Nebraska:		
Scotts Bluff County	———	Spanish heritage.
Thurston County	———	American Indian.
Nevada:		
Elko County	———	Spanish heritage, American Indian.
Mineral County	———	American Indian.
Nye County	———	Spanish heritage.
White Pine County	———	Do.
New Mexico:		
Bernalillo County	———	Do.
Catron County	———	Do.
Chaves County	———	Do.
Colfax County	———	Do.
Curry County	———	Do.
De Baca County	———	Do.
Dona Ana County	———	Do.
Eddy County	———	Do.
Grant County	———	Do.
Guadalupe County	———	Do.
Harding County	———	Do.
Hidalgo County	———	Do.
Lea County	———	Do.
Lincoln County	———	Do.
Los Alamos County	———	Do.
Luna County	———	Do.
McKinley County	———	American Indian, Spanish heritage.
Mora County	———	Spanish heritage.
Otero County	———	Do.
Quay County	———	Do.
Rio Arriba County	———	American Indian, Spanish heritage.

APPENDIX—JURISDICTIONS COVERED UNDER SEC. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
New Mexico—Continued		
Roosevelt County		Spanish heritage.
Sandoval County		American Indian, Spanish heritage.
San Juan County		Do.
San Miguel County		Do.
Santa Fe County		Do.
Sierra County		Do.
Socorro County		Do.
Taos County		American Indian, Spanish heritage.
Torrance County		Spanish heritage.
Union County		Do.
Valencia County		American Indian, Spanish heritage.
New York:		
Bronx County	Spanish heritage.	Spanish heritage.
Kings County	do	Do.
New York County		Do.
North Carolina:		
Hoke County		American Indian.
Jackson County	American Indian.	Do.
Robeson County		Do.
Swain County		Do.
North Dakota:		
Benson County		Do.
Dunn County		Do.
McKenzie County		Do.
Mountrail County		Do.
Rolette County		Do.
Oklahoma:		
Adair County		Do.
Beaver County		Do.
Caddo County		Do.
Cherokee County		Do.
Choctaw County		Do.
Coal County		Do.
Craig County		Do.
Delaware County		Do.
Harmon County		Spanish heritage.
Hughes County		American Indian.
Johnston County		Do.
Latimer County		Do.
McCurtain County		Do.
McIntosh County		Do.
Mayes County		Do.
Okfuskee County		Do.
Okmulgee County		Do.
Osage County		Do.
Ottawa County		Do.
Pawnee County		Do.
Pushmataha County		Do.
Rogers County		Do.
Seminole County		Do.
Sequoyah County		Do.
Tillman County		Spanish heritage.
Oregon:		
Jefferson County		American Indian.
Malheur County		Spanish heritage.

[1] See footnote at end of table.

APPENDIX—JURISDICTIONS COVERED UNDER SEC. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975—Continued

[Applicable language minority group(s)]

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
South Dakota:		
Bennett County		American Indian.
Charles Mix County		Do.
Corson County		Do.
Lyman County		Do.
Mellette County		Do.
Shannon County	American Indian.	Do.
Washabaugh County		Do.
Todd County	American Indian.	Do.
Texas	Spanish heritage [1].	
Andrews County		Spanish heritage.
Aransas County		Do.
Atascosa County		Do.
Bailey County		Do.
Bandera County		Do.
Bastrop		Do.
Bee County		Do.
Bell County		Do.
Bexar County		Do.
Blanco County		Do.
Borden County		Do.
Brazoria County		Do.
Brazos County		Do.
Brewster County		Do.
Briscoe County		Do.
Brooks County		Do.
Burleson County		Do.
Burnet County		Do.
Caldwell County		Do.
Calhoun County		Do.
Cameron County		Do.
Castro County		Do.
Cochran County		Do.
Coke County		Do.
Colorado County		Do.
Comal County		Do.
Concho County		Do.
Coryell County		Do.
Cottle County		Do.
Crane County		Do.
Crockett County		Do.
Crosby County		Do.
Culberson County		Do.
Dallam County		Do.
Dawson County		Do.
Deaf Smith County		Do.
De Witt County		Do.
Dickens County		Do.
Dimmit County		Do.
Duval County		Do.
Ector County		Do.
Edwards County		Do.
Ellis County		Do.
El Paso County		Do.
Falls County		Do.
Fisher County		Do.
Floyd County		Do.
Foard County		Do.

APPENDIX—JURISDICTIONS COVERED UNDER SEC. 4(f)(4) AND 203(c) OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY THE VOTING RIGHTS ACT AMENDMENTS OF 1975—Continued

(Applicable language minority group(s))

Jurisdiction	Coverage under sec. 4(f)(4)	Coverage under sec. 203(c)
Texas—Continued		
Fort Bend County		Spanish heritage.
Frio County		Do.
Gaines County		Do.
Galveston County		Do.
Garza County		Do.
Gillespie County		Do.
Glasscock County		Do.
Goliad County		Do.
Gonzales County		Do.
Grimes County		Do.
Guadalupe County		Do.
Hale County		Do.
Hall County		Do.
Hansford County		Do.
Harris County		Do.
Haskell County		Do.
Hays County		Do.
Hidalgo County		Do.
Hockley County		Do.
Howard County		Do.
Hudspeth County		Do.
Jackson County		Do.
Jeff Davis County		Do.
Jim Hogg County		Do.
Jim Wells County		Do.
Jones County		Do.
Karnes County		Do.
Kendall County		Do.
Kenedy County		Do.
Kerr County		Do.
Kimble County		Do.
Kinney County		Do.
Kleberg County		Do.
Knox County		Do.
Lamb County		Do.
Lampasas County		Do.
La Salle County		Do.
Live Oak County		Do.
Lubbock County		Do.
Lynn County		Do.
McCulloch County		Do.
McLennan County		Do.
McMullen County		Do.
Madison County		Do.
Martin County		Do.
Mason County		Do.
Maverick County		Do.
Medina County		Do.
Menard County		Do.
Midland County		Do.
Milam County		Do.
Mitchell County		Do.
Moore County		Do.
Nolan County		Do.
Nueces County		Do.
Parmer County		Do.
Pecos County		Do.
Potter County		Do.
Presidio County		Do.
Reagan County		Do.
Real County		Do.
Reeves County		Do.
Refugio County		Spanish heritage.
Robertson County		Do.
Runnels County		Do.
San Patricio County		Do.
San Saba County		Do.
Schleicher County		Do.
Scurry County		Do.
Sherman County		Do.
Starr County		Do.
Sterling County		Do.
Sutton County		Do.
Swisher County		Do.
Taylor County		Do.
Terrell County		Do.
Terry County		Do.
Throckmorton County		Do.
Tom Green County		Do.
Travis County		Do.
Upton County		Do.
Uvalde County		Do.
Val Verde County		Do.
Victoria County		Do.
Ward County		Do.
Webb County		Do.
Wharton County	Spanish heritage.	Do.
Willacy County		Do.
Williamson County		Do.
Wilson County		Do.
Winkler County		Do.
Yoakum County		Do.
Zapata County		Do.
Utah:		
Carbon County		Do.
San Juan County		American Indian.
Tooele County		Spanish heritage.
Uintah County		American Indian.
Virginia: Charles City County.		Do.
Washington:		
Adams County		Spanish heritage.
Columbia County		Do.
Grant County		Do.
Okanogan County		American Indian.
Yakima County		Spanish heritage.
Wisconsin:		
Nashville Town (Forest County).		American Indian.
Bowler Town (Outagamie County).		Spanish heritage.
Oneida Town (Outagamie County).		American Indian.
Hayward City (Sawyer County).		Do.
Wyoming:		
Carbon County		Spanish heritage.
Fremont County		American Indian.
Laramie County		Spanish heritage.
Sweetwater County		Do.
Washakie County		Do.

[1] Statewide coverage.

[Order No. 655-76, 41 FR 29996, July 20, 1976, as amended by Order No. 733-77, 42 FR 35971, July 13, 1977; Order No. 841-79, 44 FR 43719, July 26, 1979]

SUITS ALLEGING DILUTION IN WHICH THE UNITED STATES
FIRST PARTICIPATED AFTER JANUARY 1, 1975 */

CASE	ROLE OF U.S.	DATE OF INITIAL PARTICIPATION	PREVAILING PARTY
Conner v. Finch (Mississippi), 469 F. Supp. 693 (S.D. Miss. 1979)	Intervenor	6/11/75	Plaintiff
United States v. Board of Supervisors of Forrest County (Mississippi), C.A. No. H75-71(C) (S.D. Miss., July 6, 1979)	Plaintiff	7/21/75	Plaintiff
United States v. City of Albany (Dougherty County, Georgia), 437 F. Supp. 137 (M.D. Ga. 1977)	Plaintiff	7/21/75	Plaintiff
Kirksey v. Board of Supervisors of Hinds County, Mississippi, 468 F. Supp. 285 (S.D. Miss. 1979)	Amicus	9/24/75	Plaintiff
Parnell v. Rapides Parish School Board (Louisiana), 425 F. Supp. 399 (W.D. La. 1976), affirmed in pertinent part, 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1977)	Amicus	5/17/76	Plaintiff
United States v. East Baton Rouge Parish School Board (Louisiana), C.A. No. 76-252 (M.D. La., June 6, 1980)	Plaintiff	8/17/76	Plaintiff
United States v. City of Kosciusko, Mississippi (Attala County), C.A. No. EC-77-72-K (N.D. Miss., October 3, 1977)	Plaintiff	5/9/77	Plaintiff
United States v. City Commission of Texas City (Galveston County), C.A. No. G-77-78 (S.D. Tex., February 17, 1978)	Plaintiff	5/12/77	Plaintiff

*/ Through January 31, 1982. Excluded from this list are dilution suits in which the participation of the United States was limited to Section 5 issues. The plaintiff is listed as prevailing party where the suit achieved its desired objective even though, for example, the lawsuit awaits final resolution of some issues or ultimately was resolved by consent of the parties.

ATTACHMENT J

CASE	ROLE OF U.S.	DATE OF INITIAL PARTICIPATION	PREVAILING PARTY
Blacks United for Lasting Leadership, Inc. v. City of Shreveport (Caddo Parish, Louisiana), 571 F.2d 248 (5th Cir. 1978)	Amicus	6/8/77	Defendant
United States v. Uvalde Consolidated I.S.D. (Uvalde County, Texas), C.A. No. DR-77-CA-20 (W.D. Tex., January 27, 1982)	Plaintiff	9/19/77	Plaintiff
United States v. Temple I.S.D. (Bell County, Texas), C.A. No. W-78-CA-10 (W.D. Tex., May 20, 1978)	Plaintiff	1/12/78	Plaintiff
Lipscomb v. Wise (City of Dallas, Dallas County, Texas), 437 U.S. 535 (1978)	Amicus	4/7/78	Plaintiff
United States v. Marengo County Commission (Alabama), C.A. No. 78-474-H (S.D. Ala.)	Plaintiff	8/25/78	Pending
United States v. Thurston County (Nebraska), C.A. No. 78-0-380 (D. Neb., May 9, 1979)	Plaintiff	8/30/78	Plaintiff
Greater Houston Civic Council v. Mann (Harris County, Texas), C.A. No. 77-2083 (5th Cir., December 26, 1979)	Amicus	9/20/78	Plaintiff
United States v. City of Hattiesburg (Forrest County, Mississippi), C.A. No. H-78-0147(C) (S.D. Miss.)	Plaintiff	10/2/78	**/

**/ Voluntarily dismissed by plaintiff, July 8, 1980.

CASE	ROLE OF U.S.	DATE OF INITIAL PARTICIPATION	PREVAILING PARTY
United States v. Dallas County Commission and School Board (Alabama), C.A. No. 78-578 H (S.D. Ala.)	Plaintiff	10/19/78	Pending
United States v. County of San Juan, New Mexico, C.A. No. 79-507 JB (D. N.Mex., April 8, 1980)	Plaintiff	6/21/79	Plaintiff
United States v. State of South Carolina, C.A. No. 80-730-8 (D.S.C.)	Plaintiff	4/18/80	**/
United States v. Clarke County Commission (Alabama), C.A. No. 80-0547-H (S.D. Ala., April 17, 1981)	Plaintiff	9/2/80	Plaintiff
Lodge v. Buxton (Burke County, Georgia) 639 F.2d 1358 (5th Cir. 1981)	Amicus	10/2/80	Pending
Brown and United States v. Board of School Commissioners of Mobile County, Alabama, 446 U.S. 236 (1980), on remand, C.A. No. 75-298-P (S.D. Ala.)	Plaintiff-Intervenor	11/7/80	Pending
Bolden and United States v. City of Mobile, Alabama (Mobile County), 446 U.S. 55 (1980), on remand, C.A. No. 75-497-P (S.D. Ala.)	Plaintiff-Intervenor	5/8/81	Pending
Kirksey v. City of Jackson (Hinds County, Mississippi), C.A. No. J77-0075(N) (S.D. Miss., December 11, 1981)	Amicus	5/8/81	Pending

**/ Voluntarily dismissed by plaintiff, June 11, 1980.

ATTACHMENT K

COUNTIES DESIGNATED AS EXAMINER COUNTIES
THROUGH DECEMBER 31, 1981

ALABAMA (18)

COUNTY	DATE OF DESIGNATION
Autauga	10-29-65
Bullock	11-6-78
Choctaw	5-30-66
Conecuh	8-28-80
Dallas	8-9-65
Elmore	10-29-65
Greene	10-29-65
Hale	8-9-65
Jefferson	1-20-66
Lowndes	8-9-65
Marengo	8-9-65
Montgomery	9-29-65
Perry	8-18-65
Pickens	9-1-78
Russell	9-25-78
Sumter	5-2-66
Talladega	10-31-74
Wilcox	8-18-65

CALIFORNIA (1)

San Francisco	5-19-80 1/

GEORGIA (19)

Baker	11-4-68
Bullock	7-30-80
Burke	11-7-78
Calhoun	7-30-68
Early	7-30-80
Hancock	11-7-66
Johnson	7-30-80
Lee	3-23-67
Meriwether	8-8-76
Mitchell	7-30-80
Peach	11-4-72
Screven	3-23-67
Stewart	8-3-76

1/ Certified by court order, to remain in effect until 8/6/85.

COUNTY	DATE OF DESIGNATION
Sumter	7-30-80
Taliaferro	11-4-68
Telfair	7-30-80
Terrell	3-23-67
Tift	7-30-80
Twiggs	9-3-74
LOUISIANA (12)	
Bossier	3-23-67
Caddo	3-23-67
De Soto	3-23-67
East Carroll	8-9-65
East Feliciana	8-9-65
Madison	8-12-66
Ouachita	8-18-65
Plaquemines	8-9-65
Sabine	9-27-74
St. Helena	8-16-72
St. Landry	12-5-79
West Feliciana	10-29-65
MISSISSIPPI (42)	
Amite	3-23-67
Benton	9-24-65
Bolivar	9-24-65
Carroll	12-20-65
Claiborne	4-12-66
Clay	9-24-65
Coahoma	9-24-65
Covington	8-6-79
De Soto	10-29-65
Forrest	6-1-67
Franklin	3-23-67
Greene	8-6-79
Grenada	7-20-66
Hinds	10-29-65
Holmes	10-29-65
Humphreys	9-24-65
Issaquena	6-1-67
Jasper	4-12-66
Jefferson	10-29-65
Jefferson Davis	8-18-65
Jones	8-18-65
Kemper	10-31-74
Leflore	8-9-65
Madison	8-9-65
Marshall	8-5-67

COUNTY	DATE OF DESIGNATION
Neshoba	10-29-65
Newton	12-20-65
Noxubee	4-12-66
Oktibbeha	3-23-67
Pearl River	4-29-74
Quitman	10-29-80
Rankin	4-12-66
Sharkey	6-1-67
Simpson	12-20-65
Sunflower	4-29-67
Tallahatchie	8-14-71
Tunica	10-31-75
Walthall	10-29-65
Warren	12-20-65
Wilkinson	8-5-67
Winston	4-12-66
Yazoo	10-28-71
NEBRASKA (1)	
Thurston	5-9-79 2/
NEVADA (1)	
Humboldt	9-7-78 3/
SOUTH CAROLINA (4)	
Clarendon	10-29-65
Darlington	11-6-78
Dorchester	10-29-65
Marion	6-26-78
TEXAS (11)	
Atascosa	10-29-80
Bee	10-29-76
Crockett	8-11-78
El Paso	11-6-78
Fort Bend	4-28-76
Frio	10-29-76
LaSalle	10-29-76
Medina	4-28-76
Reeves	5-5-78
Uvalde	4-28-76
Wilson	4-28-76
WISCONSIN (1)	
Bartelme	2-17-78 4/

2/ Certified by court order, for a period of five years.
3/ Certified by court order, for one election only.
4/ Certified by court order, for a period of six months.

ATTACHMENT L

NUMBER OF FEDERAL OBSERVERS ASSIGNED

JANUARY 1, 1972 THROUGH DECEMBER 31, 1981

ALABAMA

Elections	Counties	No. of Observers
May 2, 1972 Primary	Choctaw	20
August 8, 1972 Special Election	Dallas	10
November 7, 1972 General	Hale Wilcox	42 68 110
May 7, 1974 Primary Election	Choctaw Hale Lowndes Wilcox	24 30 18 30 112
June 4, 1974 Primary Run-Off	Sumter	22
November 5, 1974 General	Greene Lowndes Talladega Wilcox	18 24 54 14 110
May 4, 1976 Primary	Dallas Wilcox	42 44 86
May 25, 1976 Primary Run-Off	Choctaw Wilcox	14 20 34
August 10, 1976 Municipal	Sumter (Gainesville)	3
November 2, 1976 General	Perry Sumter Wilcox	25 21 12 58

CALIFORNIA

Elections	Counties	No. of Observers
November 7, 1978 General	San Francisco	146
December 11, 1979 Run-Off	San Francisco	140

GEORGIA

Elections	Counties	No. of Observers
August 8, 1972 Primary	Baker	6
	Taliaferro	6
		12
August 29, 1972 Primary Run-off	Taliaferro	12
November 7, 1972 General	Peach	20
August 13, 1974 Primary	Hancock	30
November 5, 1974 General	Hancock	34
December 10, 1975 Municipal	Terrell (Dawson)	11
August 10, 1976 Primary	Meriwether	15
	Stewart	13
	Terrell	27
		55
August 31, 1976 Primary Run-Off	Stewart	12
April 10, 1978 General	Hancock (Sparta)	4
August 5, 1980 Primary	Bulloch	9
	Calhoun	18
	Early	19
	Johnson	33
	Mitchell	19
	Sumter	26
	Telfair	18
	Tift	14
		156

LOUISIANA

Elections	Parishes	No. of Observers
August 19, 1972 Primary	De Soto St. Helena	16 24 40
September 20, 1972 Primary Run-off	St. Helena	6
November 7, 1972 General	De Soto	14
March 23, 1974 Municipal Primary	East Carroll (Lake Providence) Madison (Tallulah)	12 20 32
May 4, 1974 Primary Run-Off	East Carroll (Lake Providence)	12
September 28, 1974 School Board Run-Off	Sabine	12
November 1, 1975 Primary	East Carroll Madison DeSoto	38 56 5 99
December 13, 1975 Primary Run-Off	East Feliciana St. Helena	13 4 17
August 14, 1976 Primary	East Carroll East Feliciana	30 3 33
October 27, 1979 Primary	Plaquemines East Carroll St. Helena	27 11 44 82
December 8, 1979 Primary Run-Off	East Carroll St. Helena	34 14 48

Elections	Parishes	No. of Observers
April 5, 1980 Special School Board	St. Landry	12

MISSISSIPPI

Elections	Counties	No. of Observers
August 24, 1972 Special Run-off	Humphreys	6
November 7, 1972 General	Claiborne Issaquena Madison Wilkinson	38 14 47 36 135
November 21, 1972 Special Run-off	Issaquena	5
April 1, 1974 Municipal	Yazoo (Yazoo City)	8
May 28, 1974 Local Special	Marshall	20
November 5, 1974 General	Kemper	48
December 17, 1974 Special	Kemper	24
August 5, 1975 Primary	Benton Claiborne Hinds Leflore Madison Marshall Noxubee Sunflower Warren Yazoo	11 38 14 81 63 65 57 71 42 46 4 (Reserves) 492

MISSISSIPPI

Elections	Counties	No. of Observers	
August 26, 1975	Benton	6	
Primary	Clay	16	
Run-Off	Hinds	12	
	Holmes	14	
	Humphreys	8	
	Madison	67	
	Marshall	42	
	Noxubee	12	
	Oktibbeha	16	
		8	(Reserves)
		201	
November 4, 1975	Benton	12	
General	Bolivar	55	
	Claiborne	38	
	Holmes	20	
	Humphreys	59	
	Issaquena	2	
	Jefferson	26	
	Leflore	81	
	Madison	57	
	Marshall	110	
	Noxubee	57	
	Sharkey	20	
	Tallahatchie	6	
	Tunica	8	
	Wilkinson	20	
		24	(Reserves)
		595	
September 7, 1976	Grenada	9	
Special Election	(City of Grenada)		
September 14, 1976	Grenada	10	
Run-Off	(City of Grenada)		
November 2, 1976	Clay	16	
General	DeSoto	51	
	Issaquena	4	
	Noxubee	26	
	Tunica	16	
		113	

Elections	Counties	No. of Observers
May 10, 1977 Primary	Noxubee (Macon)	7
	Sunflower (Sunflower & Moorhead)	6
	Bolivar (Shaw)	4
	Hinds (Edwards)	3
	Leflore (Itta Bena)	4
	Tallahatchie (Tutwiler)	2
	DeSoto (Hernando)	2
		28
May 16, 1977 Primary Re-run	Bolivar (Shaw)	5
May 17, 1977 Primary Run-Off	Marshall (Holly Springs)	5
June 7, 1977 General	Bolivar (Shaw)	5
	Holmes (Tchula)	5
		10
June 28, 1977 Special	Tunica	24
August 16, 1977 Special	Marshall	14
September 13, 1977 General	Leflore (Sidon)	3
April 3, 1978 General	Yazoo (Yazoo City)	16
November 14, 1978 Special	Tunica	5
November 28, 1978 Run-Off	Tunica	5

Elections	Counties	No. of Observers
December 11, 1978 Municipal	Bolivar (Rosedale)	5
August 7, 1979 Primary	Bolivar	13
	Covington	21
	Greene	15
	Humphreys	30
	Jasper	18
	Kemper	44
	Marshall	105
	Tallahatchie	52
	Wilkinson	26
	Yazoo	19
		343
August 28, 1979 Primary Run-Off	Covington	8
	Greene	8
	Humphreys	38
	Kemper	11
	Marshall	136
	Tallahatchie	33
	Yazoo	34
		268
October 2, 1979 Special	Yazoo	7
November 6, 1979 General	Bolivar	32
	Covington	12
	Claiborne	73
	Greene	10
	Holmes	33
	Humphreys	38
	Marshall	136
	Noxubee	65
	Tunica	28
	Yazoo	34
		461
November 27, 1979 Special Election	Warren	89
December 11, 1979 Special Run-Off	Warren	44
May 13, 1980 Special Election (Supt. of Education)	Humphreys	21

Elections	Counties	No. of Observers
November 4, 1980 General	Claiborne	54
	Clay	36
	Humphreys	27
	Noxubee	71
	Quitman	20
	Yazoo	23
		231
November 18, 1980 Run-Off	Noxubee	15
	Yazoo	7
		22
May 12, 1981 Municipal Primary	Marshall (Holly Springs)	11
	Quitman (Marks)	5
	Tallahatchie (Tutwiler)	4
		20
May 19, 1981 Municipal Primary Run-Off	Picayune (Pearl River)	26
June 2, 1981 Municipal General	Holmes (Tchula)	4
November 10, 1981 Primary	Sunflower (Indianola)	10
December 8, 1981 General	Sunflower (Indianola)	12

NEVADA

Elections	Counties	No. of Observers
September 12, 1978 Primary	Humboldt	3

SOUTH CAROLINA

Elections	Counties	No. of Observers
November 7, 1972 General	Clarendon	50
	Dorchester	55
		105

Elections	Counties	No. of Observers
June 27, 1978 Primary Run-Off	Marion	12
November 7, 1978 General	Darlington	55

TEXAS

Elections	Counties	No. of Observers
May 1, 1976 Primary	Wilson Uvalde Medina Fort Bend	18 24 57 18 117
November 2, 1976 General	Bee Frio LaSalle	24 26 26 76
May 6, 1978 Primary	Reeves	59
June 3, 1978 Primary Run-Off	Reeves	15
August 12, 1978 Special Run-Off	Crockett	8
November 7, 1978 General	El Paso	8
November 4, 1980 General	Atascosa	19

WISCONSIN

Elections	Counties	No. of Observers
February 21, 1978 Primary	Shawano (Bartelme)	3
April 4, 1978 General	Shawano (Bartelme)	3

ATTACHMENT M

Voting Rights Act: changes
made by bill passed by the
House of Representatives
on October 5, 1981

1. On July 31, 1981, the House Judiciary Committee voted to report an amended version of H.R. 3112. The reported bill contained amendments to Sections 2, 4(a) and 203(b) of the Act. See H.R. Rep. No. 97-227, 97th Cong., 1st Sess. (1981).

The amendments to Sections 2 and 203(b) would take effect upon enactment. The amendments to Section 4(a), the "bailout" provision, would take effect in two stages. Upon enactment, the time period of the present bailout standard would be extended. For jurisdictions that became covered in 1965 or 1970, the period would be extended from 17 years to 19 years; for 1975-covered jurisdictions, it would be extended from ten years to 17 years. An effect of the change would be to postpone until August 1984 the earliest date when most 1965-covered jurisdictions could seek a bailout judgment.

Effective August 6, 1984, the bill would amend the procedures and the standard applicable to bailout actions.

The amendment to Section 203(b) would extend the duration of that provision for seven years, from August 6, 1985 (the present termination date) to August 6, 1992. Section 203(c) imposes a bilingual-election requirement on political subdivisions within the coverage formula of Section 203(b).

2. The House debated the bill on October 2 and 5, 1981, and passed it on October 5. See 127 Cong. Rec. H6841-H6878 (daily ed., Oct. 2, 1981); id. at H6937-H7011 (daily ed., Oct. 5, 1981). Only three substantive amendments were adopted--one regarding the effect that pending voting discrimination suits have upon a bailout suit (Section 4(a)(1)(B), see 127 Cong. Rec. H6939), one regarding the procedure for vacating a bailout judgment (Section 4(a)(5), see 127 Cong. Rec. H6939), and one concerning assistance in the voting booth (Section 208, see 127 Cong. Rec. H7001).

3. There follows the text of Sections 2 and 4(a) as they would be amended by the House-passed bill and the text of Section 208. Additions are underscored; deletions are bracketed.

1. Section 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

2. Section 4 (a)(1)*/. To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or

*/ See the above explanation of the effective date of the proposed amendments to this section.

device has been used during the [seventeen] nineteen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. [Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [seventeen] nineteen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.] No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory

judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [ten] seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2)[: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [ten] seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.]. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process,

(ii) have engaged in constructive efforts to eliminate intimidation and harrassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may intervene at any state in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provi-

sions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for [five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).] ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, set-

tlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

[If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) he shall consent to the entry of such judgment.]

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.

3. Section 208. Nothing in this Act shall be construed in such a way as to permit voting assistance to be given within the voting booth, unless the voter is blind or physically incapacitated.

ATTACHMENT N-1

COUNTIES COVERED BY SECTION 4(b) OF THE VOTING RIGHTS ACT
WHICH RECEIVED JUDICIAL FINDINGS OF DISCRIMINATION 1/
UNDER THE ACT
AUGUST 6, 1974 - JANUARY 31, 1982

ALABAMA

Clarke (1981) Dallas (1975)* Montgomery (1978)

GEORGIA

Burke (1978) Dougherty (1977)

LOUISIANA

East Baton Rouge (1980)* Plaquemines (1978)
Ouachita (1978) Rapides (1976)

MISSISSIPPI

Attala (1977)* Clay (1976) Hinds (1977)

TEXAS

Bell (1978)* Galveston (1978)* Uvalde (1982)*
Dallas (1975)* McClellan (1976)

1/ Findings of discrimination, or settlements in which the objective of the suit was substantially achieved (designated with an asterisk), are listed by county whether the suit had been brought against the county or one of its subjurisdictions, and the date in parentheses represents the year of most recent judgment. This chart is derived from the discrimination suits listed in Attachment N-1a, based on our best available information.

Our knowledge of private suits is limited; consequently, the list may not include all federal suits in which a finding of discrimination was made (or a meaningful settlement achieved), and where the United States did not participate. In addition, subsequent court action or variations in interpretation of the bailout standard set forth under H.R. 3112 may warrant the elimination of some jurisdictions from the list or the inclusion of others.

FINAL JUDGMENTS SINCE AUGUST 6, 1974,*/ INVOLVING JURISDICTIONS COVERED **/
BY SECTION 4(b), IN WHICH A FEDERAL COURT MADE A FINDING OF DISCRIMINATION

CASE	JURISDICTION	ROLE OF U.S.	DATE OF JUDGMENT
Lipscomb v. Wise, 399 F. Supp. 782 (N.D. Tex. 1975)	City of Dallas (Dallas County), Texas	Amicus	(1-17-75)
United States v. Dallas County, Alabama, C.A. No. 74-459-H (S.D. Ala. 1975)	Dallas County, Alabama	Plaintiff	(10-11-75)
Calderon v. McGee, C.A. No. W-74-CA-21 (W.D. Tex. 1976)	Waco ISD (McClennon County), Texas	Amicus	3-29-76
Parnell v. Rapides Parish School Board, 425 F. Supp. 399 (W.D. La. 1976), affirmed in pertinent part, 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1977)	Rapides Parish School Board, Louisiana	Amicus	9-30-76
Stewart v. Waller, C.A. No. EC-73-42S (N.D. Miss. 1976)	City of West Point (Clay County), Mississippi	Intervenor	12-29-76
Kirksey v. Board of Supervisors of Hinds County, Mississippi, 468 F. Supp. 285 (S.D. Miss. 1979)	Hinds County, Mississippi	Amicus	5-31-77
United States v. City of Albany, 437 F. Supp. 137 (M.D. Ga. 1977)	City of Albany (Dougherty Co.), Georgia	Plaintiff	8-24-77
United States v. City of Kosciusko, C.A. No. EC-77-72-K (N.D. Miss. 1977)	City of Kosciusko (Attala County), Mississippi	Plaintiff	(10-3-77)
United States v. City Commission of Texas City, C.A. No. G-77-78 (S.D. Tex. 1978)	Texas City (Galveston County), Texas	Plaintiff	(2-17-78)

*/ Through January 31, 1982.

**/ Also listed are cases where the suit achieved its desired objective even though, for example, the lawsuit awaits final resolution of some issues or ultimately was resolved by consent of the parties. In these instances the date of judgment is in parentheses.

ATTACHMENT N-1a

CASE	JURISDICTION	ROLE OF U.S.	JUDGMENT
United States v. Temple Independent School District, C.A. N. W-78-CA-10 (W.D. Tex. 1978)	Temple I.S.D. (Bell County), Texas	Plaintiff	(2-22-78)
Broussard v. Perez, C.A. No. 76-158(B) (E.D. La. 1978)	Plaquemines Parish, Louisiana	Amicus	7-19-78
Ausberry v. City of Monroe, 456 F. Supp. 460 (W.D. La. 1978)	City of Monroe (Ouachita Parish), Louisiana	-- ***/	9-7-78
Lodge v. Buxton, C.A. No. 176-55 (S.D. Ga. 1978)	Burke County, Georgia	Amicus	10-26-78
Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978)	Montgomery County, Alabama	--	11-15-78
United States v. East Baton Rouge Parish School Board, C.A. No. 76-252 (M.D. La. 1980)	East Baton Rouge Parish, Louisiana	Plaintiff	(6-6-80)
United States v. Clarke County Commission, C.A. No. 80-0547-H (S.D. Ala. 1981)	Clarke County, Alabama	Plaintiff	4-17-81
United States v. Uvalde Consolidated I.S.D., C.A. No. DR-77-CA-20 (W.D. Tex. 1982)	Uvalde County, Texas	Plaintiff	(1-27-82)

***/ A dash indicates that the United States did not participate. Our knowledge of private suits is limited. Consequently, this list may not include all federal suits in which a finding of discrimination was made, and where the United States did not participate.

ATTACHMENT N-2

COUNTIES COVERED BY SECTION 4(b) OF THE VOTING RIGHTS ACT
TO WHICH OBSERVERS HAVE BEEN ASSIGNED */
AUGUST 6, 1974 - DECEMBER 31, 1981

ALABAMA

Bullock (1978)	Greene (1974)	Perry (1976)	Sumter (1980)
Choctaw (1976)	Hale (1980)	Pickens (1980)	Talladega (1974)
Conecuh (1980)	Lowndes (1974)	Russell (1978)	Wilcox (1980)
Dallas (1976)	Marengo (1978)		

GEORGIA

Bulloch (1980)	Hancock (1978)	Mitchell (1980)	Telfair (1980)
Calhoun (1980)	Johnson (1980)	Stewart (1976)	Terrell (1976)
Early (1980)	Meriwether (1976)	Sumter (1980)	Tift (1980)

LOUISIANA

DeSoto (1975)	East Feliciana (1976)	Plaquemines (1979)	St. Helena (1979)
East Carroll (1979)	Madison (1975)	Sabine (1974)	St. Landry (1980)

*/ The listed counties had observers assigned in connection with either county elections or municipal elections within the county. The date in parentheses represents the year of most recent observer assignment.

This chart is derived from the complete list of observer use, Attachment L, which was based on our best available information.

MISSISSIPPI

Benton (1975)	Hinds (1977)	Madison (1975)	Tallachatchie (1981)
Bolivar (1979)	Holmes (1981)	Marshall (1981)	Tunica (1979)
Claiborne (1980)	Humphreys (1980)	Noxubee (1980)	Warren (1979)
Clay (1980)	Issaquena (1976)	Oktibbeha (1975)	Wilkinson (1979)
Covington (1979)	Jasper (1979)	Picayune (1981)	Yazoo (1980)
DeSoto (1977)	Jefferson (1975)	Quitman (1981)	
Greene (1979)	Kemper (1979)	Sharkey (1975)	
Grenada (1976)	Leflore (1977)	Sunflower (1981)	

SOUTH CAROLINA

Darlington (1978)

Marion (1978)

TEXAS

Atascosa (1980)	El Paso (1978)	LaSalle (1976)	Uvalde (1976)
Bee (1976)	Fort Bend (1976)	Medina (1976)	Wilson (1976)
Crockett (1978)	Frio (1976)	Reeves (1978)	

ATTACHMENT N-3

COUNTIES WHICH RECEIVED OBJECTIONS*/ TO CHANGES SUBMITTED
PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT
AUGUST 6, 1974 - DECEMBER 31, 1981

ALABAMA (1981)

Barbour (1981)	Conecuh (1981)	Mobile (1976)	Shelby (1977)
Bibb (1976)	Dallas (1980)	Perry (1981)	Sumter (1981)
Chambers (1976)	Hale (1976)	Pickens (1976)	Talladega (1975)
Clarke (1979)	Jefferson (1980)	Pike (1974)	Wilcox (1981)
Colbert (1976)	Lowndes (1978)	Russell (1975)	

ARIZONA

Apache (1976)	Cochise (1975)

CALIFORNIA

Monterey (1977)	Yuba (1976)

*/ The counties shown here are derived from the complete lists of objections found in Attachments D-1 and D-2, and are based on our best available information. It should be noted, however, that variations in interpretation of the bail-out standard are possible.

In parentheses next to the jurisdiction is the year of the most recent objection to a submission by a county or a political or geographical subdivision thereof. In Virginia, independent cities have been considered counties for the purpose of this table. For fully covered states the year of the most recent objection to a state enactment appears in parentheses next to the state name. Under the bail-out standard of H.R. 3112 any objection whatsoever in such states would serve as a bar to bail-out.

The table includes a limited number of counties that received objections which were later withdrawn after a jurisdiction altered the submission, thereby removing the basis for the objection. Not considered for this table, however, are objections later withdrawn without alteration of the original submission (if included, the following jurisdictions would be added: Chatham, Lanier, Mitchell and Rockdale counties in Georgia; East Baton Rouge Parish in Louisiana; Hinds County in Mississippi; Craven and Edgecombe counties in North Carolina; Brazos, Ward and Midland counties in Texas; and the city of Suffolk in Virginia).

GEORGIA (1981)

Berrien (1980)	Coweta (1975)	Henry (1980)	Pike (1979)
Bibb (1975)	Decatur (1977)	Irwin (1975)	Polk (1976)
Brooks (1978)	Dekalb (1980)	Jefferson (1974)	Richmond (1981)
Bulloch (1980)	Dooly (1980)	Jones (1974)	Spalding (1981)
Camden (1978)	Floyd (1975)	Long (1976)	Taliafero (1976)
Charlton (1977)	Fulton (1977)	McDuffie (1974)	Terrell (1977)
Clarke (1975)	Glynn (1975)	Morgan (1975)	Walton (1976)
Colquitt (1977)	Harris (1975)	Newton (1976)	Wilkes (1976)

LOUISIANA (1977)

Caddo (1976)	Ouachita (1977)	Rapides (1975)
Orleans (1978)	Pointe Coupee (1978)	Sabine (1976)

MISSISSIPPI (1981)

Attala (1976)	Harrison (1980)	Lowndes (1975)	Tallahatchie (1977)
Benton (1975)	Holmes (1977)	Madison (1977)	Tunica (1979)
Bolivar (1975)	Humphreys (1977)	Marshall (1981)	Walthall (1978)
Clay (1975)	Kemper (1975)	Panola (1980)	Warren (1976)
Coahoma (1977)	Leake (1975)	Quitman (1977)	Winston (1980)
DeSoto (1977)	Lee (1977)	Simpson (1981)	Yazoo (1977)
Grenada (1976)	Leflore (1977)	Sunflower (1981)	

NEW YORK

Bronx (1981)	Kings (1981)	New York (1981)

NORTH CAROLINA

Martin (1977)	Pitt (1980)	Rockingham (1979)
Pasquotank (1978)	Robeson (1975)	Scotland (1978)

SOUTH CAROLINA (1981)

Abbeville (1976)	Chester (1979)	Edgefield (1979)	Marion (1978)
Allendale (1977)	Chesterfield (1977)	Horry (1976)	Oconee (1976)
Bamberg (1977)	Clarendon (1975)	Lancaster (1978)	Sumter (1976)
Calhoun (1976)	Colleton (1979)	Lee (1976)	York (1978)
Charleston (1977)	Dorchester (1978)		

SOUTH DAKOTA

Shannon (1979) Todd (1979)

TEXAS (1978)

Anderson (1978)	Comal (1979)	Jefferson (1980)	Smith (1976)
Angelina (1977)	Crockett (1976)	Jim Wells (1980)	Tarrant (1978)
Aransas (1978)	Crosby (1977)	Kaufman (1976)	Terrell (1978)
Atascosa (1979)	Deaf Smith (1979)	Liberty (1981)	Trinity (1976)
Bee (1979)	Ector (1978)	Medina (1979)	Tyler (1976)
Bexar (1977)	Edwards (1978)	Moore (1976)	Uvalde (1978)
Brazoria (1977)	Floyd (1976)	Nacogdoches (1980)	Victoria (1980)
Burleson (1981)	Fort Bend (1977)	Navarro (1978)	Waller (1978)
Caldwell (1979)	Frio (1976)	Nueces (1980)	Willacy (1977)
Castro (1979)	Galveston (1976)	Orange (1981)	Williamson (1979)
Cherokee (1979)	Harris (1980)	Parmer (1979)	Wilson (1980)
Cochran (1980)	Harrison (1978)	Reeves (1976)	Wood (1976)

Zavala (1978)

VIRGINIA (1981)

Hopewell (1980) Lynchburg (1975) Pittsylvania (1979)

ATTACHMENT N-4

COUNTIES COVERED BY SECTION 4(b) OF THE VOTING RIGHTS ACT
WHICH RECEIVED JUDICIAL DETERMINATIONS OF NONCOMPLIANCE
WITH SECTION 5 OF THE VOTING RIGHTS ACT */
AUGUST 6, 1974 - DECEMBER 31, 1981

ALABAMA

Barbour (1979) Colbert (1978)

Clarke (1981) Hale (1976)

Pike (1979)

GEORGIA

DeKalb (1980) Henry (1980)

Dougherty (1977) Peach (1978)

Sumter (1981)

LOUISIANA

Ascension (1975) Plaquemines (1976)

MISSISSIPPI

Bolivar (1976) Grenada (1975) Leflore (1978)

NEW YORK

Bronx (1981) Kings (1981) New York (1981)

SOUTH CAROLINA

Chester (1978) Colleton (1981) Horry (1977)

*/ The counties listed here are derived from the list of judicial findings of noncompliance with Section 5, Attachment N-4a, and are based on our best available information. Subsequent court action or variations in interpretation of the bailout standard set forth under H.R. 3112 may warrant the elimination of some jurisdictions from the list or the inclusion of others.

In parentheses next to the county is the year of the most recent finding of a failure to submit for preclearance or to comply with an objection pursuant to Section 5 for the county itself or one of its political subdivisions.

SOUTH DAKOTA

Todd (1980)

TEXAS

Atascosa (1978)
Bee (1978)
Bexar (1978)
Castro (1979)
Crockett (1977)
Dallas (1979)
Deaf Smith (1979)
Galveston (1979)
Guadelupe (1981)
Harris (1980)
Jim Wells (1979)
Kleberg (1980)
Medina (1981)
Midland (1978)
Parmer (1979)
Smith (1978)
Trinity (1978)
Wood (1979)

JUDGMENTS BY FEDERAL COURTS OF NONCOMPLIANCE WITH SECTION 5 OF THE VOTING RIGHTS ACT, WHICH WOULD BAR BAILOUT UNDER H.R. 3112, AUGUST 6, 1974 - DECEMBER 31, 1981 */

CASE	TYPE	ROLE OF U.S.	DATE OF JUDGMENT
ALABAMA			
United States v. Barbour County Commission, C.A. No. 78-348-N (M.D. Ala.)	Noncompliance with Objection	Plaintiff	10-23-79
United States v. Clarke County Commission, C.A. No. 80-0547-4 (S.D. Ala.)	Noncompliance with Objection	Plaintiff	4-17-81
United States v. Board of Commissioners of Sheffield, Alabama (Colbert County), 435 U.S. 110 (1978)	Noncompliance with Objection	Plaintiff	3-6-78
United States v. Hale County Commission, C.A. No. 76-403-P (S.D. Ala.), aff'd, 430 U.S. 924 (1977)	Failure to Submit	Plaintiff	10-18-76
United States v. Pike County Commission, C.A. No. 79-245-N (M.D. Ala.)	Noncompliance with Objection	Plaintiff	10-12-79
GEORGIA			
NAACP, DeKalb County Chapter v. State of Georgia (DeKalb County), 494 F. Supp. 668 (N.D. Ga.)	Failure to Submit	Private	6-11-80

*/ This list represents only the most recent judgments of noncompliance for each affected county.

CASE	TYPE	ROLE OF U.S.	DATE OF JUDGMENT
GEORGIA (cont.)			
White v. Dougherty County Board of Education, 439 U.S. 32 (1978)	Failure to Submit	Amicus (in Supreme Court)	3-27-77
Head v. Henry County Board of Commissioners, C.A. No. C-79-2063A (N.D. Ga.)	Noncompliance with Objection	Amicus	6-17-80
Berry v. Doles (Peach County), 438 U.S. 190 (1978)	Failure to Submit	Amicus	6-26-78
Edge v. Sumter County School Board, C.A. No. 80-20-Amer. (M.D. Ga.)	Noncompliance with Objection	Amicus	12-1-81
LOUISIANA			
Town of Sorrento Municipal Democratic Committee (Ascension Parish) v. Reine, C.A. No. 73-120 (M.D. La.)	Noncompliance with Objection	Amicus	4-18-75
Broussard v. Perez (Plaquemines Parish), C.A. No. 76-158 (E.D. La.)	Failure to Submit	Amicus	7-6-76
MISSISSIPPI			
United States v. Bolivar County, C.A. No. DC-75-52-K (N.D. Miss.)	Noncompliance with Objection	Plaintiff	3-29-76
United States v. Grenada County, C.A. No. WC-75-44-K (N.D. Miss.)	Noncompliance with Objection	Plaintiff	5-30-75

CASE	TYPE	ROLE OF U.S.	DATE OF JUDGMENT
MISSISSIPPI (cont.)			
Matthews v. Leflore County Board of Election Commissioners, 450 F. Supp. 765 (N.D. Miss.)	Noncompliance with Objection	Private	2-2-78
NEW YORK			
Herron v. Koch (Bronx, Kings, New York Counties), 523 F. Supp. 167 (S.D. N.Y.)	Failure to Obtain Preclearance	Amicus	9-2-81
SOUTH CAROLINA			
United States v. County Council of Chester County, C.A. No. 78-881 (D. S.C.)	Noncompliance with Objection	Plaintiff	6-6-78
United States v. Board of Commissioners of Colleton County, South Carolina, C.A. No. 78-903-8 (D. S.C.)	Noncompliance with Objection	Plaintiff	2-17-81
McCray v. Hucks (Horry County), C.A. No. 76-2476 (D. S.C.)	Noncompliance with Objection	Amicus	3-22-77
SOUTH DAKOTA			
United States v. State of South Dakota (Todd County), C.A. No. 79-3039 (D. S.D.)	Noncompliance with Objection	Plaintiff	5-21-80
TEXAS			
United States v. Board of Trustees of Somerset I.S.D. (Atascosa and Bexar Counties), C.A. No. SA-78-CA-84 (W.D. Tex.)	Noncompliance with Objection	Plaintiff	12-26-78
Gomez v. Galloway (Bee County), C.A. No. 76-C-146 (S.D. Tex.)	Failure to Obtain Preclearance	Amicus	6-2-78

CASE	TYPE	ROLE OF U.S.	DATE OF JUDGMENT
TEXAS (cont.)			
United States v. Hereford I.S.D. (Deaf Smith, Parmer, and Castro Counties), C.A. No. 2-77-14 (N.D. Tex.)	Noncompliance with Objection	Plaintiff (countersuit)	3-20-79
De Hoyas and United States v. Crockett County, C.A. No. 6-76-26 (N.D. Tex.)	Noncompliance with Objection	Amicus	7-26-77
Heggins v. City of Dallas (Dallas County), C.A. No. 3-79-118-E (N.D. Tex.)	Failure to Submit	Private	2-20-79
Trinidad v. Koebig (Sequin City, Guadalupe County), 630 F.2d 846 (5th Cir. 1981)	Failure to Submit	Private	3-5-81
United States v. Village of Dickinson (Galveston County), C.A. No. G-78-35 (S.D. Tex.)	Failure to Submit	Plaintiff	5-2-79
United States v. Intarim Board of Trustees of Westheimer I.S.D.(City of Houston, Harris County), 494 F. Supp. 738 (S.D. Tex.)	Noncompliance with Objection	Plaintiff	7-1-80
Arriola v. Harville (Jim Wells County), C.A. No. C-78-87 (S.D. Tex.)	Noncompliance with Objection	Amicus	10-9-79
McDaniel v. Sanchez (Kleberg County), 49 U.S.L.W. 4615 (U.S. June 1, 1981)	Failure to Submit	Amicus	4-14-80

CASE	TYPE	ROLE OF U.S.	DATE OF JUDGMENT
TEXAS (cont.)			
Garcia v. Decker (Medina County), C.A. No. SA-79-CA-414 (W.D. Tex.)	Noncompliance with Objection	Amicus	2-9-81
United States v. Board of Trustees of Midland I.S.D. (Midland County), C.A. No. MO-77-CA-17 (W.D. Tex.)	Noncompliance with Objection	Plaintiff	6-2-78
United States v. Board of Trustees of Chapel Hill I.S.D. (Smith County), C.A. No. TY-77-137-CA (E.D. Tex.)	Noncompliance with Objection	Plaintiff	12-21-78
United States v. Board of Trustees of Trinity I.S.D. (Trinity County), C.A. No. H-77-487 (S.D. Tex.)	Noncompliance with Objection	Plaintiff	3-28-78
United States v. Hawkins I.S.D. (Wood County), C.A. No. TY-77-81-CA (E.D. Tex.)	Noncompliance with Objection	Plaintiff	8-5-79

ATTACHMENT N-5

COUNTIES COVERED BY SECTION 4(b) OF THE VOTING RIGHTS ACT
WHICH RECEIVED DENIALS OF JUDICIAL PRECLEARANCE
UNDER SECTION 5 OF THE VOTING RIGHTS ACT */
AUGUST 6, 1974 - DECEMBER 31, 1981

ALABAMA

Hale (1980)

ARIZONA

Apache (1980)

GEORGIA

Floyd (1979) Wilkes (1978)

MISSISSIPPI

Warren (1979)

TEXAS

Caldwell (1981) Jefferson (1981)

*/ The counties listed here are derived from the complete list of declaratory judgment actions found in Attachment N-5a, and are based on our best available information.

Counties are listed in this table whether the suit for declaratory judgment had been brought by the county or one of its subdivisions. The date in parentheses represents the year of the most recent judgment.

SECTION 5 DECLARATORY JUDGMENT ACTIONS
(DISTRICT COURT FOR THE DISTRICT OF COLUMBIA)
THROUGH DECEMBER 31, 1981

CASE TITLE	DATE FILED	POLITICAL JURISDICTION	DATE OF DECISION	DECISION
City of Petersburg v. U.S.	3-17-72	Petersburg, VA.	10-24-72	D.J.1/ denied
*Vance v. U.S.	7-31-72	State of Alabama	11-30-72	D.J. granted
City of Richmond v. U.S.	8-25-72	Richmond, VA	5-29-74	D.J. denied
Beer v. U.S.	7-25-73	New Orleans, LA.	3-15-74	D.J. denied 2/
Griffith v. U.S.	4-26-74	Kings and New York Counties, N.Y.	5-16-74	Dismissed (lack of standing)
Glynn County, Ga. v. U.S.	1-12-76	Glynn County, GA.	1-12-76	Dismissed (new plan precleared)
Wilkes County School District v. U.S.	6-14-76	Wilkes County, GA.	4-20-78	D.J. denied
Wilkes County, Ga. v. U.S.	6-14-76	Wilkes County, GA.	4-20-78	D.J. denied
Whitfield v. U.S.	9-1-76	Grenada County, MS.	3-28-78	Dismissed (new plan precleared)
City of Rome, Ga. v. Bell	5-9-77	Rome (Floyd County), GA.	4-4-79	D.J. denied
Hale County v. U.S.	2-16-77	Hale County, AL.	9-4-80	D.J. denied
Horry County, S.C. v. U.S.	9-27-77	Horry County, S.C.	12-11-78	Dismissed (new plan precleared)

1/ Declaratory judgment.

2/ The district court subsequently granted preclearance July 29, 1976, upon remand from the Supreme Court.

* No prior administrative review by the Attorney General.

SECTION 5 DECLARATORY JUDGMENT ACTIONS
(DISTRICT COURT FOR THE DISTRICT OF COLUMBIA)
THROUGH DECEMBER 31, 1981

CASE TITLE	DATE FILED	POLITICAL JURISDICTION	DATE OF DECISION	DECISION
Apache County H.S.D. No. 90 v. U.S.	10-20-77	Apache County, AZ.	6-12-80	D.J. denied
*Donnell v. U.S.	3-7-78	Warren County, MS.	7-31-79	D.J. denied
Charlton County Bd. of Ed. v. Brooks & U.S.	3-29-78	Charlton County, GA.	11-1-78	D.J. granted
State of Mississippi v. Bell (Reapportionment)	8-1-78	State of MS.	6-1-79	D.J. granted
*City of Lallas, Tx. v. U.S.	9-5-78	Dallas (Dallas County), TX.	12-7-79	Dismissed (new plan precleared)
State of Mississippi v. U.S. (Open primary)	12-27-79	State of MS.	Pending	
Commissioners Court, Medina County, Tx. v. U.S.	1-25-80	Medina County, TX.	12-18-80	Dismissed (new plan precleared)
City of Lockhart v. U.S.	2-6-80	Lockhart (Caldwell County), TX.	7-30-81	D.J. denied
City of Port Arthur v. U.S.	3-12-80	Port Arthur (Jefferson County), TX.	6-12-81	D.J. denied
State of South Dakota v. U.S.	8-6-80	State of S.D.	12-1-81	D.J. granted (by consent decree)
City of Pleasant Grove, Ala. v. U.S.	10-9-80	Pleasant Grove (Jefferson County), AL.	Pending	
Colleton County v. U.S.	11-4-81	Colleton County, South Carolina	Pending	
State of California v. Smith	11-17-81	Kings, Merced, Monterey and Yuba counties, Cal.	Pending	

ATTACHMENT O

STATUTORY AND CASE LAW REGARDING
MULTI-MEMBER ELECTION DISTRICTS

Prior to the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), Sec. 2 of the Voting Rights Act did not play a major role in cases charging that multi-member electoral districts discriminated on account of race. The United States relied on Sec. 2 to give it authority to sue (see, e.g., United States v. Uvalde Consol. I.S.D., 625 F.2d 547 (5th Cir. 1980), cert. denied, 451 U.S. 1002 (1981), and private plaintiffs coupled Sec. 2 claims with claims of unconstitutional discrimination. But no court has ever relied on Sec. 2 as a ground for relief against multi-member districts. 1/

1/ Of the few appellate court opinions which address claims under Sec. 2 of the Voting Rights Act, only three antedate the Supreme Court's decision in Mobile. One was the Fifth Circuit's decision in Mobile, 571 F.2d 238, 242 n.3 (5th Cir. 1978) (the plaintiffs' Sec. 2 claim "was at best problematic; this court knows of no successful dilution claim expressly founded on [Sec. 2]"). Neither of the others was a dilution case. Toney v. White, 476 F.2d 203, 207, modified and aff'd en banc, 488 F.2d 310 (5th Cir. 1973), involved relief based on an official's purge of blacks from the voter rolls, conduct held to violate both Sec. 2 and the Fifteenth Amendment. United States v. St. Landry Parish School Board, 601 F.2d 859, 865-866 (5th Cir. 1979), pertained to a vote-buying scheme involving black voters. Other decisions in suits based in part upon Sec. 2 did not discuss Sec. 2. Coalition for Education in Dist. 1 v. Board of Elections, 495 F.2d 1090 (2d Cir. 1974) (successful challenge by minority race voters to school board election in New York City); Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) (unsuccessful challenge to at-large system for electing the Boston School Committee); and United States v. East Baton Rouge Parish School Board, 594 F.2d 56 (5th Cir. 1979) (reversing the dismissal of suit attacking the use of multi-member wards).

Four post-Mobile Fifth Circuit cases discuss the application of Sec. 2 to dilution claims. United States v. Uvalde Consol. I.S.D., 625 F.2d 547 (5th Cir. 1980), cert. denied, 451 U.S. 1002 (1981). (United States' authority under Sec. 2 to challenge discriminatory multi-member school board electoral system); McMillan v. Escambia County, 638 F.2d 1239, 1242, n.8, 1243 n.9 (5th Cir. 1981), appeal pending (Sec. 2 and the Fifteenth Amendment do not cover vote dilution); Lodge v. Buxton, 639 F.2d 1358, 1364 n.11 (5th Cir. 1981), prob. juris. noted sub nom. Rogers v. Lodge, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (Mobile establishes that Sec. 2 does not provide a remedy for conduct that does not violate the Fifteenth Amendment); Kirksey v. City of Jackson, 663 F.2d 659, 664-665 (5th Cir. 1981) (rejecting assertion that Sec. 2 goes beyond the Fifteenth Amendment and prohibits practices that perpetuate the effexts of past discrimination). See also n.6, infra.

Thus, it is clear that the controversy over Mobile does not relate to enforcement of Sec. 2, but instead concerns whether Mobile has radically altered the pre-existing case law under the Fourteenth and Fifteenth Amendments. The Supreme Court's first review of the contention that multi-member districts discriminated against blacks was in Whitcomb v. Chavis, 403 U.S. 124 (1971). There the district court had struck down the legislative multi-member district in Marion County, Indiana, because it found the scheme had a discriminatory effect. 2/ However, the Supreme Court reversed, holding that there is no right to proportional representation and noting that there was no suggestion that the multi-member districts in Indiana "were conceived or operated as purposeful devices to further racial or economic discrimination." Id. at 149. The Court discussed at length various ways of proving intentional discrimination, including discrimination in voter registration and exclusion from party slates. Thus, Whitcomb (a) rejected the effects test; (b) applied the purpose test; and (c) gave some guidance as to the proof necessary to sustain a constitutional challenge to at-large elections.

The only other pre-Mobile Supreme Court decision directly on the subject is White v. Regester, 412 U.S. 755 (1973), in which the Court upheld a finding that multi-member districts in Bexar and Dallas Counties, Texas, unconstitutionally discriminated on account of race and national origin. While the case has been pointed to as embracing an effects test, the Court explicitly began its analysis by emphasizing that "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." 412 U.S. at 765-766. As to Dallas County, the Court held that the district court findings of a history of official discrimination against blacks, the use of electoral devices which enhanced the opportunity for racial discrimination, the discriminatory exclusion of blacks from party slates, and the use of anti-black campaign tactics demonstrated a violation of the rule of Whitcomb v. Chavis. 412 U.S. at 766-767. As to Bexar County the Court again found "the totality of the circumstances" supported the district court's view "that the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life." 412 U.S. at 769. It is true that the opinion of Justice White, for the Court, refers on several

2/ Specifically, the district court "thought [poor Negroes] unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the ghetto's proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts." 403 U.S. at 148-149.

occasions to "the impact" of the practices, but nowhere does the opinion intimate that impact alone was enough. Rather, the Court examined impact as one of several pieces of circumstantial evidence of "invidious discrimination." 3/

Thus, although Washington v. Davis, 426 U.S. 229 (1976) is often cited as the genesis of the purpose test in racial discrimination cases brought under the Constitution, Washington simply is a continuation of a settled line of Supreme Court decisions. Indeed, Washington relies not only upon cases involving purposeful discrimination in schools and jury selection, but also on Wright v. Rockefeller, 376 U.S. 52 (1964), in which the Supreme Court had applied a purpose standard to a claim of racial discrimination in drawing legislative district lines. While Washington expressly disapproved certain other cases which appeared to have relied solely on an effects test, it did not disapprove Whitcomb, White, or lower court cases which had followed them, for the simple reason that those cases did not embody an effects test.

The decision-making in the lower courts followed a similar course. The leading cases were decided in the Fifth Circuit. From 1973 to 1978 the controlling Fifth Circuit case was Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). 4/ Zimmer did not address Section 2. That case did, however, set out a series of evidentiary factors for determining whether a multi-member district is unconstitutionally discriminatory under the rule of Whitcomb and White. While that opinion does exhibit some confusion as to whether purpose or effect or both are at issue (see, e.g., 485 F.2d at 1304 and n.16), the court stressed that "it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305. The court characterized the issue as whether the evidence shows unconstitutional "dilution" of the vote of minority members, thus sidestepping any debate about whether a purpose test or an effects test applies. 5/

3/ Justice White, himself, agreed in his dissenting opinion in Mobile that White v. Regester was a case in which indirect evidence supported an "inference of purposeful discrimination." 446 U.S. at 103. He simply disagreed with the Mobile plurality's assessment of the evidence regarding purpose in Mobile.

4/ The affirmance was without consideration of the constitutional issue.

5/ The court borrowed most of the "Zimmer" factors from Whitcomb and White. The court said:

> * * * where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of

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When the Zimmer rule was challenged by Mobile and other jurisdictions with multi-member districts, the Fifth Circuit thoroughly discussed the Zimmer factors in light of Washington v. Davis. In a companion case to Mobile the Fifth Circuit explained that:

> * * * Washington v. Davis * * * requires a showing of intentional discrimination in racially based voting dilution claims founded on the fourteenth amendment. We conclude also that the case law requires the same showing in fifteenth amendment dilution claims. Moreover, we demonstrate that the dilution cases of this circuit are consistent with our holding in this case. In particular, we read Zimmer as impliedly recognizing the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination.

Nevett v. Sides, 571 F.2d 209, 215 (1978), cert. denied, 446 U.S. 951 (1980). Based on these standards the Fifth Circuit held that the district court's findings in Mobile "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment." Bolden v. City of Mobile, 571 F.2d 238, 245 (5th Cir. 1978). 6/

Thus, when Mobile reached the Supreme Court both the Fifth Circuit and prior Supreme Court cases accepted the proposition that discriminatory intent is a necessary element of a claim that multi-member districts violate the Constitution. The plurality

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> legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305 (footnotes omitted).

The one change resulting from Mobile is that the rigid criteria of Zimmer are no longer controlling in the Fifth Circuit, though they continue to be pertinent. Perhaps the temporary result is a lack of precision and clarity as to what constitutes adequate proof of discriminatory intent. However, this is one area in which the courts may be better able than Congress to evolve standards.

Senator HATCH. I will request that the record be held open until the end of this week. That is Friday. We will make an effort to see that the record is thorough and complete. We will attempt to accommodate all reasonable requests. I am not sure we can accommodate all requests because the verbosity of several of the statements submitted for insertion. We will not be able to accommodate requests for insertion of such lengthy works into the record. We will have to make some reasonable determinations as we build the record so it will be a good record, representative of all sides of the issue presented. As I have said earlier in our proceedings, I would like to have this subcommittee complete its action on or before the 20th of this month. This may not be possible. I do not want to mislead anyone. We may not be able to complete the necessary action because of the tremendous amount of material in the hearing record. In addition, we can expect difficulties to arise during the next couple of weeks with the Williams case coming on the floor and with other problems being experienced by the Senators on the committee. The 20th of this month is my goal which I hope we will be able to meet. We certainly would appreciate the help of the Justice Department as we try to formulate the best voting rights bill possible from this committee. Hopefully we can come up with a bill that will be acceptable to all concerned, although I have no illusions.

My personal feeling is, as yours, that this is a monumental piece of legislation. I think it is the most important civil rights bill to be addressed in recent history. I think it is important that we understand these are not inconsequential issues that have been raised in this hearing or that you have raised, here today, Mr. Reynolds. They are critical constitutional issues which have the potential of dramatically altering our election process. I think we have to get away from a totally emotional approach to the analysis of this issue. We have to employ a more objective approach that will hopefully continue to resolve problems of deprivation of minority voting rights while at the same time keeping our constitutional structures of government intact. That is what we are trying to do.

I would like to personally compliment you on your statement and the way you have handled yourself in this hearing today. Some of the questions have not been easy and personally I thought some of them were irrelevant and rather unreasonable. I thought several of the questions asked failed to address real issues involved in this debate. We each tend to think our own questions are good questions. But I felt that you answered all of the questions objectively and you answered them within what you consider to be the best possible framework, a constitutional standpoint, and I want to compliment you for that.

I also believe that Attorney General Smith did a tremendous job in speaking for the administration.

Be that as it may, there are people that disagree with you and people that disagree with me and they may be a vast majority. You never know. But this issue of section 2 transcends even the issue of civil rights. It is very important that in our zeal to do what is right for minorities in this country, that we always keep the Constitution sound and that at the same time we do not denigrate the political processes that have worked so well for almost 200 years. I

think this is one of the big issues that confronts me as a committee chairman, because I feel as strongly as anybody that there should be no discrimination at the polling places in this country or any other place. I personally want to work as hard as I can to ameliorate that and get rid of it. Whatever the outcome of this debate, I personally hope that we will be able to say a decade from now, that we did what was right and I personally hope that we will not have to say a decade from now that no one really appreciated at the time what the section 2 issue was all about. I think we have made a very effective and important record on the section 2 issue. I can tell you, should this measure pass in the House form, I firmly believe we are going to have many of the problems that you have articulated here. I do not think there is any question about that.

With that we will recess this committee until we reconvene it for the purpose of voting on this issue.

The hearing is adjourned.

[Whereupon, at 1:20 p.m., the subcommittee recessed, to reconvene subject to the call of the Chair.]

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